

Article 42
Laws and regulations of States bordering straits
relating to transit passage

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

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

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

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

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

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

SOURCES

1. A/AC.138/SC.II/L.7, first article, paragraph 2(d), reproduced in SBC Report 1972, at 162 (USSR).
2. A/AC.138/SC.II/L.28, article 37, paragraph 3, reproduced in III SBC Report 1973, at 35, 50 (Malta).
3. Item 4, "Straits used for international navigation," Variant C, article 37, paragraph 3; and Variant D, first article, paragraph 2(d), reproduced in IV SBC Report 1973, at 50–53.
4. A/CONF.62/C.2/L.3 (1974), Chapter III, article 4, III Off. Rec. 183, 186 (U.K.).
5. A/CONF.62/C.2/L.11 (1974), article 1, paragraph 2(d), III Off. Rec. 189 (Bulgaria, Czechoslovakia, German Democratic Republic, Poland, Ukrainian SSR and USSR).
6. A/CONF.62/C.2/L.16 (1974), article 22, paragraph 3, III Off. Rec. 192 (Malaysia, Morocco, Oman and Yemen).

7. A/CONF.62/L.8/Rev.1 (1974), Annex II, Appendix I [A/CONF.62/C.2/WP.1], Provisions 62, 63 and 65, III Off. Rec. 93, 107, 117 (Rapporteur-general) [Main Trends].
8. A/CONF.62/WP.8/Part II (ISNT, 1975), article 41, IV Off. Rec. 152, 158 (Chairman, Second Committee).
9. A/CONF.62/WP.8/Rev.1/Part II (RSNT, 1976), article 40, V Off. Rec. 151, 159 (Chairman, Second Committee).
10. A/CONF.62/WP.10 (ICNT, 1977), article 42, VIII Off. Rec. 1, 11.
11. A/CONF.62/WP.10/Rev.1 (ICNT/Rev.1, 1979, mimeo.), article 42. Reproduced in I Platzöder 375, 406.
12. A/CONF.62/WP.10/Rev.2 (ICNT/Rev.2, 1980, mimeo.), article 42. Reproduced in II Platzöder 3, 34.
13. A/CONF.62/WP.10/Rev.3* (ICNT/Rev.3, 1980, mimeo.), article 42. Reproduced in II Platzöder 179, 211.
14. A/CONF.62/L.78 (Draft Convention, 1981), article 42, XV Off. Rec. 172, 182.
15. A/CONF.62/L.109 (1982), article 42, paragraph 1(b), XVI Off. Rec. 223 (Spain).

Drafting Committee

16. A/CONF.62/L.67/Add.1 (1981, mimeo.), at 72–74.
17. A/CONF.62/L.67/Add.1/Rev.1 (1981, mimeo.), at 73–77.
18. A/CONF.62/L.67/Add.14 (1981, mimeo.), at 4.
19. A/CONF.62/L.72 (1981), XV Off. Rec. 151 (Chairman, Drafting Committee).
20. A/CONF.62/L.152/Add.23 (1982, mimeo.), at 56.
21. A/CONF.62/L.160 (1982), XVII Off. Rec. 225 (Chairman, Drafting Committee).

Informal Documents

22. Informal Working Paper No. 2, Provision III, para. 3, Provision IX, and Provision X, Formula A, para. 1; No. 2/Rev.2, Provision III, para. 3, and Provisions IX, X and XII; and No. 2/Rev.2, Provision IV, para. 3, and Provisions XII, XIII and XV (all 1974, mimeo.). Reproduced in III Platzöder 263, 270 and 279.
23. Oman (1975, mimeo.), article 4, para. 6. Reproduced in IV Platzöder 187, 188.
24. Yemen (1976, mimeo.), third article, para. 6. Reproduced in IV Platzöder 267, 268.
25. Spain (1976, mimeo.), article 43 (ISNT II). Reproduced in IV Platzöder 274, 278.
26. Greece ([1976], mimeo.), article 41, para. 5 (ISNT II). Reproduced in IV Platzöder 282.
27. Malaysia (1976, mimeo.), article 40, para. 1, and articles 40 *bis* and 40 *ter* (RSNT II). Reproduced in IV Platzöder 396, 397.

