

STRAITS USED FOR INTERNATIONAL  
NAVIGATION: A COMMENTARY ON PART III OF  
THE UNITED NATIONS CONVENTION ON THE  
LAW OF THE SEA 1982\*

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I. INTRODUCTION

THE UN Convention on the Law of the Sea was the product of a detailed re-examination of all issues relating to the law of the sea extending over a period of more than twelve years. In the words of its preamble, the Convention was seen as 'an important contribution to the maintenance of peace, justice and progress for all peoples of the world'. The Convention contains numerous significant provisions, amongst which must be included Part III concerning straits used for international navigation. The formulation of the articles in Part III was an important element in the overall solution, reached at the conference, to the question of maritime limits, since establishing 12 nm as the maximum breadth of the territorial sea was acceptable to many delegations only on the basis of a satisfactory regime for passage through straits used for international navigation. At the same time, Part III represents a balance between the interests of States bordering busy straits in such matters as security, safety and protection of the environment, and the interests of other States in the freedom of communications. The purpose of this article is to provide insights into the terms of Part III as a whole, as well as a detailed commentary on the individual articles.

(a) *The Evolution of the Law on International Straits 1894–1970*

Unlike several parts of the Convention (including Part II concerning the territorial sea and contiguous zone and Part VII concerning the high seas), the wording of Part III was not based on any of the Conventions on the Law of the Sea adopted by the First UN Conference on the Law of the Sea of 1958. This is not to say that Part III did not have antecedents: Part III is

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the latest of several attempts by international lawyers and governmental conferences to set down in the form of articles the rules of law applicable to straits. The first attempts were made by the Institut de Droit International and the International Law Association (ILA) between 1894 and 1906 in their 'Rules relating to territorial Waters'. In the form adopted by the ILA in 1906 the Rules contained the following about straits:—

ART. 10.—Les dispositions des articles précédents s'appliquent aux détroits dont l'écart n'excède pas douze milles, sauf les modifications et distinctions suivantes:

1° Les détroits dont les côtes appartiennent à des États différents font partie de la mer territoriale des États riverains, qui y exerceront leur souveraineté jusqu'à la ligne médiane.

2° Les détroits dont les côtes appartiennent au même État et qui sont indispensables aux communications maritimes entre deux ou plusieurs États autres que l'État riverain font toujours partie de la mer territoriale du riverain, quel que soit le rapprochement des côtes. *Ils ne peuvent jamais être barrés.*

3° *Dans les détroits dont les côtes appartiennent au même État, la mer est territoriale bien que l'écartement des côtes dépasse douze milles, si à chaque entrée du détroit cette distance n'est pas dépassée.*

4° Les détroits qui servent de passage d'une mer libre à une autre mer libre ne peuvent jamais être *barrés*.

ART. 11.—Le régime des détroits actuellement soumis à des conventions ou usages spéciaux demeure réservé.

(The words in italics were the modifications made by the ILA to the Rules adopted by the Institut in 1894.)<sup>1</sup>

The League of Nations Conference of 1930 marked another attempt to formulate articles: the Hague Conference considered the question of the territorial sea in its Second Committee. The report of Sub-Committee No. II discussed the question of straits and included the following:—

#### PASSAGE OF WARSHIPS THROUGH STRAITS

Under no pretext whatever may the passage even of warships through straits used for international navigation between two parts of the high sea be interfered with.

According to the previous Article the waters of straits which do not form part of the high sea constitute territorial sea. It is essential to ensure in all circumstances the passage of merchant vessels and warships through straits between two parts of the high sea and forming ordinary routes of international navigation.<sup>2</sup>

The question of the law of international straits was reviewed fully in a learned treatise by Brüel, written in the late 1930s and published in English in 1947. His conclusion was that such straits had a legal position which was

<sup>1</sup> *Annuaire de l'Institut de Droit International, Abrégement (1928-9)*, vol. 3, p. 393; *Report of the Seventeenth Conference of the ILA (1906)*, pp. 114-16.

<sup>2</sup> Conference on the Progressive Codification of International Law, *Publications of the League of Nations V: Legal Questions*, 1930. The Report also appears in *American Journal of International Law*, 24 (1930), Supplement: Official Documents, p. 234 at p. 253.

*sui juris*, i.e. separate from the law of innocent passage through the territorial sea.<sup>3</sup>

The law was clarified in 1949 by the International Court of Justice: in its judgment in the *Corfu Channel* case, the Court held that:

. . . States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.<sup>4</sup>

The Court thus stated some basic rules of customary law about passage through straits used for international navigation, rules which applied to all ships and which did not depend upon the precise legal status of the waters forming such a strait.

The wide significance of this decision was not fully reflected in the draft articles of the International Law Commission<sup>5</sup> which formed the basic proposal at the Geneva Conference on the Law of the Sea. As a result, the question of passage through straits was treated in the Convention on the Territorial Sea and the Contiguous Zone of 1958 as an incidental aspect of the right of innocent passage through the territorial sea. Thus Article 16(4) provided that:

There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.

This paragraph was described by a participant in the Conference as 'a universally recognised rule of general international law';<sup>6</sup> but the question of straits was not dealt with generally and even less as a separate topic.

