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## Comment

# International Straits and Navigational Freedoms

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On May 17, 1991, Finland filed an application instituting proceedings before the International Court of Justice (ICJ) in the case entitled "Passage through the Great Belt (Finland v. Denmark)." Finland complains that the proposed bridge across the Great Belt (the only deep draft route through the straits connecting the Baltic with the North Sea) would be a fixed span with 65 meters' clearance, preventing Finnish drilling rigs from being towed in their vertical position under the bridge and thus in Finland's view contrary to international law. Denmark filed its memorial with the International Court of Justice December 31, 1991. Finland filed its countermemorial by the June 1, 1992, deadline.*

The United States is not a party to the International Court of Justice case, but my government feels strongly that the basic rules codified in the 1982 UN Convention on the Law of the Sea (LOS Convention) control. Although the LOS Convention straits articles do not *per se* address the issue of bridges across straits, the transit passage articles would clearly prohibit the unfettered, unilateral construction of a bridge across a strait used for international navigation (hereafter, an international strait).

My comments are not confined merely to the issue of bridges (although I do attempt to provide the requisite legal analysis for determining how bridges should "legally" be built across international straits). Although law of the sea old-timers were, as Dean Acheson might have said, "present at the creation" and have a sound knowledge of the *lingua franca* of the LOS Convention's navigational terms of art,

Editor's Note: The following comment is based closely on remarks delivered by Admiral Schachte at the 26th Annual Law of the Sea Institute Conference held in Genoa, Italy, June 22–26, 1992. They represent, as Admiral Schachte states in his remarks, the official position of the United States government.

*The Great Belt Bridge case was settled by the parties, Finland and Denmark, in early September 1992, and the International Court of Justice issued an order dismissing the case on September 10. (*Oceans Policy News*, Oct. 1992, 1.) As the reader will discover, however, the discontinuance of the Great Belt Bridge case does not affect the current relevance and importance of Admiral Schachte's comment.—*Ed.*

I have observed there is now a whole new generation of lawyers and officials in the United States government, as well as in foreign ministries, who may not appreciate the vital significance of the technical terms in the navigational articles—and the role those navigation articles play—in precisely regulating the various types of navigation regimes and the six categories of international straits recognized in the LOS Convention.

Some elements of the United States' position regarding the straits articles have been made in U.S. delegation statements to the Third UN Conference on the Law of the Sea during the conference years as well as in remarks contained in U.S. official documents since then. I should add that we operate our freedom of navigation program in complete conformance with international law as reflected in the navigation articles of the 1982 LOS Convention. I believe it well worth our while here to recap the United States' official position on the LOS Convention's navigational articles. Please note I say "official," for these remarks, for once, do not come with the usual caveat that they are my personal views only and do not necessarily represent the views of the United States—they do.

My discussion is organized into five sections. The first deals with the very practical problems that bridge building poses for international maritime navigation and commerce. The second section identifies and explains the LOS Convention's navigational terms of art, with primary emphasis on their relationship and relevance to transit passage. It also comprehensively sets forth the correlative duties and obligations of both user and coastal states. The third section sets forth the six categories of international straits the LOS Convention recognizes and the important juridical distinctions involved. The fourth section examines in more detail the overlay that exists between the regime applying 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). The fifth section presents an international approach the United States suggests for appraising future proposals for the construction of bridges over international straits, the reasons why we believe it is justified, and the reasons why we believe it protects navigation interests while equitably balancing the legitimate interests of both coastal and user states, thus furthering the central principle underlying the navigation articles of the LOS Convention.

## Bridges Pose Practical Problems in International Straits

The problem a bridge poses is obvious—it can impede, if not stop, navigation. If it is a nonfixed span, such as a drawbridge, and the width of the nonfixed span is of sufficient width, the problem is greatly reduced, assuming, of course, that the main channel is under the nonfixed span and it is of sufficient depth to allow deep draft vessels to pass. In important straits of restricted width and congested traffic, a single movable span would also cause problems if its width were not sufficient to allow sufficiently broad traffic separation schemes for traffic to pass in both directions. Even if these criteria are satisfied, problems with the strait's hydrographic characteristics, such as severe tides and currents, and perhaps even habitually occurring strong winds, may effectively negate an otherwise acceptable design.

Another issue that is squarely joined in the Danish Bridge case currently before the Court is how "high is high enough"—that is, how much vertical clearance must there be under a fixed span in the main channel. Should it be of sufficient height to allow all existing ships to pass through, or enough to permit all ships presently under

construction or planned for construction, or even more than that so as to allow for as yet uncontemplated designs to pass through? As was the case in balancing user and coastal state interests in formulating the LOS Convention, the United States believes the correct response is between the two extremes. An acceptable fixed span bridge should clearly accommodate ship designs that are reasonably foreseeable.