28. Morocco ([1976], mimeo.), articles 40 and 42 *bis* (RSNT II). Reproduced in IV Platzöder 399, 401 [French only].
29. Spain ([1977], mimeo.), article 40, paras. 1, 5 and 6 (RSNT II). Reproduced in IV Platzöder 393, 395.
30. C.2/Informal Meeting/4 (1978, mimeo.), articles 42 and 42 *bis* (Spain). Reproduced in V Platzöder 6, 8.
31. C.2/Informal Meeting/17 (1978, mimeo.), article 42, para. 1(a) (Greece). Reproduced in V Platzöder 23, 24.
32. C.2/Informal Meeting/22 (1978, mimeo.), article 42, para. 1 (Morocco). Reproduced in V Platzöder 30, 32.

COMMENTARY

42.1. Article 42 enumerates the activities regarding which States bordering straits may adopt laws and regulations relating to transit passage through straits used for international navigation. It also provides that foreign ships are to comply with such laws and regulations in exercising their right of transit passage. Further, international responsibility for any loss or damage resulting from a violation of these laws and regulations is to be borne by the flag State of a ship or the State of registry of an aircraft “which acts in a manner contrary to such laws and regulations.”

42.2. At the 1972 session of the Sea-Bed Committee, a proposal by the Soviet Union (Source 1) contained a provision on liability, which read:

Liability for any damage which may be caused to the coastal States of the straits as a result of the transit of ships shall rest with the flag-State of the ship which has caused the damage or with juridical persons under its jurisdiction or acting on its behalf.

A proposal by Malta (Source 2) added two new elements, providing that measures taken by coastal States with regard to passage through straits “shall be non-discriminatory and shall not take effect unless notified to the international ocean space institutions and duly published.” Other proposals by a group of straits States and by Fiji based the regime of passage through straits on the regime of innocent passage in the territorial sea.¹

The Soviet and Maltese proposals were reflected in the list of variants annexed to the Committee’s 1973 Report (Source 3).

42.3. At the second session of the Conference (1974), a proposal by the United Kingdom (Source 4) included an article combining several provisions, reading:

¹ See, e.g., A/AC.138/SC.II/L.18, article 6, reproduced in III SBC Report 1973, at 3, 5 (Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain and Yemen); and A/AC.138/SC.II/L.42 and Corr.1, article 4, para. 2, and article 5, *ibid.* 91, 94 (Fiji). See further para. 21.3 above.

1. Subject to the provisions of this article, a straits State may make laws and regulations:

(a) in conformity with the provisions of article 3 above [now article 41];

(b) giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait.

2. Such laws and regulations shall not discriminate in form or in fact among foreign ships.

3. The straits State shall give due publicity to all such laws and regulations.

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

5. If a ship entitled to sovereign immunity does not comply with any such laws or regulations and damage to the straits State results, the flag State shall in accordance with article 7 be responsible for any such damage caused to the straits State.

The representative of the United Kingdom explained that the proposal

made express provision that any State bordering on a strait could prescribe laws and regulations in order to give full effect to traffic separation schemes for navigation in straits. It also provided a basis for the straits State to take appropriate powers to control discharge of oil or other noxious substances into the strait by making laws and regulations. Foreign ships exercising the right of transit passage would have to conform with the regulations; should they fail to comply, the possibility of legal proceedings would arise in the case of merchant vessels. In the case of warships and other vessels entitled to sovereign immunity, . . . paragraph 5 . . . stipulated that the flag-State was directly responsible for damage caused by non-compliance with such laws and regulations on the part of one of its ships. Namely, there would be liability on the international level or, in other words, State responsibility.²

Under the U.K. proposal, States bordering straits would only be able to prescribe laws and regulations relating to sea lanes and traffic separation schemes, and for the effective application of international regulations concerning marine pollution (primarily from oil). Responsibility for compliance by foreign ships with such laws and regulations would rest with the flag State.