(b) *The UN Committee on the Peaceful Uses of the Sea-Bed ('the Sea-Bed Committee')*

The change in approach adopted at the Third Conference was prompted by the wider acceptance of the twelve-mile limit for the territorial sea which had become apparent in the 1970s. The change first found expression in the draft articles on the breadth of the territorial sea and straits submitted to the UN Sea-Bed Committee in 1971 by the United States. Draft Article II provided that:

<sup>3</sup> Brüel, *International Straits* (1947), vol. 1, pp. 38-9. Another leading authority is Baxter, *The Law of International Waterways* (1964), esp. pp. 159 ff. For a modern authority, see O'Connell, *The International Law of the Sea*, vol. 1 (1982), p. 327.

<sup>4</sup> *ICJ Reports*, 1949, p. 4, at p. 28. In the authentic French text, the key phrases are 'le droit de faire passer leurs navires de guerre par les détroits qui servent, aux fins de la navigation internationale, à mettre en communication deux parties de haute mer . . . '.

<sup>5</sup> Report of the ILC, in *Yearbook of the ILC*, 1958, vol. 2, pp. 254 ff., esp. draft Article 17(4).

<sup>6</sup> Fitzmaurice, 'Some Results of the Geneva Conference', *International and Comparative Law Quarterly*, 8 (1959), p. 73 at p. 101. See also Article 5(6) of the Convention on the Continental Shelf: the reference to 'recognized sea lanes essential to international navigation' includes straits used for international navigation.

In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State, all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight, for the purpose of transit through or over such straits, as they have on the high seas.<sup>7</sup>

In 1972, the Soviet Union made a similar proposal (but confined to straits linking two parts of the high seas) which went on to elaborate more detailed rules for the exercise of the freedoms of navigation and of overflight through straits.<sup>8</sup> Later that year, the 'List of Subjects and Issues relating to the Law of the Sea' adopted by the Sea-Bed Committee included item 4:

Straits used for International Navigation

4.1 Innocent Passage

4.2 Other Related Matters including the Question of the Right of Transit.<sup>9</sup>

The List of Subjects and Issues was, in effect, the substantive agenda for the Third Conference and the inclusion of a separate item about straits marked a significant development. In the Sea-Bed Committee (and indeed during much of the Conference), the views were pressed that there was no separate body of law about straits and that the rules about innocent passage through the territorial sea applied to them (subject to some qualifications). However, those views did not prevail: the predominant opinion was that the question of passage through straits used for international navigation should be treated separately from that of passage through the territorial sea. It is that opinion, based on customary law and the needs of the contemporary situation, which finds expression in Part III.

### (c) *The Work of the Fiji/UK Group*

At the Conference, rival proposals were tabled which would have given expression to these two different approaches. Supporting the approach of separate treatment for straits, the UK put forward a set of draft articles in two parts, one on territorial sea and the other on straits;<sup>10</sup> and separate proposals on straits were tabled by Bulgaria and certain other States.<sup>11</sup> The UK's proposals on straits put forward the concept of the right of transit passage, which, though an extensive right in content, was not the same as freedom of navigation and overflight, as had been proposed by the US in 1971 and the Soviet Union in 1972. Supporting the other approach, a

<sup>7</sup> Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, A/8421, p. 241. Article I provided for a maximum breadth of the territorial sea of 12 nm.

<sup>8</sup> Report of the Committee, A/8721, p. 162.

<sup>9</sup> Report to the General Assembly, A/8721, p. 5. (Item 2 concerned the territorial sea and Item 3 the contiguous zone.)

<sup>10</sup> A/CONF. 62/C.2/L. 3. Some amendments were proposed by Denmark and Finland (*ibid.*, L. 15).

<sup>11</sup> *Ibid.*, L. 11. Bulgaria *et al.* put forward proposals about passage through the territorial sea in *ibid.*, L. 26. Algeria proposed 'free transit' in straits for ships other than warships which were to enjoy the right of innocent passage (*ibid.*, L. 20). Iraq proposed 'freedom of navigation' in straits customarily used for navigation (*ibid.*, L. 71).

group of delegations led by Malaysia<sup>12</sup> proposed to deal with straits in the context of the territorial sea, applying to straits the regime of innocent passage with modifications. The proposals by Fiji<sup>13</sup> were stated to be without prejudice to the Conference's decision on the issue of the approach; but, significantly, the point of departure in the Fiji paper was that submarines might pass in straits under water, thereby accepting a distinction between the territorial sea in general and straits—a distinction which formed the basis for the later compromise between the Fijian and British proposals. The Fijian proposals also dealt in detail with the question of the legislative powers of straits States. The two different approaches, as well as the Fijian proposals, were reflected in the document entitled 'Main Trends', produced by the Second Committee in 1974.<sup>14</sup>

Informal consultations had been held in 1974 between the British and Fijian delegations about questions of navigation and, in particular, the formulations of the rules on innocent passage in their respective sets of draft articles. In 1975 it was decided after further consultation to create a group of delegations from the different regional groups under the joint chairmanship of Mr Nandan (Fiji) and Mr Dudgeon (UK), the so-called 'Private Working Group on Straits used for International Navigation' or the 'Fiji/UK Group'. Attendance was by joint invitation of the Co-Chairmen who sought a cross-section of moderate opinion, drawn from all regional groups and including straits States and delegations with a particular interest in sea-borne trade or questions of limits of the territorial sea and EEZ. The first meeting on 25 March 1975 was attended by 14 delegations: Argentina, Bahrain, Denmark, Ethiopia, Fiji, Iceland, Italy, Kenya, Lebanon, Nigeria, Singapore, the UK, United Arab Emirates and Venezuela. (Subsequent meetings were attended also by Australia, Bulgaria and India.)<sup>15</sup> The objective was explained as being to continue to seek accommodation between the proposals of Fiji and the UK on straits, in order to achieve a sound balance between the interests of States bordering straits and maritime nations.