Part and parcel of this question is what constitutes a ship, again an issue that clearly will have to be addressed on the merits. It is the view of the United States that a ship in this context includes any seagoing vessel that is designed for and is capable of self-propulsion and such propulsion is incident to the primary purpose for which it is normally used. Thus a drilling rig or other mobile unit that is self-propelled and such means of propulsion is normally used for transporting it and positioning it in place for exploitation would be a ship. A corollary of this view, of course, is that an object being towed would enjoy the same rights of navigation provided it did not exceed the same height criterion.

## 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 and straits states is an appreciation of the rationale behind the terms of art and definitions in the navigation provisions of the LOS Convention, which in the U.S. view reflect customary law. These terms and definitions are not dead verbiage. They must be grasped and applied carefully. They enable the practitioner to trace logically through complex factual situations that arise, such as the Great Belt. The LOS Convention provides excellent analytical tools to come up with a very logical, persuasive conclusion. I shall next discuss various words of art, necessary facts, and official U.S. interpretive positions on which analysis of the various straits regimes depend.

### *Genesis of the Regime of Transit Passage*

The regime of transit passage in straits used for international navigation arose from (a) the emergence of 12-mile territorial sea claims; (b) the distinction between the right of innocent passage and high seas freedom of navigation; (c) geography; and (d) reality.

Even before the Third UN Law of the Sea Conference first convened in the early 1970s, the critical importance and unique nature of international straits were recognized. These choke points form the lifeline between high seas areas. In order for the high seas freedoms of navigation and overflight to be preserved in international straits, which would be overlapped by 12-mile territorial sea claims (displacing the earlier recognized 3-mile territorial sea norm), the navigational regime in international straits would have to share similar basic characteristics with these high seas freedoms. General support existed in the Conference for a 12-mile territorial sea. Such support depended, however, on ensuring that in international straits less than 24 miles wide at their narrowest point, an adequate navigation regime be preserved to ensure essential elements of the right of freedom of navigation and overflight. The lesser navigational right of nonsuspendable innocent passage was simply not enough.

Reality, in terms of fundamental international commerce and security interests, required open access through international straits. Regardless of the breadth of the strait, whether 5 or 24 miles, certain freedoms had to apply, such as continuous and expeditious transit in, under, and over the strait and its approaches. Any codification of the law of the sea had to reflect this state practice and political and military reality.

Before we proceed further, it is important to underscore that the regime of transit passage is crucial to the maintenance of world peace and order. By relieving littoral states of the political burdens associated with a role as gatekeepers, the transit passage rules minimize the possibility of straits states being drawn into conflicts.

### *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.

Article 14(2) provides that "passage 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." Article 14(4) provides that "[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State." Other than a provision that submarines were required to navigate on the surface and to show their flag (Article 14(6)) and one relating to fishing vessels (Article 14(5)), what conduct "is not prejudicial to the peace, good order or security of the coastal State" was nowhere defined, thereby constituting 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 the territorial sea (Article 15(1)) and that there would be "no suspension of the innocent passage of foreign ships through straits which are used for international navigation." A final important geographic caveat (Article 5(2)) 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." This was retained in the LOS Convention.

To my mind, the most significant change in the territorial sea regime is the exhaustive elaboration in LOS Convention Article 19 of what constitutes non-innocent passage and in Article 21 of what laws and regulations relating to innocent passage the coastal state can enact and enforce. Although the International Law Commission prior to the 1958 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.

It is the United States' view that the enumerations in Articles 19 and 21 are all-inclusive—that is, a ship may engage in any activity while engaged in innocent passage if it is not prejudicial or proscribed in Article 19(2), and a coastal state can only enact those laws and regulations that are contained in Article 21.

Perhaps the most important factor to be noted in this connection 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, a coastal state in order to exercise the right of innocent passage. A number of de-

veloping coastal states maintain that although the LOS Convention is silent on this point, earlier customary international law permitted a coastal state to require prior notification. They thus believe that this competence still exists. This is incorrect. The *travaux preparatoires* of the LOS Convention unequivocally indicate that such is not the case. During the Sea-Bed Committee (1970–1973) discussions, 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 1980–1982 and included the so-called Seven Power Proposal (Argentina, China, Ecuador, Peru, Madagascar, Pakistan, and the Philippines), which was introduced in both the ninth and eleventh sessions and subsequently styled the Twenty Power Proposal, having gained additional developing state sponsors. A Twenty-Eight Power Proposal attempted to secure the same objective by adding "security" to Article 21(h), which enumerates the competences the coastal state can enforce in its territorial sea. The process culminated in a statement by the president of the Conference in plenary that the sponsors of the amendment at his request had agreed not to press it to a vote. Although the erstwhile 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 that exclude or modify the legal effect of provisions of the LOS Convention.