A proposal by six East European Socialist States (Source 5) revised the earlier Soviet proposal regarding liability, providing for liability for any damage to straits States, "their citizens or juridical persons" by a ship in transit. It indicated that such liability would rest first "with the owner of

² Second Committee, 11th meeting (1974), para. 23, II Off. Rec. 125.

the ship or other person liable for the damage,” and second with the flag State.

A proposal by four straits States (Source 6), equating transit passage through straits used for international navigation with innocent passage in the territorial sea, provided that:

3. The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea in straits and shall make every effort to ensure speedy and expeditious passage; in particular it shall not discriminate, in form or in fact, against the ships of any particular State or against ships carrying cargoes or passengers to, from and on behalf of any particular State.

That proposal added a clause regarding nondiscrimination “against ships carrying cargoes or passengers to, from and on behalf of any particular State.”

Fiji reiterated its earlier proposal in the Sea-Bed Committee applying the regime of innocent passage to both the territorial sea and to straits.³

The different elements in these proposals subsequently were reformulated in Provisions 62, 63 and 65 of the Main Trends Working Paper (Source 7).

42.4. At the third session (1975), Oman submitted a proposal (Source 23) which, in an attempt to consolidate the regime of innocent passage through straits, repeated the earlier proposal by four straits States regarding nondiscrimination.

The Private Group on Straits subsequently adopted a text modeled on the earlier U.K. proposal, embodying new elements in paragraph 1.⁴ That text, with some minor drafting changes, was incorporated in the ISNT/Part II (Source 8) as article 41, which read:

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

(a) The safety of navigation and the regulation of marine traffic as provided in article 40;

(b) The prevention of pollution, giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;

(c) With respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;

(d) The taking on board or putting overboard of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary regulations of the strait State.

³ A/CONF.62/C.2/L.19 (1974), article 5, paras. 1–4, III Off. Rec. 196, 197 (Fiji). See further para. 21.4 above.

⁴ Private Group on Straits (1975, mimeo.), article 4. Reproduced in IV Platzöder 194, 196.

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

3. The strait State shall give due publicity to all such laws and regulations.

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

5. If a ship or aircraft entitled to sovereign immunity acts in a manner contrary to the provisions of this part or laws and regulations adopted in accordance with paragraph 1 and loss or damage results to a strait State or other State in the vicinity of the strait, the flag State shall be responsible for that loss or damage.

Paragraph 1 expanded on earlier proposals by setting out four categories of activities with respect to which a strait State could make laws and regulations. Paragraph 2 was expanded to provide that such laws and regulations would not “have the practical effect of denying, hampering or impairing the right of transit passage.” Similar language was included at that stage in article 21 (now article 24) on innocent passage (“denying or prejudicing” the right of innocent passage). Paragraph 6 of the text previously suggested by the Private Group on Straits was not included in the ISNT. That paragraph had provided that “[i]f a strait State acts in a manner contrary to the provisions of this Chapter and loss or damage to a foreign ship or aircraft results the strait State shall compensate the owner of the vessel or aircraft for that loss or damage.” (Although that idea was not retained in article 42, the general issue of responsibility and liability for damage now comes within the scope of article 304.)

42.5. At the fourth session (1976), an informal proposal by Yemen (Source 24) essentially repeated the earlier proposal by four straits States about the duty not to hamper the innocent passage of foreign ships, and about nondiscrimination against any ships. An informal proposal by Spain (Source 25) suggested a number of modifications, adoption of which would have restructured the article into a regime of innocent passage through straits. It applied to “any strait State,” and deleted all references to “transit” passage and to “aircraft.” In addition, it proposed a new paragraph 5 reading:

5. If a ship exercising the right of passage through the strait does not comply with the law[s] and regulations made by the strait State in conformity with the present article, such ship will be responsible of [sic] any damage that might be caused within the areas submitted to the sovereignty of the strait State.