In the discussion, it was noted that unimpeded passage of straits was one

<sup>12</sup> *Ibid.*, L. 16. The group consisted of Malaysia, Morocco, Oman and Yemen and the proposal was sometimes referred to in the Second Committee as 'the Oman draft'. A similar approach to that of L. 16 was implicit in the proposals by Spain (*ibid.*, L. 6) and Iran (*ibid.*, L. 72). The difference between the 'two different schools of thought' was brought out clearly in a statement by Mr Lacleta (Spain) during the 14th meeting of the Second Committee (*UNCLOS III Official Records (hereinafter Official Records)*, vol. 2, pp. 136-7).

<sup>13</sup> A/CONF. 62/C.2/L. 19, repeating with modifications proposals advanced in Sea-Bed Committee in 1973 (A/AC. 138/SC II/242). Fiji's proposals of 1973 influenced those of the UK about passage through the territorial sea in A/CONF. 62/C.2/L. 3. In tabling the revised proposals in *ibid.*, L. 19, Fiji indicated in an Explanatory Note an open mind about 'the regime or regimes applicable to the passage of foreign ships through straits'.

<sup>14</sup> *Official Records*, vol. 3, p. 107 at p. 115. A footnote reads: 'For some delegations, straits used for international navigation which are part of the territorial sea of one or more states, fall, except for some specific rules . . . under the same legal regime as that of any other portion of the territorial sea.'

<sup>15</sup> Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. 1 (1985), p. 107, gives the same list but excluding Ethiopia and Lebanon whose representatives did not attend the final meetings of the Group.

of three major issues, the others being the twelve-mile territorial sea and the 200-mile EEZ. Whilst passage should be unimpeded, it was pointed out that the cases of merchant ships, surface warships, submarines and nuclear-powered vessels (civil or military) would have to be considered, as well as overflight. The distinction was brought out between the regime of navigation and overflight, on the one hand, and the nature of the waters, on the other. Another distinction drawn was between straits linking two parts of the high seas/EEZ and those linking the high seas/EEZ to the territorial sea, on the grounds that the balance of interests differed between the two situations. The view was expressed that even in the first type of situation, complete freedom of navigation could not be accepted although freedom in the sense of non-discrimination should be granted. Concern for the interests of developing States was voiced. Responding to these points, the Co-Chairmen pointed out that the UK and Fiji draft articles had not proposed complete freedom of navigation such as existed on the high seas since passage had to be, for example, expeditious, without threat to the straits States and in compliance with international regulations. All types of vessels required to make passage; but passage must be effected in a way which did not prejudice the interests of coastal States in the narrow stretches of water forming straits. The question of nuclear vessels was being considered elsewhere in the conference. The need for submerged passage had to be considered in the context of its powerful backing and the safeguards offered to straits States.

After discussing the issues, the members of the Group agreed at the end of the first meeting to continue work on the basis that there should be a regime for straits which was separate from the regime of innocent passage applicable to the territorial sea in general. The members of the Group then proceeded to discuss the nature of the regime for straits during seven subsequent meetings ending on 18 April 1975. Between meetings, individual members of the Group held detailed informal discussions with many interested delegations outside the Group. In particular, in view of the link with the question of archipelagic States, close contacts were maintained with Indonesia and Malaysia: at the same time, major maritime powers such as the Soviet Union, the United States, France, Japan and the FRG were consulted, as well as straits States such as Morocco. The Co-Chairmen were especially active in those discussions.

On 30 April 1975, the Co-Chairmen circulated to all delegations the set of draft articles<sup>16</sup> which resulted from the Group's work and which represented what they described as a 'broad consensus' of the members. They explained that 'the principal basis of our work' had been 'the straits chapter of document A/CONF. 62/C.2/L. 3'; but several substantive changes were made by the Group, notably those concerning the definition of transit passage, the legislative powers of States bordering straits, the designation of

<sup>16</sup> Platzoder (ed.), *Third United Nations Conference on the Law of the Sea: Documents*, vol. 4 (1983), p. 194.

sea lanes and the status of the waters forming straits, as well as minor changes of wording.

