

*Article 44*  
*Duties of States bordering straits*

States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.

**SOURCES**

1. A/AC.138/SC.II/L.7, first article, paragraph 2(e), and second article, paragraph 2(d), reproduced in SBC Report 1972, at 162, 163 (USSR).
2. A/AC.138/SC.II/L.18, article 5, paragraph 4, reproduced in III SBC Report 1973, at 3, 5 (Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain and Yemen).
3. A/AC.138/SC.II/L.28, article 36, paragraph 2, article 37, paragraph 1, and article 38, reproduced in III SBC Report 1973, at 35, 50 (Malta).
4. A/AC.138/SC.II/L.42 and Corr.1, article 4, paragraph 2, reproduced in III SBC Report 1973, at 91, 94 (Fiji).
5. Item 4, "Straits used for international navigation," Variant A, article 4, paragraph 2; Variant B, article 5, paragraph 4; Variant C, article 36, paragraph 2, article 37, paragraph 1, and article 38; and Variant D, first article, paragraph 2(e), and second article, paragraph 2(d), reproduced in IV SBC Report 1973, at 50, 51.
6. A/CONF.62/C.2/L.3 (1974), Chapter III, article 6, III Off. Rec. 183, 186 (U.K.).
7. A/CONF.62/C.2/L.11 (1974), article 1, paragraphs 2(e) and (f), and article 3, paragraph 2(d), III Off. Rec. 189, 190 (Bulgaria, Czechoslovakia, German Democratic Republic, Poland, Ukrainian SSR and USSR).
8. A/CONF.62/C.2/L.16 (1974), article 21, and article 23, paragraph 3, III Off. Rec. 192, 194 (Malaysia, Morocco, Oman and Yemen).
9. A/CONF.62/C.2/L.19 (1974), article 4, paragraph 2, III Off. Rec. 196, 197 (Fiji).
10. A/CONF.62/C.2/L.20 (1974), article 1, paragraph 2(d), III Off. Rec. 198, 199 (Algeria).
11. A/CONF.62/L.8/Rev.1 (1974), Annex II, Appendix I [A/CONF.62/C.2/WP.1], Provision 54, paragraphs 2 and 3, and Provision 60, III Off. Rec. 93, 107, 115–17 (Rapporteur-general) [Main Trends].
12. A/CONF.62/WP.8/Part II (ISNT, 1975), article 43, IV Off. Rec. 152, 159 (Chairman, Second Committee).
13. A/CONF.62/WP.8/Rev.1/Part II (RSNT, 1976), article 42, V Off. Rec. 151, 160 (Chairman, Second Committee).
14. A/CONF.62/WP.10 (ICNT, 1977), article 44, VIII Off. Rec. 1, 11.
15. A/CONF.62/WP.10/Rev.1 (ICNT/Rev.1, 1979, mimeo.), article 44. Reproduced in I Platzöder 375, 407.

16. A/CONF.62/WP.10/Rev.2 (ICNT/Rev.2, 1980, mimeo.), article 44. Reproduced in II Platzöder 3, 35.
17. A/CONF.62/WP.10/Rev.3\* (ICNT/Rev.3, 1980, mimeo.), article 44. Reproduced in II Platzöder 179, 211.
18. A/CONF.62/L.78 (Draft Convention, 1981), article 44, XV Off. Rec. 172, 182.

### **Drafting Committee**

No documents from the concordance process.

### **Informal Documents**

19. Informal Working Paper No. 2, Provision III, paras. 3 and 4, and Provision VII; No. 2/Rev.1, Provision III, paras. 3 and 4, and Provision VII; and No. 2/Rev.2, Provision IV, paras. 3 and 4, and Provision X (all 1974, mimeo.). Reproduced in III Platzöder 263, 270 and 279.
20. Oman (1975, mimeo.), article 4, paras. 6 and 7. Reproduced in IV Platzöder 187, 188.
21. Yemen (1976, mimeo.), third article, paras. 6 and 7. Reproduced in IV Platzöder 267, 268.
22. Spain (1976, mimeo.), article 45. Reproduced in IV Platzöder 274, 280.
23. Greece ([1976], mimeo.), article 43 (ISNT II). Reproduced in IV Platzöder 282.
24. Spain ([1977], mimeo.), article 42 (RSNT II). Reproduced in IV Platzöder 393, 395.
25. C.2/Informal Meeting/4 (1978, mimeo.), article 44 (Spain). Reproduced in V Platzöder 6, 9.
26. C.2/Informal Meeting/22 (1978, mimeo.), “Three additional articles” (Morocco). Reproduced in V Platzöder 30, 33.