That text would have placed responsibility on the ship for any damage caused in “areas submitted to the sovereignty of the strait State” during

passage through the strait. Greece (Source 26) proposed removing the reference to aircraft from paragraph 5.

None of these amendments was accepted, and article 40 of the RSNT/Part II (Source 9) repeated the ISNT provision, except for paragraph 5 which was revised to read:

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

This rewording served to emphasize that the flag State would bear international responsibility for any loss or damage resulting from acts by its ships or aircraft entitled to “sovereign” immunity in contravention of the laws and regulations adopted by the States bordering a strait. The title “Laws and regulations of States bordering straits relating to transit passage” was added at this stage.

42.6. At the fifth session (1976), Malaysia (Source 27) proposed a more elaborate listing in paragraph 1 of the activities in respect of which States bordering straits could adopt laws and regulations. That proposal included those elements listed in article 40 of the RSNT/Part II, and brought in the additional elements contained in article 20 of that text (now article 21), on laws and regulations of the coastal State relating to innocent passage. Malaysia also proposed a new article 40 *bis* allowing States bordering straits to provide legal and regulatory “protection for straits with special peculiarities.” In addition, it proposed a new article 40 *ter* making it compulsory for vessels to “carry adequate insurance to meet any claim for any loss or damage caused to the State bordering the strait.” Morocco submitted a similar proposal (Source 28) to expand the listing under paragraph 1, also providing that such laws and regulations were to be adopted “in conformity with the rules of the present Convention and of [sic] other rules of international law.”

42.7. At the sixth session (1977), Spain also proposed an expansion of the activities listed under paragraph 1 (Source 29). In addition, it repeated its earlier proposal for a new paragraph providing that ships in passage would be responsible for any damage (see para. 42.5 above). The new proposal also suggested deleting the words “or aircraft” from paragraph 5.

None of the proposals submitted at the fifth and sixth sessions was accepted, and the ICNT (Source 10) repeated the RSNT provision almost verbatim, incorporating only minor drafting changes.

42.8. At the seventh session (1978), Spain submitted an informal proposal (Source 30) which suggested amending paragraph 1(b) to apply to the prevention, reduction and control of marine pollution “in accordance with

generally accepted international regulations, procedures and practices.”⁵ It also proposed a new paragraph 1(e) concerning the “protection of navigational aids and facilities, of cables and pipelines, and of other facilities and installations.” Further, Spain proposed deleting paragraph 5 and replacing it with an article 42 *bis* providing, *inter alia*, that States ensure that “ships flying their flag are provided with adequate insurance” and that States provide recourse in their legal systems for “prompt and adequate compensation or other relief in respect of any loss or damage caused by ships flying their flag in the exercise of the right of transit passage.” (This would have tied in with the provisions on responsibility and liability for damage caused by pollution of the marine environment, now contained in article 235.)

Greece (Source 31) proposed expanding paragraph 1(a) to include “the safety of air traffic and the rules, regulations and procedures of the ICAO.” Morocco submitted a proposal (Source 32) repeating its earlier proposal to expand the list of activities in paragraph 1 (see para. 42.6 above).

None of these suggested amendments was accepted, and the article was substantially unchanged in subsequent texts. Article 42 was cast into its final form with the incorporation of drafting changes recommended by the Drafting Committee (Sources 16 to 21).