Lastly in this regard, if there is any doubt as to the law existing prior to 1982, the International Court of Justice, in the 1949 *Corfu Channel Case*, clearly stated that there is no right for a coastal state to prohibit innocent passage in time of peace, nor any right to subject the exercise of the right of innocent passage to obtaining previous authorization from the straits state.

Two final points should be noted under the innocent passage regime. Article 23 of the 1958 Convention and Article 30 of the LOS Convention provide that "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." Second, I believe a useful document that illustrates the interpretation given to the innocent passage regime is 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. Since it sets forth the positions of two major maritime powers, I find it highly persuasive evidence and have included it at the end of this article.[1]

### *Nonsuspendable Innocent Passage*

Under Article 16(4) of the 1958 Convention, nonsuspendable innocent passage applied to ships through straits used for international navigation between one part of the high seas and another part of the high seas or territorial sea of a foreign state. It was important because it recognized that in straits overlapped by opposite three-mile-wide territorial seas, the international community had 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, a regime codified as "transit passage" in the LOS Convention. The more limited regime of nonsuspendable innocent passage is now applicable to international straits governed

by Article 38(1) of the LOS Convention (the so-called Messina Exception) and Article 45(1)(b) (the so-called dead-end strait exception).

The regime of nonsuspendable innocent passage under current customary law of the sea is extremely limited in application. It has in almost all cases been superseded by the transit passage regime applying to straits connecting one part of the high seas or an exclusive economic zone with another part of the high seas or an exclusive economic zone. The dead-end strait exception is only applicable in those few geographic instances in which high seas or exclusive economic zone areas connect with a territorial seas area of one state by means of a strait bordered by one or more other states. Without the right of nonsuspendable innocent passage, the state at the end of the cul-de-sac would effectively be landlocked with a territorial sea leading nowhere.

The law reflected in the LOS Convention, with its elaboration of what constitutes innocent passage, its statement of when nonsuspendable innocent passage applies, and its precision as to straits used for international navigation, is a great improvement over the *status quo ante*. Had it existed in 1946, it would have cleared up any confusion regarding navigational rights that led to the *Corfu Channel Case* in 1949.

The Corfu Channel, it will be remembered, is an example of a "Messina Exception" strait in which nonsuspendable innocent passage applies. 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. Albania would not have been able to maintain that the Corfu Channel was not a strait used for international navigation on the grounds that it was only a route of secondary importance and that it was not a necessary route between two parts of the high seas.

Articles 34 and 38 would have provided ready answers, but in 1949 it required the International Court of Justice to state clearly that the Corfu Channel was used for international navigation and that it was additionally a useful route for international maritime traffic. The inspiration for Article 38(1) and Article 45(1)(a) is directly attributable to the 1949 Judgment.

### *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. The regime is applicable in straits that are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. The right of transit passage, unlike nonsuspendable innocent passage, includes the right of overflight and submerged transit.

Following are some important U.S. interpretative positions applicable to the transit passage regime. First, the language referring to "straits which are used for international navigation" signifies all straits which are used or which may be used for navigation—that is, straits that 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 the old, or a former trade route no longer suitable due to a change in tides or currents, environmental problems, change in depth, and so on. Essentially, we place less emphasis on historical use and look instead to the susceptibility of the strait to international navigation.

Second, it is the United States' position that the right of transit passage applies not just to the waters of the straits themselves but to all normally used approaches to the straits. It would make no sense at all to have the right of overflight, for example, apply only within the cartographers' historical delineation of a certain strait, but not apply to restrictive geographical areas leading into or out of the strait, thereby effectively preventing exercise of the right of overflight.

It would defy navigational safety to require ships or aircraft to converge at the hypothetical "entrance" to the strait. It would also effectively deny many aircraft the right of transit passage if the pilot had to zigzag around the territorial seas of rocks and islands during the approaches to a strait. 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 (this is of course subject to any IMO-approved traffic separation scheme that may be in place).