The Chairman of the Second Committee took account of the Group's work in preparing his informal single negotiating text.<sup>17</sup> His main changes affected the structure of the draft articles, including the introduction of three sections (general provisions, transit passage and innocent passage) which brought greater clarity to the text. Whilst this part of the ISNT remained controversial, the subsequent changes to the text were minor and the Conference accepted what became Part III as part of the overall solution to the issue of limits.<sup>18</sup>

(d) *The Categorization of Straits in Part III*

The Conference attempted to make provision for navigation in all straits. However, circumstances of history and geography vary greatly from one strait to another, and so it was found appropriate to make different provision for different situations. For these reasons, the Convention in effect divided straits into several categories, with rules which may be summarized as follows:

- |   |   |   |
|---|---|---|
| (a) Straits not used for international navigation;  | } | Not subject to Part III.  |
| (b) 'Broad straits' which have a high seas/EEZ route through them; and  |   | Part II may apply to those areas in such straits which are territorial sea and Parts V, VI and VII apply to areas beyond the territorial sea. |
| (c) Straits subject to their own long-standing regimes;   |   |   |
| (d) Straits not covered by (b) or (c) and used for international navigation:                                    |   | Part III applies to the question of passage.  |
| (i) Straits between two parts of the high seas/EEZ, apart from those subject to the exception in Article 38(1), |   | Part III, Section 2 applies, i.e. transit passage.  |
| (ii) Straits between the high seas/EEZ and the territorial sea of a foreign State, and                          | } | Part III, Section 3 applies, i.e. non-suspendable innocent passage.   |
| (iii) Straits excluded from Article 38(1).  |   |   |

Two further points may be noted: first, those straits which are situated

<sup>17</sup> A/CONF. 62/WP.8/Part II, Articles 34 to 44.

<sup>18</sup> Statements were made about different aspects of Part III upon signature of the Convention by Finland, Greece, Iran, Iraq, Oman, Spain and Sweden.

within an archipelagic State are subject to Part IV; and, secondly, there is no reference in Part III to the idea of 'historic straits' to parallel the reference to historic bays in Part II.

(e) *The Interpretation and Application of Part III as a Whole*

In construing and applying Part III, the normal rules of international law on the interpretation of treaties, as set out in the Vienna Convention on the Law of Treaties,<sup>19</sup> are applicable. At the same time, there are some general points which may be noted:

1. The way in which geographical factors should be approached;
2. The question of what is meant by the expression 'a strait used for international navigation';
3. The differences between transit passage, archipelagic sea lanes passage and innocent passage.

1. *Geographical factors*

Part III contains several important geographical references, such as those to straits 'formed by an island' and 'mainland', as well as to straits 'between one part of the high seas' and another. In putting forward their proposals at Caracas,<sup>20</sup> the UK delegation had available a set of 'chartlets' illustrating such features as the wide strait (with or without a suitable route beyond twelve-mile limits throughout its length), the strait giving access to the territorial sea of a foreign State, the strait lying between the mainland and an island of the coastal State, and so on. Geographical factors are of crucial importance in construing the provisions of Part III and, indeed, in deciding what constitutes 'a strait', since the term was not accompanied by a formal definition. The *Concise Oxford Dictionary* defines the word to mean a 'narrow passage of water connecting two seas or larger bodies of water'; it comes from the Latin root '*strictus*'. The definition's use of the word 'passage' is worthy of special note.

How, then, should geographical factors be approached? The best approach is to take into account the terms of the articles as well as all the relevant geographical and other factors, i.e. to adopt something of a 'common-sense' interpretation. A strictly literal (or 'mechanical') interpretation could well be found to be inappropriate in certain settings. Each geographical situation is unique and many published maps are drawn to a small scale which does not permit the inclusion of every natural feature. At the same time, some features may not be relevant to the question of how to apply Part III. It may be the case, to take the last example, that a strait is formed by a mainland and two islands of a coastal State, with the mainland on one

<sup>19</sup> Articles 31 to 35 set out rules of international law.

<sup>20</sup> Notably, at the time when the Second Committee considered Agenda Item 4: see the statement by Mr Dudgeon (UK) on 22 July 1974 (*Official Records*, vol. 2, pp. 125-6). A set of chartlets is appended to this article.

side and the two islands on the other. In such a case, the fact that there are two islands rather than one is hardly a material factor for the purposes of Article 38(1). To take another example, if a mainland is masked by an elongated island close to the coast so that strictly a strait is formed between that island and another belonging to the same State, it would be consonant with the intention behind Part III to assimilate the elongated island to the mainland for the purpose of applying Part III. An overly mathematical approach to straits would appear to be out of harmony with the principles of Part III. Its terms have to be construed in their context, which has to do with questions of passage—something reflected in the dictionary definition of the word 'strait'. This approach is also consistent with that of the ICJ in the *Fisheries case (UK v. Norway)*,<sup>21</sup> as well as more recently in the *Libya/Malta case*.<sup>22</sup>

## 2. *The question of 'use'*

The second issue—that of a strait's use for international navigation—is also crucial: it was a source of much discussion and even controversy at the Conference. The test of 'use' comes from the ICJ's decision in the *Corfu Channel* case and the Court's analysis of the idea retains its value. It will be recalled that after appraising certain evidence, the Court continued:

The Albanian Government does not dispute that the North Corfu Channel is a strait in the geographical sense; but it denies that this Channel belongs to the class of international highways through which a right of passage exists, on the grounds that it is only of secondary importance and not even a necessary route between two parts of the high seas, and that it is used almost exclusively for local traffic to and from the ports of Corfu and Saranda.