42.9. At the eleventh session (1982), Spain submitted a formal proposal (Source 15) to amend paragraph 1(b) by replacing “applicable” with “generally accepted” international regulations. Noting that “generally accepted” was the phrase used in article 211, paragraph 2 (on pollution from vessels), the Spanish representative observed that “the problem was that the applicability of particular regulations might depend on the flag of the ship concerned, and so it would become impossible to establish an objective régime.”⁶ The same proposal referred to regulations “regarding the discharge of oil, wastes and other noxious substances in the strait” (here the reference to “oily” wastes was dropped), to make the text “broader by including all kinds of wastes.”⁷ The Spanish proposal subsequently was put to a vote, but did not receive the majority required for adoption.⁸

⁵ Later in the Drafting Committee a similar proposal was made by the English Language Group, but it was not accepted by the Co-ordinators of the Language Groups. See ELGDC/6 (1981, mimeo.); DC/Part III/Article 42 (1981, mimeo.); and CG/WP.4 (1981, mimeo.). Objection was taken by the Chinese Language Group, which did not think that “applicable” before “international rules/regulations” should always be changed to “generally accepted,” but that each case should be considered separately. The Group also thought that the change “may involve questions of substance,” and it referred specifically to articles 42(1), 94(4)(c), 218(1) and 219. The change, therefore, was not made in those four provisions. See DC/Part III/Article 42 (1981, mimeo.), at 2.

⁶ See 169th plenary meeting (1982), para. 4, XVI Off. Rec. 93.

⁷ *Ibid.*

⁸ See 176th plenary meeting (1982), paras. 8–9, *ibid.* 133. The vote was 60 in favor and 29 against, with 51 abstentions. Rule 39 of the Conference Rules of Procedure provided that decisions on matters of substance required a “two-thirds majority of the representatives present and voting, provided that such majority shall include at least a majority of the States

42.10(a). Paragraph 1 gives States bordering straits the power to adopt laws and regulations in respect of all or any of the four matters specified in paragraphs 1(a) to 1(d). This power is exercisable “subject to the provisions of this section,” that is, Part III, section 2, articles 37 to 44, on transit passage. The legislative history indicates that the list in paragraphs 1(a) to 1(d) is exhaustive, none of the suggested changes having been accepted. In view of the attempts to introduce other matters, however, articles 39 and 40 embrace some of the topics to which amendments were addressed.⁹ Further, article 233 contains a specific cross-reference to article 42, paragraphs 1(a) and (b),¹⁰ with regard to actual or threatened major damage to the marine environment of a strait.

42.10(b). Paragraph 1(a), with its reference to article 41, constitutes a careful delineation of the power of the States bordering a strait to provide for the safety of navigation and to regulate maritime traffic. The rules established in article 41 are adopted without expansion in article 42; laws and regulations regarding sea lanes and traffic separation schemes should be adopted in conformity with the guidelines established by IMO (see paras. 41.9(c) and (g) above).

42.10(c). Paragraph 1(b) authorizes States bordering straits to adopt laws and regulations relating to the prevention, reduction and control of pollution. This authority was a crucial issue for many of those States, which were concerned about discharges of oil and other pollutants from transiting ships. On the other hand, user States were concerned that unreasonable pollution-control regulations might be a means of impairing the freedom of transit through straits. These two conflicting viewpoints were accommodated by allowing States bordering straits to adopt laws and regulations on the prevention, reduction and control of pollution, but only by way of “giving effect to applicable international regulations.” Although the words “giving effect to” would seem to allow for some measure of interpretative discretion, States bordering straits are not free to adopt regulations that are substantially different from or more stringent than the applicable international standards. A limited enforcement jurisdiction is granted through article

participating in that session.” A/CONF.62/30/Rev.3 (1981, mimeo.). Reproduced in XIII Platzöder 489.

⁹ Other matters suggested included the safety of air traffic in accordance with ICAO; the protection of navigational aids and facilities, cables and pipelines; and the protection of other facilities and installations. See para. 42.8 above.