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, thus creating a high seas corridor of similar convenience down the middle of those straits. In such a case, innocent passage applies within the territorial sea areas, and high seas' freedom of navigation applies throughout the corridors. This is so because Article 36 provides that the straits transit regime does not apply when a high seas corridor exists through the strait; instead, "the other relevant Parts of this Convention, including the provisions regarding the freedom of navigation and overflight, apply."

The foregoing is what I would call the interesting "hard law" scenario to which Article 36 applies. Of course Article 36 was intended to apply in most instances to straits wider than 24 miles. Article 36 provides that "this part [straits used for international navigation] does not apply to a strait used for international navigation if there exists through the high seas or through an exclusive economic zone a route of similar convenience with respect to navigational and hydrographical characteristics; in such routes, the other relevant parts of this Convention, including the provisions regarding the freedoms of navigation and overflight, apply."

Given the comparative complexity of the situations the "hard law" scenario of Article 36 envisages, it is useful to illustrate the various hypothetical variations. Consider an international strait 18 miles wide with a different straits state on each side. State A extends its territorial sea to 12 miles; State B remains at 3 miles, thus leaving a high seas corridor 3 miles wide. In this instance innocent passage applies in both territorial seas as Article 36 is correctly invoked so as to make freedom of navigation apply only in the high seas corridor if it is a route of similar convenience. This is to a degree inequitable for State B, since State A gains full benefit from State B's restraint. However, if State B extends its territorial sea to 9 miles (presumably it would force State A to roll back its claim to the equidistance line, or 9 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. If both State A and State B extend to 7 miles, however, innocent passage would apply in each territorial sea with freedom of navigation applying in the high seas corridor beyond.

Fourth, it is the United States' unequivocal position that transit passage is customary international law that the provisions of the LOS Convention reflect. This is independent of the question whether or not the 1982 Convention is in force and

whether or not states signatory to it have ratified or nonsignatories have acceded to it. The fact that the vast majority of states today claim a 12-nautical-mile-wide territorial sea and that the majority of coastal states claim exclusive economic zones, concepts both not recognized (indeed, the latter not even conceived) prior to the 1982 Convention, clearly reflects the validity of this position.

Fifth, and in parallel vein to the all-inclusive list of the user/coastal states' rights and duties under Articles 19 and 21 of the innocent passage regime, Article 42 is an all-inclusive list of the laws and regulations that straits states may adopt relating to transit passage.

## The Six Categories of International Straits

I shall now discuss the different categories of international straits provided for in the LOS Convention, for the regimes differ to some degree both in content and in area of application depending on the nature of the strait involved. The categories are (1) the normal international strait connecting one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone, as provided under Article 37, and overlapped by opposite territorial seas; (2) the Article 36 strait in which a route through the high seas or exclusive economic zone of similar convenience with respect to navigational and hydrographic characteristics exists; (3) the Article 38(1) strait, the so-called Messina Exception strait; (4) the Article 45(1)(b) strait, the so-called dead-end strait exception strait; (5) international straits that occur within archipelagic waters of archipelagic states as provided for in Articles 46–54; and (6) the Article 35(c) strait in which passage is regulated by long-standing international conventions in force, which is discussed separately in the fourth section of this commentary.

### *The "Normal" Strait Used for International Navigation*

Having discussed at length the five official U.S. interpretative positions on transit passage, I shall note other points in the regime important to U.S. interests.

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.

As I mentioned at the beginning of the discussion of transit passage, with regard to straits "used" for international navigation, there is no list of such straits. It is not a static concept—the only exception to this being the number of Article 35(c) straits, the ones subject to long-standing conventions, which number *is* limited.

In the United States' view it is immaterial whether or not ice covers such a strait during most or all of the year, as the right of transit passage, it will be remembered, covers overflight as well as submerged transit. 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 continuous and expeditious transit . . ." (emphasis added). Because the normal mode for submarines to transit is under the surface, such an unquestionable right is accorded them under the Convention both in transit passage and in archipelagic sea lanes passage. While this is not explicitly included under Article 38 (right of transit passage) as it is under Article 53(3) (definition of archipelagic sea lanes passage), such a distinction is not a sub-

stantive one and does not diminish the right. This was done in order to avoid any ambiguity in the archipelagic sea lanes passage articles in that the duties of ships and aircraft under Article 54 incorporate *mutatis mutandis* the transit passage Articles 39, 40, 42, and 44. The drafters wished there to be no doubt that subsurface navigation was included in such waters although archipelagic waters also constitute the waters within archipelagic sea lanes. This conclusion is confirmed by comparison with Article 20(2) in the innocent passage articles, which requires submarines to navigate on the surface and to show their flag. Moreover, since the waters of international straits were formerly high seas until overlapped by 12-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" also means in the case of transit passage (and archipelagic sea lanes passage) that ship's aircraft may both land and be launched. (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.) 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. If such were not permitted under transit passage, a prohibition would have been included under those articles.