It may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this Strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic Seas. It has nevertheless been a useful route for international maritime traffic.<sup>23</sup>

The Court concluded that 'the North Corfu Channel should be considered

<sup>21</sup> *ICJ Reports*, 1951, p. 116. In its judgment the Court stated that the rule whereby baselines must 'respect the general direction of the coast' was 'devoid of any mathematical precision' (at pp. 141-2).

<sup>22</sup> *ICJ Reports*, 1985, p. 13. The Court found that weighing up the relevant considerations in adjusting an equidistance line in order to achieve an equitable result was 'not a process which can infallibly be reduced to a formula expressed in actual figures' (at p. 52).

<sup>23</sup> *ICJ Reports*, 1949, p. 4 at p. 28. This aspect of the judgment was criticised by Brüel in an article entitled 'Some Observations on Two of the Statements concerning the Legal Position of International Straits'. Brüel recalled his conclusion in *International Straits* (1947) that 'only those straits that are of some, not quite inconsiderable, importance to the international sea-commerce, enjoy the peculiar legal position of straits', and went on to argue that 'the Corfu Channel fulfils none of these conditions'. Brüel described

as belonging to the class of international highways through which passage cannot be prohibited by a coastal state in time of peace'.

There exists a temporal problem with the word 'used'. In French, the equivalent is '*servant*', a present participle, or 'serving', which suggests that use at the time when the question arises is what really matters. If so, evidence of past use, whilst relevant in showing a pattern, is of lesser significance. In the normal case, very slight or short-lived use would be insufficient; but in certain circumstances limited use brought about by, say, an oil discovery may quickly put a strait into the category of those used for international navigation. Purely potential use would not appear to be sufficient: there should be actual use when the question falls to be decided. Taking the English and French texts together, 'used' and '*servant*' can be said to be in the present continuous.

Finally on 'use', it has to be remembered that proposals at different times to insert an adverb such as 'normally', 'customarily' or 'traditionally' before 'used' have been rejected. The ILC expressed 'the opinion that it would be in conformity with the Court's decision [in the *Corfu Channel* case] to insert the word "normally" ',<sup>24</sup> but this formulation was not accepted by the First UN Conference on the Law of the Sea.<sup>25</sup> Proposals were put forward at the Third Conference by Algeria and others<sup>26</sup> and by Iraq<sup>27</sup> employing the term 'customarily used'. Canada proposed a definition of 'international strait' which included the qualification that it 'has traditionally been used for international navigation'.<sup>28</sup> Chile spoke in favour of 'traditional use' in the Second Committee on 23 July 1974<sup>29</sup> and a similar proposal was advanced by Canada, Chile and Norway in an *aide-mémoire* dated 30 April 1975,<sup>30</sup> commenting upon the Fiji/UK Group's draft articles. However, the Chairman of the Second Committee did not include 'customarily', 'traditionally', or any similar qualification upon the word 'used' in framing his ISNT.<sup>31</sup> In contrast, Article 53 ('Right of Archipelagic Sea Lanes Passage') provides for that right to apply in 'all *normal* passage routes used as routes for international navigation or overflight' (paragraph 4): if an archipelagic State does not designate sea lanes or air routes, the right 'may be exercised through routes *normally* used for international navigation' (paragraph 12) (emphasis added). This contrast is significant since in many other respects

the *Corfu Channel* as a typical 'détroit latéral' or water dividing an island from a mainland 'the importance of which can never be sufficient to qualify them as "international"' (*Festschrift für R. Laun* (1953)). This distinction has now been recognized in Articles 38(1) and 45 of the Convention, but the application of those Articles to the particular case of the *Corfu Channel* is not entirely clear.

<sup>24</sup> *Yearbook of the ILC*, 1956, vol. 2, p. 273.

<sup>25</sup> A/CONF. 13/C.1/SR. 34.

<sup>26</sup> A/CONF. 62/C.2/L. 44.

<sup>27</sup> *Ibid.*, L. 71.

<sup>28</sup> *Ibid.*, L. 83.

<sup>29</sup> *Official Records*, vol. 2, p. 138 (14th meeting).

<sup>30</sup> Platzoder, *op. cit.* above (n. 16), p. 223.

<sup>31</sup> A/CONF. 62/WP.8/Part II.

the right of archipelagic sea lanes passage is set out in the same terms as the right of transit passage. The omission of 'normally' from Part III means that any type of use may be relevant: no evidence of use is to be excluded *a priori*, e.g. as non-traditional or exceptional. Use which is recent or novel, as well as use in the more remote past, may be taken into account. Use does not have to be regular or to reach any predetermined level. It may be civil or military, or both, so long as the military use does not threaten the coastal State. Secondary or subsidiary straits which are not indispensable for international navigation may nevertheless count as ones used for international navigation so long as they connect two parts of the high seas/EEZ. The exact regime of passage through such a strait is, of course, a separate question and it is to be anticipated that international tribunals would have regard to all the relevant considerations of law and fact, including geography, in coming to a decision.

The reference to 'international navigation', taken together with references to the high seas/EEZ, exclude use of a strait for cross traffic between ports on the strait, even if shipping moves thereby from one State's territory to another's.