## **COMMENTARY**

**44.1.** Article 44 imposes three duties on States bordering straits: they must not hamper transit passage; they must give appropriate publicity to any danger to navigation or overflight of which they have knowledge; and they are not to suspend transit passage. Although the third duty is phrased in absolute terms as a general obligation (that there shall be no suspension of transit passage), it is obviously directed primarily at States bordering straits, since those States are the primary ones in a position to suspend transit passage. This stems from the title of the article: “Duties of States bordering straits.”

**44.2.** At the 1972 session of the Sea-Bed Committee, the Soviet Union submitted a proposal (Source 1) which addressed in separate provisions the noninterruption of transit passage of ships through straits and of overflight of aircraft. With regard to ships it provided that:

No State shall be entitled to interrupt or stop the transit of ships through the straits, or engage therein in any acts which interfere with the transit of ships. . . .

In a similar vein, with regard to aircraft it provided that:

No State shall be entitled to interrupt or stop the overflight of foreign aircraft, . . . in the airspace over the straits.

In that way, the basic rule of noninterference with the freedom of transit passage and of overflight were expressed at an early stage of the negotiations.

**44.3.** At the 1973 session of the Sea-Bed Committee, a proposal by eight straits States (Source 2), addressing the issues of navigation through the territorial sea and through straits used for international navigation as a single entity, provided that:

4. . . . there shall be no suspension of the innocent passage of foreign ships through straits used for international navigation which form part of the territorial sea.

A proposal by Fiji (Source 4) used almost identical language, adding that there was to be no suspension of innocent passage “through [designated] sea lanes.”

Malta submitted a proposal (Source 3) in which several provisions directed coastal States to “not hamper” passage through straits, including both those more than 24 miles wide and those less than 24 miles wide. Provision was included, however, that measures could be taken to prevent or suspend passage through straits less than 24 miles wide, but “only in case of reasonable fear of grave or imminent threat to [the coastal State’s] security.”

These proposals were reflected in the list of variants annexed to the Committee’s 1973 Report (Source 5).

**44.4.** At the second session of the Conference (1974), the proposal submitted by the United Kingdom (Source 6) consolidated the various ideas in a single article reading:

A straits State shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which it has knowledge. There shall be no suspension of transit passage.

Introducing that proposal, the representative of the U.K. indicated that it was intended to provide “for a sure right of navigation and overflight for ships or aircraft proceeding from one part of the high seas to another through or over waters connecting those two seas.”<sup>1</sup>

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<sup>1</sup> Second Committee, 3rd meeting (1974), para. 31, II Off. Rec. 102.

A proposal by four straits States (Source 8) combined the regime for navigation in the territorial sea with that for straits used for international navigation. Article 21 indicated that the passage of foreign ships through straits was to be governed by the rules for innocent passage in the territorial sea. In that context, article 22, paragraph 3, 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; . . . .

Fiji (Source 9) largely repeated its earlier proposal, providing:

2. Except to the extent authorized under the provisions of these articles, there shall be no suspension of the innocent passage of foreign ships through straits used for international navigation or through sea lanes designated under the provisions of these articles.

A proposal by six East European Socialist States (Source 7) repeated the earlier Soviet proposal, and added a requirement that, with regard to the transit of ships, “[t]he coastal State shall not place in the straits any installations which could interfere with or hinder the transit of ships.”<sup>2</sup>

Algeria included slightly different wording in a proposal on straits and semi-enclosed seas (Source 10), providing that “[n]o State shall be entitled to interrupt or suspend free transit through straits or to take any measures likely to hamper such transit.”

The latter two approaches were reflected in Provisions 54 and 60 in the Main Trends Working Paper (Source 11).

**44.5.** At the third session (1975), Oman submitted a proposal (Source 20) which sought to apply the regime of innocent passage to the passage of foreign ships in straits. On the other hand, a proposal by the Private Group on Straits<sup>3</sup> adopted the U.K. text.

In the ISNT/Part II (Source 12), the U.K. text was included as article 43, which read:

A strait State shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within

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<sup>2</sup> The representative of Denmark took note of the reference in that proposal to the placement of installations, noting that:

Denmark had geographically the character of an island country, the main island being separated from the other main parts of the country, as well as from neighbouring Sweden, by narrow international straits. . . . Existing plans took full account of the obligation not to hamper the free passage of ships in transit.

Second Committee, 11th meeting (1974), para. 12, *ibid.* 124.