Another unambiguous duty provided under Article 44 requires that straits states "shall not hamper transit passage" and that "there shall be no suspension of transit passage." This is a far greater navigational right than that accorded ships under innocent passage, since 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." 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."

As in the case in all maritime jurisdictional belts—that is, the territorial sea, the exclusive economic zone, and archipelagic waters—warships and other government ships operated for noncommercial purposes enjoy sovereign immunity in straits. In the straits articles this is provided for under Article 34(2), which 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," and Article 42 (laws and regulation of states bordering straits relating to transit passage), paragraph 5, which 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 in States bordering straits." The applicable articles for the territorial sea are Articles 30–32.

### *Article 36 Straits*

As discussed above with relation to transit passage, Article 36 in its most interesting "hard laws" applications refers to straits in which one or more straits states choose not to extend their territorial seas out to 12 miles or out to a limit that results in no territorial sea overlap and the continued existence of a high seas corridor.

It may also apply to international straits which are wider than 24 miles in their entirety, which was the principal situation envisaged by the United Kingdom when

it introduced the original version of Article 36 in the Third Conference's Single Negotiating Text in 1975. As a practical matter, of course, there is a point at which this becomes meaningless as the strait is no longer a strait but merely a high seas area in which freedom of navigation applies and where the transit passage articles are inapplicable.

### *Article 38(1) Straits*

This category of international straits, conceived due to the Strait of Messina, 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." It is to note that the regime of *nonsuspendable innocent passage* shall apply in an Article 38(1) strait in the area between the mainland and the island.

### *Article 45(1)(b) Straits*

This category, conceived to provide an adequate regime of navigation in dead-end straits, also provides that the regime of nonsuspendable 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. In that such a strait does not in its entirety fit the Article 37 definition of a strait to which transit passage applies, and as a regime of innocent passage would not be sufficient to meet a 45(1)(b) state's interests, the LOS Convention recognizes the right of nonsuspendable innocent passage in these situations.

### *International Straits that Occur within Archipelagic Waters*

This important category of international straits is treated slightly differently from straits in which transit passage applies in that they fall in whole or in part within the archipelagic waters of midoceanic archipelagic states, a creation the genesis of which in the first instance originated as a recognized concept of international law with the nailing down of all the necessary elements and archipelagic rights in the 1982 Convention.

The concept of the midoceanic archipelagic state permits states that fulfill the definition and criteria of land/water ratios contained in Articles 46 and 47 to enclose within straight baselines surrounding their outermost islands ocean areas previously high seas in nature, subject to the navigational right of archipelagic sea lanes passage. This concept is customary international law as reflected in Articles 46–54 of the LOS Convention, requiring the archipelagic state to recognize and respect the navigational rights and freedoms applicable within archipelagic waters. Archipelagic sea lanes passage applies to all international straits as well as to all other international sea lanes and air routes.

One of the key navigational freedoms is the right of archipelagic sea lanes passage as provided in Article 53. This regime applies to all sea lanes and air routes designated by the archipelagic state. The lanes and routes shall include all normal passage lanes and routes used for international navigation and overflight and be approved before their designation by the International Maritime Organization. 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.

Article 53(3) defines archipelagic sea lanes passage as "the exercise in accordance with the 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," a definition being almost verbatim to that of the right of transit passage. Article 54 provides that certain of the transit passage articles (Articles 39, 40, 42, and 44) apply *mutatis mutandis* to archipelagic sea lanes passage. 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).

Four interpretative positions regarding the right of archipelagic sea lanes passage are, from our view and that of the international community, controlling.

First, as the territorial sea of an archipelagic state extends seaward of the baselines enclosing the archipelagic 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. If this were not the case, a right of archipelagic sea lanes passage existing within archipelagic waters would be meaningless.

Second, only midoceanic island states such as Fiji and Indonesia qualify as archipelagic states. Mainland or continental states that have island possessions cannot treat those islands as archipelagic states even if they would otherwise fulfill the definitions and land/water ratios.

Third, if an archipelagic state designates only a percentage of its sea lanes and air routes, this does not mean that only those so designated may be used; on the contrary, the other normal sea lanes and air routes will still be subject to the exercise of archipelagic sea lanes passage even if they are never so designated.