### 3. *Differences between the regimes of passage*

Turning to the differences between the regimes of transit passage, archipelagic sea lanes passage and innocent passage, these emerge from detailed comparisons of the texts of Parts III, IV and II. On the broader level, the differences between the right of transit passage and the right of innocent passage are of great significance, especially in their strategic aspect. Both are regimes of passage: in other words, under either regime ships may in principle pass. However, the right of innocent passage may be suspended in certain circumstances; it is not available to aircraft, and submarines are required to pass on the surface. Transit passage may not be suspended; it is available to aircraft, and may be exercised by submarines submerged. The distinctions are justified by the consideration that transit passage exists where there is no alternative route or none of equal convenience. The differences between the right of transit passage and that of archipelagic sea lanes passage are not so marked: indeed, much of the wording of Article 53 was taken verbatim from what became Part III. Article 53 contemplates the possibility of there being designated sea lanes and air routes which traverse the whole of an area of archipelagic waters, whereas Part III makes no provision for the designation of air routes in straits and sea lanes need not run for the entire length of a strait. The distinction arises from the geographical circumstances in the two cases. Whereas a strait is a relatively narrow strip of water, an archipelago often has islands more than 24 nm apart between which international sea routes pass. It was necessary, therefore, to devise a system which would confine the exercise of archipelagic sea lanes passage within certain limits. In practice, however, the differences between these two regimes of passage may be insignificant since ships and aircraft in

transit can be expected to remain within the bounds of routes normally used for international navigation.

(f) *Part III and Customary Law*

Part III represents both codification and progressive development of customary law. The fundamental principles laid down by the ICJ in the *Corfu Channel* case have been retained and elaborated: this was achieved in the context of a consensus that 12 nm should be accepted as the maximum breadth of the territorial sea.<sup>32</sup> Many of the detailed rules take account of modern developments such as sea lanes and traffic schemes, and these rules too contain elements of codification and development of the law. The article attempted to strike a balance between the interests of coastal States and other States; between the security and other interests of the former and the general interest in freedom of commerce and communication; between self-protection and self-defence, on the one hand, and freedom of the seas and the freedom of communications on the other. The coastal State on a strait would not be justified in seeking to take advantage of its geographical situation in order to interfere with international communications; but, at the same time, its legitimate interests are safeguarded in relation to its coasts and waters within the strait. Although the precise balance proposed during the first part of the Conference was resisted by several States bordering straits, the terms of Part III—which resulted from long debates—eventually achieved consensus<sup>33</sup> and so represent negotiated solutions in the overall context. It is likely, therefore, that Part III will influence the practice of States even before the entry into force of the Convention.<sup>34</sup>

<sup>32</sup> A good number of straits used for international navigation are less than 24 nm wide. Of the 33 examples in the study prepared for the First UN Conference on the Law of the Sea in 1958, 32 are less than twice 12 nm wide and so are made up of territorial sea if the maximum permissible breadth of the territorial sea is taken by the coastal State(s) concerned (A/CONF. 13, *Official Records*, vol. 1, pp. 114 f.). In the State Department's table of 'Widths of Selected Straits and Channels', 108 out of 136 straits are less than 24 nm wide (*Geographic Bulletin*, No. 3, 1965).

<sup>33</sup> Although votes were taken on proposals by Spain to amend Articles 39 and 42 (*Official Records*, vol. 16, pp. 132-3, 176th plenary meeting).

<sup>34</sup> The following is a recent example:

**JOINT DECLARATION BY THE GOVERNMENT OF THE UNITED KINGDOM AND THE GOVERNMENT OF THE FRENCH REPUBLIC**

On the occasion of the signature of the Agreement relating to the Delimitation of the Territorial Sea in the Straits of Dover, the two Governments agreed on the following declaration:

The existence of a specific regime of navigation in the straits is generally accepted in the current state of international law. The need for such a regime is particularly clear in straits, such as the Straits of Dover, used for international navigation and linking two parts of the high seas or economic zones in the absence of any other route of similar convenience with respect to navigation.

In consequence, the two Governments recognise rights of unimpeded transit passage for merchant vessels, state vessels and, in particular, warships following their normal mode of navigation, as well as the right of overflight for aircraft, in the Straits of Dover. It is understood that, in accordance with the principles governing this regime under the rules of international law, such passage will be exercised in a continuous and expeditious manner.

The two Governments will continue to co-operate closely, both bilaterally and through the International Maritime Organisation, in the interests of ensuring the safety of navigation in the Straits of

## II. PART III OF THE CONVENTION: TEXT AND COMMENTARY

### SECTION I: GENERAL PROVISIONS

#### *Article 34*

#### *Legal status of waters forming straits used for international navigation*

1. The regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.
2. The sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law.

Section 1, which consists of three articles, deals with several general points of a miscellaneous nature.

Article 34 stands in relation to Part III as Article 2 stands in relation to Part II: both define the legal status of the waters to which the respective Parts apply.