¹⁰ See further the statement relating to article 233, in its application to the Straits of Malacca and Singapore, and the determination of under keel clearance of ships transiting those straits, with its specific reference to article 42, paragraph 1(a). A/CONF.62/L.145 (1982), XVI Off. Rec. 250 (Malaysia), and Add.1–8, *ibid.* 251–53 (Indonesia, Singapore, France, U.K., U.S.A., Japan, Australia and Federal Republic of Germany, respectively). The statement by Malaysia is reproduced in Volume IV of this series, at 388, para. 233.8.

233 to enable States bordering straits to deal with actual or threatened major damage to the marine environment.¹¹

42.10(d). Paragraph 1(c) authorizes States bordering straits to regulate the activities of fishing vessels for the prevention of fishing, including the requirement that such vessels stow fishing gear while in transit. This authority is limited to fishing vessels, and forms part of a wider rule set out in article 19, paragraph 2(i), article 21, paragraph 1(c), article 62, paragraph 4(k), and article 73. Fishing by other ships in transit passage would not constitute an activity incident to “the normal mode of continuous and expeditious transit” required by article 39 of all ships while exercising their right of transit passage. Under article 73, a coastal State may take enforcement measures in respect of its laws and regulations regarding fishing in those parts of a strait which comprise part of that State’s exclusive economic zone.

42.10(e). Paragraph 1(d) authorizes States bordering straits to adopt laws and regulations relating to the loading or unloading of any commodity, currency or person, specifically with regard to the contravention of customs, fiscal, immigration or sanitary laws and regulations of those States.¹² These are some of the most obvious impacts that a transiting ship could have on a State bordering a strait; parallel provisions allow for the protection of the same interests of the coastal State in the territorial sea through article 21, paragraph 1(b), and in the contiguous zone through article 33. The loading and unloading of any commodity, currency or person are objectively verifiable acts, and would not be normal incidents of continuous and expeditious transit through a strait. In this respect, such activities would also be in contravention of article 39, paragraph 1(c).

42.10(f). Paragraph 2 contains two limitations on the freedom of action of the States bordering straits under paragraph 1. The first limitation is that laws and regulations adopted under the authority of paragraph 1 must not discriminate “in form or in fact among foreign ships.” This provision has parallels in article 24, paragraph 1(b), and article 25, paragraph 3, concerning innocent passage in the territorial sea; article 52, paragraph 2, concerning innocent passage in archipelagic waters; and in article 227, concerning nondiscrimination with respect to foreign vessels in connection with protection of the marine environment (articles 24 and 227 use the preposition “against” instead of “among”; see further para. 24.7(b) above). By implication, article 42, paragraph 2, allows discrimination against *all* foreign ships provided there is no discrimination *among* them, but this

¹¹ This aspect was of particular importance to the States bordering the Straits of Malacca and Singapore. *Supra* note 10.

¹² The World Health Organization also noted that the right of States bordering straits under paragraph 1(d) “falls within the scope of the measures permitted under chapter III of the International Health Regulations.” See A/CONF.62/109 (1981), XV Off. Rec. 94 (Director-General, WHO). For the health regulations see World Health Organization, *International Health Regulations (1969)* (3d annotated ed., 1983).

would appear to be of little relevance in practice. The provisions on transit passage in Part III are designed to govern the respective rights and duties of transiting foreign ships and aircraft vis-à-vis the States bordering the straits.

The expression “in form or in fact” corresponds to the terminology of the other nondiscrimination provisions in the Convention. That expression would appear to cover acts that overtly discriminate in a manner that is prohibited by the article (discrimination “in form”), and those acts which, even if not overtly discriminatory, have a discriminatory effect as applied (discrimination “in fact”). Unlike article 24, paragraph 1(b), however, article 42, paragraph 2, does not mention cargoes (although there was an attempt to include cargoes at the second session (see para. 42.3 above)).

42.10(g). The second limitation contained in paragraph 2 is that the application of the laws and regulations adopted by States bordering straits must not have the practical effect of denying, hampering or impairing the right of transit passage as defined in Part III, section 2. This is a further reinforcement of the conclusion that the jurisdiction provided for in article 42 is prescriptive only. Ships exercising the right of transit passage may not be inspected, arrested, detained, seized, refused passage or subjected to other forms of control that would impair the right of transit passage. The same principle is repeated in slightly different terms in article 44 (see para. 44.8(a) below).