Fourth, Article 52 means what it says: the right of innocent passage applies to all archipelagic waters that do not comprise sea lanes. I mention this only because some doubt was earlier expressed by an archipelagic state representative whether or not Article 53 on archipelagic sea lanes passage obviated the need for innocent passage in archipelagic waters as contained in Article 52.

## Straits Governed in Whole or in Part by Long-Standing International Conventions in Force

The issue of bridges over international straits has focused attention during the past year on straits that are governed in whole or in part by long-standing international conventions in force, simply because Denmark claims that the Great Belt Strait over which the controversial bridge is to be constructed happens to be such a strait as provided for under Article 35(c). Article 35(c) provides that transit passage articles do not affect "the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits."

During the conference years, the Baltic straits were the subject of much discussion. The Treaty for the Redemption of the Sound Dues of 14 March 1857 and the parallel Convention for the Discontinuance of the Sound Dues between Denmark and the United States of 11 April 1857 ensure free navigation, and, from that per-

spective, it is somewhat academic whether or not the Belts are considered Article 35(c) straits. My friend, Peter Brueckner, however, maintained that subsequent Danish domestic law (such as the claimed restrictions on warship passage) also applied as a form of retroactive overlay on the 1857 provisions, a position the United States cannot accept. If such straits constitute Article 35(c) straits, subsequent domestic legislation, absent concurrence of at least the 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 (the straits transit regime) of the LOS Convention only on the understanding that the Article 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 Part III and transit passage apply.

At this point, it will be useful to discuss several U.S. interpretive positions regarding Article 35(c) straits.

To my mind a most interesting linguistic issue presented in Article 35(c) is the phrase "in whole or in part." The phrase is susceptible to two interpretations.

The first interpretation might be called preemptive. If an Article 35(c) convention regulates the straits regime *(a)* only in certain aspects (for example, commercial vessels but not airplanes, airplanes and commercial vessels but not warships) or *(b)* in whole (for example, airplanes, commercial vessels, and ships entitled to sovereign immunity), that straits regime is totally independent of the normal transit passage regime, which does not apply. This is so because the chapeau of Article 35 states "[n]othing in this part affects" Article 35 subparagraphs (a), (b), and (c). 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 only in part certain classes of ships (for example, commercial vessels, but not airplanes or vessels entitled to sovereign immunity), only those vessels so regulated fall within the Article 35(c) regime, and the nonregulated categories are governed by the transit passage regime. This interpretation is truer to the intent of the straits articles. Transit passage is the norm, and 35(c) 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.

Usage plays a role in each 35(c) strait in determining more precisely the nature of the applicable 35(c) convention regime. As each 35(c) straits regime is *sui generis* depending on the regime established under the "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 in the case in which separate bilateral agreements are in existence collaterally with the long-standing convention regime. For the parties to these bilateral agreements, their provisions will determine the precise relationship, in that the specific prevails over the general.

Another characteristic of an Article 35(c) strait is that it be recognized by the international maritime community as such to qualify. This does not mean that all

states must be parties to the convention regulating the specific strait. The 1885 Convention governing the Magellan Strait has but two parties (Chile and Argentina), but all states enjoy the international transit rights enshrined in its provisions. As another example, the United States is not a party to the 1936 Montreux Convention, but we always have complied with its long-standing provisions.

The only caveat attaching to this status is that 35(c) conventions, although they can be amended by the original parties, have created rights affecting nonparties. Thus, as a general principle, such amendments are not binding on nonparties, since they share neither the long-standing character nor international acceptance of the original provisions. Common sense must be applied in instances in which a straits state, bound by a 35(c) convention, is faced with significantly altered conditions, and reasonable changes gain wide acceptance. (Example: Straits state bound by the 35(c) convention to accept Weimar Republic currency, which subsequently becomes worthless.) This is, however, a subject that requires its own examination and is outside the scope of this comment. Suffice it to say that we recognize that ancillary provisions (those not having to do with fundamental navigation rights) contained in a 35(c) convention are not necessarily treated as immutable.

Third, Article 35(c) straits can only be those governed by long-standing conventions in force—this is corroborated by the *travaux preparatoires* of the LOS Convention. However, it is equally important to observe in this connection that if the Article 35(c) convention lacks specificity or its language is obscure due to terminology that has fallen into desuetude, this does not absolve the straits state of its duty under customary international law to follow the appropriate customary international law norm even though the "long-standing convention" language at issue may appear to be narrower than that norm.

At this point, it will be useful to discuss the 35(c) principles in relation to the only straits that were submitted by the straits negotiating group as falling within the 35(c) exception (an exception that was espoused actively from the very beginnings of the negotiations by Denmark): the Danish Straits, the Aaland Strait, the Turkish Straits (Bosphorus and Dardanelles), and the Strait of Magellan.