The formal proposals made to the Second Committee about straits used for international navigation<sup>35</sup> included Article 1(3)(b) of the draft articles of Bulgaria and other co-sponsors to the effect that 'the provisions of this Article . . . shall not affect the sovereign rights of the coastal States with respect to the surface, the sea-bed and the living and mineral resources of the straits'. During informal discussions in the Fiji/UK Group, disquiet was expressed about the possible effects of the proposals submitted by the UK upon other aspects of the waters forming straits. In particular, concern was expressed about possible prejudice to the coastal State's sovereignty over its internal waters and territorial sea within a strait, including its jurisdiction over such matters as fisheries. In order to allay these fears, the Group developed the wording which became Article 34. The wording was included by the Chairman of the Second Committee in his ISNT<sup>36</sup> and retained in subsequent texts.<sup>37</sup>

Article 34(1) makes it clear that Part III applies only to the question of

Dover, as well as in the southern North Sea and the Channel. In particular, the traffic separation scheme in the Straits of Dover will not be affected by the entry into force of the Agreement.

With due regard to the interests of the coastal states the two Governments will also take, in accordance with international agreements in force and generally accepted rules and regulations, measures necessary in order to prevent, reduce and control pollution of the marine environment by vessels.

2 November 1988

<sup>35</sup> A/CONF. 62/C.2/L. 3 (UK) (and amendments in L. 15 (Denmark and Finland), L. 6 (Spain), L. 11 (Bulgaria *et al.*), L. 16 (Malaysia *et al.*), L. 19 (Fiji), L. 20 (Algeria), L. 71 (Iraq) and L. 72 (Iran), as well as definitions in L. 44 (Algeria *et al.*) and L. 83 (Canada)).

<sup>36</sup> A/CONF. 62/WP 8/Part II, Article 34(1) and (2).

<sup>37</sup> Despite some criticism (e.g. Spain, A/CONF. 62/WS/12) and some informal amendments (C2/Informal Meeting 4 (Spain), 17 (Greece) and 22 (Morocco), none of which were accepted).

passage through straits used for international navigation. It does not apply to such questions as whether the waters within such a strait are territorial sea, or high seas, or internal or archipelagic waters, nor to any questions of fishing, baselines, delimitation and the like. In other words, although it is entitled 'straits used for international navigation', Part III does not in fact apply to all aspects of such straits: it is confined to the question of passage in such straits. Article 34(1) speaks about 'the regime of passage . . . established in this Part': this is a reference to the right of transit passage (Section 2) and the right of innocent passage (Section 3) in the different types of straits used for international navigation. The regime of passage affects 'the legal status of the waters forming' straits used for international navigation to the extent that the waters are subject to that regime in accordance with Part III.<sup>38</sup> But in all other respects, the legal status of the waters is not affected. Equally unaffected is the exercise by the States bordering straits of their sovereignty or jurisdiction over the waters (including the sea-bed and subsoil and the air space) forming the straits.

Article 34(2) provides that (i) the sovereignty of a State bordering a strait over its internal waters and territorial sea within a strait, and (ii) its jurisdiction over any areas of its EEZ or continental shelf within a strait, have both to be exercised subject to (a) Part III as regards passage through the strait, and (b) other rules of international law, e.g. those on the non-use of force or delimitation.<sup>39</sup> In other words, in so far as non-navigational questions may arise, other rules of international law, including other Parts of the Convention, apply. Amongst other provisions in the Convention, Article 233 (safeguards with respect to straits used for international navigation) may be noted: this permits a State bordering such a strait to take appropriate enforcement measures in the case where a merchant ship has violated the State's laws and regulations, thereby causing or threatening major damage to the marine environment of the straits.

*Article 35*  
*Scope of this Part*

Nothing in this Part affects:

- (a) any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such;
- (b) the legal status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas; or
- (c) the legal regime in straits in which passage is regulated in whole or in part by

<sup>38</sup> In Article 49(4), the comparable provision in Part IV (Archipelagic States), there appears additionally a reference to the resources contained in the sea-bed, etc.: there can be no doubt that Article 34(1) also applies to any resources in the subsoil etc.

<sup>39</sup> Similar provisions are contained in Articles 2(3) concerning the territorial sea and 49(3) concerning archipelagic waters. The precise meaning of the reference to 'other rules of international law' may not always be entirely clear in practice.

long-standing international conventions in force specifically relating to such straits.

Article 35 sets out three separate saving provisions for cases not intended to be affected by Part III: in brief, they are (a) internal waters, (b) the status of waters beyond the territorial sea and (c) straits in which passage is regulated by existing treaties.

#### *Case (a)*

The origins of sub-paragraph (a), which concerns certain areas of water which are excluded, can be traced to proposals describing which straits were included. Thus, Article 1(3) of the UK's proposal<sup>40</sup> was that transit passage should apply 'to any strait or other stretch of water, whatever its geographical name which (a) is used for international navigation and (b) connects two parts of the high seas'. A Canadian definition<sup>41</sup> of straits required that they should be 'naturally formed', should lie within the territorial sea and should have been 'traditionally used for international navigation'. In 1975, the Fiji/UK Group considered the definition: the resulting text applied to '. . . any strait (which term includes any naturally-formed stretch of water whatever its geographical name) . . .'.<sup>42</sup> In an *aide-mémoire*<sup>43</sup> dated 30 April 1975, Canada, Chile and Norway pointed out that on the basis of the *Corfu Channel* case and Article 16(4) of the Convention on the Territorial Sea and the Contiguous Zone of 1958 (hereinafter the CTSCZ), the law on straits applied to 'only those that lie within the territorial sea of one or more States' and that the proposed wording would negate the regime of internal waters behind straight baselines drawn by many States. In his ISNT, the Chairman of the Second Committee tried to take account of the three delegations' concerns<sup>44</sup> by excluding from the application of Part III 'any areas of internal waters which had been considered as part of the high seas or territorial sea prior to the drawing of straight baselines'.<sup>45</sup> Subject to drafting changes, this approach was accepted by the Conference in Article 35(a).