This prohibition does not deny the right of the State bordering a strait to exercise its enforcement jurisdiction to the fullest extent if the ship should enter that State’s port or in some other way come within the State’s competence to exercise its enforcement jurisdiction (at all events, if such action is taken voluntarily—cf. articles 218 and 220). Despite this possibility, it is clear that the authority of a State bordering a strait is strictly limited. That State may not actually interfere with a ship in transit passage, whether by denying its right of transit passage, or by hampering or impairing that right. There is nothing in Part III corresponding to article 25, paragraph 1, by which a coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent. To the contrary, article 44 reinforces that “[t]here shall be no suspension of transit passage” in straits used for international navigation.

42.10(h). Paragraph 3 provides that States bordering straits must give due publicity to the laws and regulations adopted under the authority provided by paragraph 1. (On the question of “due publicity” see para. 16.9(c) above.)

42.10(i). Paragraph 4 is the necessary complement to paragraph 1. It sets out the correlative duty of foreign ships exercising the right of transit passage to comply with the laws and regulations adopted in accordance with paragraph 1. It is reinforced by article 39, paragraph 1(d), which requires ships in transit passage to comply with other provisions of Part III. The

laws and regulations that may be established under article 42, paragraph 1, constitute a major portion of such “other provisions.”

42.10(j). Paragraph 5 provides that when a ship or aircraft entitled to sovereign immunity acts in a manner contrary to laws and regulations adopted by a coastal State in accordance with article 42, or contrary to other provisions of Part III, the international responsibility of the flag State or State of registry is engaged for any loss or damage which results to States bordering straits. This provision is the counterpart of the right of a State bordering a strait to bring a civil suit against an offending vessel or aircraft that is not entitled to sovereign immunity (cf. article 229, in cases of pollution of the marine environment). A regime which did not provide for recovery for damage caused by vessels entitled to sovereign immunity, and as to which the State bordering the strait had no right to deny passage, would not have been acceptable to States bordering straits. The Convention therefore confirms that the normal principle of State responsibility applies to such situations. In this connection, reference should also be made to articles 235, 263 and 304.

42.10(k). Paragraphs 1 to 4 *prima facie* only apply to ships exercising their right of transit passage. Paragraph 5, however, also applies to aircraft entitled to sovereign immunity, despite attempts in the Conference to remove the reference to aircraft (see para. 42.5 above). Paragraph 5, unlike the other provisions of this article, refers both to the laws and regulations adopted by virtue of paragraph 1 and to “other provisions of this Part”; other provisions of Part III refer to aircraft, including State aircraft within the meaning of the 1944 Convention on International Civil Aviation. Paragraph 5 confirms that States bordering straits can obtain reparation for any loss or damage occasioned by violation of these duties by such ships and aircraft. In relation to ships, therefore, paragraph 5 refers to the duties imposed by articles 39 through 42; in relation to aircraft it refers to those duties imposed by articles 39 and 42.

42.10(l). In connection with article 42, the Secretariat of IMO has emphasized that this provision and article 41 only apply in respect of straits used for international navigation in which the regime of transit passage is applicable as provided for under article 37. In other straits, the States bordering those straits have an obligation to apply the regime of non-suspendable innocent passage or, in the case of a strait qualifying under article 35, subparagraph (c), the provisions of the long-standing international convention applicable to passage in such a strait. It has also drawn attention to the obligations of flag States under article 42, paragraph 4.¹³

¹³ See *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization (IMO)*, Study by the Secretariat of IMO, doc. LEG/MISC/1 (1986,mimeo.), para. 46. Reproduced in 3 NILOS YB [1987], at 340, 357; I AROA 1985–1987, at 123, 135.