### *The Danish Straits*

The Treaty for the Redemption of the Sound Dues of 14 March 1857 and the parallel Convention for the Discontinuance of the Sound Dues between Denmark and the United States of 11 April 1857, among others, recognized "entire freedom of the navigation of the Sound and the Belts" (Article I) and "free and unencumbered navigation" (Article II). Although only surface navigation and neither overflight nor submerged transit was in the contemplation of the parties in 1857, one cannot reasonably maintain that they are *ipso facto* excluded from the central intent of the agreement—that is, transit rights free from dues and interference. In a similar vein, as the regime established was ostensibly as broad a regime as it was 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 from applying their domestic laws to foreign flags transiting the straits except as recognized under modern international law (LOS Convention) and preclude them from applying their internal 1976 Ordinance to foreign warships.

### *The Turkish Straits*

The Convention Regarding the Regime of the Straits signed at Montreux 20 July 1936, commonly styled the Montreux Convention, regulates transit and navigation in the Straits of the Dardanelles, the Sea of Marmara, and the Bosphorus and replaces the Lausanne Convention of 24 July 1923, which formerly regulated the straits. It is a multilateral convention 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 (Article 2), as well as in time of war, subject to certain provisions. Warships consisting of light surface vessels, minor war vessels, and auxiliary vessels enjoy in time of peace freedom of transit, subject to certain conditions, and other warships in time of peace enjoy a right of transit subject to certain conditions (Article 10). Submarines of Black Sea Powers may transit on the surface by day for the purpose of rejoining their base, provided prior notification is given (Article 12). Warships in transit cannot launch or otherwise utilize any aircraft (Article 15). Civil aircraft, in order to pass between the Mediterranean and Black seas, may use air routes prescribed by Turkey, must remain outside of forbidden zones established in the straits, and must give prior notification (Article 23).

Because the Montreux Convention is detailed, it is a convention that can be said to regulate the regime of 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 nonsuspendable innocent passage.

### *The Aaland Island Strait*

The Convention on the Non-Fortification and Neutralization of the Aaland Islands signed at Geneva 20 October 1921 is a multilateral convention to which the United States is not a party but conducts itself consistent with the treaty's terms. Article 5 provides that "the 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 regulations in force." This regime regulates warship passage within three miles of the islands. The three-mile zone takes up a small corner of the strait between Sweden and Finland. Some have argued that the no-warship rule applies to the strait as a whole, but this is totally inconsistent with the terms of the 1921 treaty itself. Historically, it might be interesting to note that the 3-mile zone was independent of Finland's territorial sea claim, which was four miles.

### *The Strait of Magellan*

The Boundary Treaty between the Argentine Republic and Chile signed at Buenos Aires 23 July 1881, provides in Article 5 that "Magellan's Straits are neutralized for ever, and free navigation is guaranteed to the flags of all nations." The applicable juridical regime is free navigation. I already mentioned some thoughts on that phrase in my discussion of the Danish 1857 Convention.

## An International Approach to Future Bridge Proposals over Straits Used for International Navigation

From the foregoing discussion, it should be evident that the construction of a bridge across a strait used for international navigation, if not subject from its inception to certain internationally accepted safeguards and readily applicable standards, could destroy the carefully crafted balance of straits state/user states' rights and obligations that form the essence of all the LOS Convention's navigational articles.

In crafting a reasonable international solution, we should look to the system whereby the international community, working through the International Maritime Organization as the "competent international organization," establishes sea lanes and traffic separation schemes through international straits.

To designate a sea lane or traffic separation scheme under that system, a state would first submit a proposal to the International Maritime Organization with a view toward adoption by that body. To be adopted, the sea lane or traffic separation scheme must conform to generally accepted international standards and regulations, and the state must give "due publicity" to its proposal.

Since sea lanes and traffic separation schemes affect navigation, it is only reasonable and practical that similar steps be followed in the case of bridges.

This is particularly so since the United States does not believe that customary international law permits a state unilaterally and without prior international approval to construct a fixed bridge over an international strait that in many instances is the sole practical deep water route available. In order, 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.

Our suggestion consists of three elements. First, prior to referral of a proposal by a straits state of plans to construct a fixed bridge over a strait used for international navigation, the straits state should be required to provide actual notice of the proposal well in advance through the International Maritime Organization to all states.

Second, all states that are then notified about the proposal by the International Maritime Organization would be given adequate opportunity to communicate their views to the proposing straits state, which would be obliged to seek to accommodate such views.