<sup>3</sup> Private Group on Straits (1975, mimeo.), article 6. Reproduced in IV Platzöder 194, 196. In that context, the Group discussed the difference between the terms “impede” and “hamper” and decided on the latter. See S.N. Nandan and D.H. Anderson, “Straits used for international navigation: A commentary on Part III of the United Nations Convention on the Law of the Sea 1982,” 60 *Brit. YB Int’l L.* 159, 195 (1989).

or over the strait of which it has knowledge. There shall be no suspension of transit passage.

**44.6.** At the fourth session (1976), a proposal by Yemen (Source 21) repeated the earlier proposal by Oman in applying the regime of innocent passage to straits. A proposal by Spain (Source 22) suggested replacing “transit passage” with “passage through the strait,” and deleting the references to aircraft (“or overflight” and “or over”). Greece (Source 23) also proposed limiting the scope of application of this article to ships.

In the RSNT/Part II (Source 13), the only changes were that the title was added, and the opening words “A strait State” were changed to “States bordering straits” (on this change see further para. III.15 above).

**44.7.** At the sixth session (1977), and again at the seventh session (1978), Spain submitted proposals to limit the application of this article to ships (Sources 24 and 25). Morocco (Source 26) proposed adding several new articles specifying certain “duties of States making use of straits.” None of these proposals was accepted, however, and the only change in the article after the RSNT was its renumbering as article 44 in the ICNT (Source 14).

**44.8(a).** Article 44 specifies the duties of States bordering straits with regard to the exercise by ships and aircraft of their right of transit passage. The first duty is that those State “shall not hamper” transit passage. Other provisions requiring States bordering straits not to deny, hamper, impair or impede transit passage appear in articles 38 and 42. Article 38, paragraph 1, in addressing the right of transit passage, states that passage “shall not be impeded.” Article 42, paragraph 2, addresses the application of the laws and regulations of States bordering straits, requiring that such laws and regulations not have “the practical effect of denying, hampering or impairing the right of transit passage.” Article 44 therefore serves to reinforce the point that transit passage may not be hampered by States bordering straits, either by the adoption of laws and regulations or in any other manner.

**44.8(b).** The second duty imposed by article 44 on States bordering straits is to give “appropriate publicity” of dangers to navigation and overflight of which the States have knowledge. The modern articulation of this duty follows from the *Corfu Channel* case.<sup>4</sup> It was adopted in article 15, paragraph 2 (dangers to navigation), of the 1958 Convention on the Territorial Sea and the Contiguous Zone, based on the work of the International Law Commission,<sup>5</sup> and is carried over into article 44 of the Convention (and in article 24, paragraph 2, which addresses dangers to navigation). With regard to “appropriate publicity” the IMO Secretariat has pointed out that

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<sup>4</sup> *Corfu Channel* case (United Kingdom v. Albania), 1949 ICJ Reports 4.

<sup>5</sup> See Report of the International Law Commission covering the work of its eighth session (A/3159), article 16 *Commentary*, II YB ILC 1956, at 253, 273.

the objective of publicity required will be effectively achieved only if the information in question reaches the States, authorities, entities and persons who are expected to be guided by the information. IMO maintains the most direct and continuing contact with the authorities of States concerned with safety of navigation and the prevention of vessel-source pollution. Accordingly the purpose of the “publicity” is likely to be served by some IMO involvement.<sup>6</sup>

What is “appropriate” presumably depends on all the circumstances, and there appears to be a difference between the “appropriate” publicity required under article 44 (and under article 24, paragraph 2, and article 60, paragraph 3) and the “due” publicity required under other provisions of the Convention (see further para. 16.8(c) above).

**44.8(c).** The third duty of States bordering straits—not to suspend transit passage—is crucial to the entire transit passage regime. A major difficulty with the innocent passage regime as it had developed since the 1958 Convention on the Territorial Sea and the Contiguous Zone was that although it was ostensibly nonsuspendable in straits used for international navigation, passage was sometimes interpreted as not innocent on the basis of a variety of subjective judgments by the States bordering the straits (and by inference passage was therefore suspendable). The transit passage regime deals with this possibility by specifically delineating the duties of ships and aircraft (article 39) as well as the right of States bordering straits (articles 40, 41 and 42). Article 44 then makes it clear that the rights of States bordering straits do not include or imply their right to suspend transit passage.<sup>7</sup>

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<sup>6</sup> See *Implications of the United Nations Convention on the Law of the Sea, 1982, for the International Maritime Organization (IMO)*, Study by the Secretariat of IMO, doc. LEG/MISC/1 (1986, mimeo.), para. 130. Reproduced in 3 *NILOS YB* [1987], at 340, 390; I *AROA* 1985–1987, at 123, 159.

<sup>7</sup> For an interpretation of this, see 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 44, 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.