As part of this process, the International Maritime Organization should first establish internationally recognized guidelines and standards to ensure that construction of bridges does not hamper or impede navigation through international straits. These guidelines and standards would in part be based on and vary with the type of international strait involved and other 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 straits state initiating the bridge construction proposal could only proceed with actual construction upon 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 16 years ago and requested that interested states submit their views to it with a view to their accommodation. The only state to submit such views prior to construction was the former Soviet Union, which requested that the clearance of the main central span over the deep water channel be increased to

65 meters, a request Denmark duly incorporated into the final construction plans. The United States believes that notice through the International Maritime Organization would ensure the international community had effective notice of the opportunity to address so potentially serious a threat to effective international navigation.

The United States looks forward to working with other interested states to help develop these procedures within the International Maritime Organization. We believe that international acceptance of such a procedure, which involves the International Maritime Organization and internationally recognized guidelines and standards that would apply to future bridge construction, would be the most equitable and effective means to address the issue. It would also reduce the potential for the establishment of adverse precedents in this field.

Recently we have been informed of suggestions to build bridges across other international straits. I wish to make it clear beyond any doubt that the United States would not acquiesce in the construction of such bridges unless internationally recognized procedures are already in place and complied with. To accept anything less after the international community worked so many years in the Law of the Sea Conference to establish a universally accepted navigation regime would place us all in unacceptable, uncertain dangers in a field in which the international community requires predictability, stability, and the orderly development of a universally endorsed body of traditional law of the sea norms.

## APPENDIX

### Joint Statement by the United States of America and the Union of Soviet Socialist Republics

Since 1986, representatives of the United States of America and the Union of Soviet Socialist Republics have been conducting friendly and constructive discussions of certain international legal aspects of traditional uses of the oceans, in particular, navigation.

The Governments are guided by the provisions of the 1982 United Nations Convention on the Law of the Sea, which, with respect to traditional uses of the oceans, generally constitute international law and practice and balance fairly the interests of all States. They recognize the need to encourage all States to harmonize their internal laws, regulations and practices with those provisions.

The Governments consider it useful to issue the attached Uniform Interpretation of the Rules of International Law Governing Innocent Passage. Both Governments have agreed to take the necessary steps to conform their internal laws, regulations and practices with this understanding of the rules.

FOR THE UNITED STATES OF AMERICA:

[James Baker, III]

Jackson Hole, Wyoming

FOR THE UNION OF SOVIET SOCIALIST REPUBLICS:

[Eduard Schevardnadze]

September 23, 1989

### Uniform Interpretation of Rules of International Law Governing Innocent Passage

1. The relevant rules of international law governing innocent passage of ships

in the territorial sea are stated in the 1982 United Nations Convention on the Law of the Sea (Convention of 1982), particularly in Part II, Section 3.

2. All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.

3. Article 19 of the Convention of 1982 sets out in paragraph 2 an exhaustive list of activities that would render passage not innocent. A ship passing through the territorial sea that does not engage in any of those activities is in innocent passage.

4. A coastal State which questions whether the particular passage of a ship through its territorial sea is innocent shall inform the ship of the reason why it questions the innocence of the passage, and provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time.

5. Ships exercising the right of innocent passage shall comply with all laws and regulations of the coastal State adopted in conformity with relevant rules of international law as reflected in Articles 21, 22, 23 and 25 of the Convention of 1982. These include the laws and regulations requiring ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may prescribe where needed to protect safety of navigation. In areas where no such sea lanes or traffic separation schemes have been prescribed, ships nevertheless enjoy the right of innocent passage.

6. Such laws and regulations of the coastal State may not have the practical effect of denying or impairing the exercise of the right of innocent passage as set forth in Article 24 of the Convention of 1982.

7. If a warship engages in conduct which violates such laws or regulations or renders its passage not innocent and does not take corrective action upon request, the coastal State may require it to leave the territorial sea, as set forth in Article 30 of the Convention of 1982. In such case the warship shall do so immediately.

8. Without prejudice to the exercise of rights of coastal and flag states, all differences which may arise regarding a particular case of passage of ships through the territorial sea shall be settled through diplomatic channels or other agreed means.

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## Note

1. See Lawrence Juda, "Innocent Passage by Warships in the Territorial Seas of the Soviet Union: Changing Doctrine," *Ocean Development and International Law* 21 (1990): 111–116; and Barbara Kwiatkowska, "Innocent Passage by Warships: A Reply to Professor Juda," *Ocean Development and International Law* 21 (1990): 447–450.