In the result, sub-paragraph (a) means that the rules about passage in Part III do not affect any areas of internal waters within a strait, unless those areas become internal waters as a result of the drawing of straight baselines in accordance with the method set forth in Article 7. Internal waters are defined by Article 8(1), i.e. waters on the landward side of the baseline of the territorial sea, and in the normal case there are no rights of passage, whether innocent or transit passage, through such waters. The exception implies that straight baselines may be drawn within or across

<sup>40</sup> A/CONF. 62/C.2/L. 3.

<sup>41</sup> A/CONF. 62/C.2/L. 83.

<sup>42</sup> Platzoder, *op. cit.* above (n. 16), p. 194. The rest of the definition followed the language of L. 3.

<sup>43</sup> *Ibid.*, p. 223.

<sup>44</sup> A/CONF. 62/WP.8/Part II, Article 35(a).

<sup>45</sup> In accordance with the rules in Article 7.

straits so long as the criteria set out in Article 7 are satisfied. The exception is consistent with the rule in Article 8(2) concerning the maintenance of the right of innocent passage. Articles 8(2) and 35(a) both use the formula 'in accordance with the method set forth in Article 7': this wording was intended to be capable of applying to baselines drawn in the past, as well as to ones to be drawn in the future, so long as the *method* set out in Article 7 was followed.

#### *Case (b)*

This sub-paragraph was intended to clarify the position with regard to areas of water lying within a strait and beyond but surrounded by the territorial sea of the coastal State(s), the so-called 'pockets' of high seas or EEZ. This situation is found in longer, broader straits such as the Straits of Malacca, and it provoked questions from Malaysia in particular. The wording originated in Article 9 of the UK's proposals<sup>46</sup> to the effect that 'pockets' of high seas within a strait were not affected by the other provisions about passage in the strait. The Chairman of the Second Committee included in his ISNT similar wording as Article 36(b);<sup>47</sup> but he also made clear that 'pockets' of EEZ were equally not affected by the provisions about straits. Subject to changes made in the Drafting Committee (notably the insertion of the word 'legal' before 'status' in the interests of consistency), his approach was accepted.

Sub-paragraph (b) makes clear that the provisions of Part II do not affect the legal status of any areas of water within a strait lying beyond the outer limit of the territorial sea of the State or States bordering a strait: these 'pockets' may be EEZ, or high seas if the States concerned have not claimed EEZs (whether generally or in the strait). As such, they would be subject to the regime of freedom of navigation and overflight in accordance with Parts V and VII.<sup>48</sup> Sub-paragraph (b) is to similar effect as Article 34(1).

#### *Case (c)*

This sub-paragraph excludes from the application of Part III a small number of straits in regard to which there exists in each case a regime of passage specifically related to that strait.

By way of background, it may be recalled that Article 25 of the CTSCZ stated:

The provisions of this Convention shall not affect conventions or other international agreements already in force, as between Parties to them.

This approach was followed in the UK's proposals about straits<sup>49</sup> which included the following Article 10:

The provisions of this Chapter shall not affect obligations under the Charter of

<sup>46</sup> A/CONF. 62/C.2/L. 3: 'Nothing in this Chapter shall affect any areas of high seas within a strait.'

<sup>47</sup> A/CONF. 62/WP.8/Part II, Article 36(b).

<sup>48</sup> Especially relevant are Articles 58 and 87.

<sup>49</sup> Loc. cit. above, n. 40.

the United Nations or under conventions or other international agreements already in force relating to a particular strait.

A slightly different approach was put forward by Bulgaria and other States: thus Article 1(3)(c) of their proposals read:

The provisions . . . (c) shall not affect the legal regime of straits through which transit is regulated by international agreements specifically relating to such straits.<sup>50</sup>

A clear example under both approaches was the Montreux Convention relating to the Bosphorus and Dardanelles. Denmark and Finland submitted a proposal<sup>51</sup> (in the form of an amendment to the UK's draft articles) advocating the maintenance of the regime of non-suspendable innocent passage in straits having a width of less than 6 nm, i.e. twice 3 nm. Sweden supported this approach on the grounds that 'it was not fair to ask coastal States to give up the control over passage through narrow straits that they had exercised for hundreds of years in accordance with the rules of international law'.<sup>52</sup>

Whilst the idea of excluding some particular cases found a positive response in the Fiji/UK Group, concern was expressed about the imprecise effects of the formulation which had been proposed by the UK. Denmark was especially concerned with this question in view of the regime in the Baltic Straits. As a result of discussions, some revised wording, derived largely from that of the Bulgarian proposal, was produced, as follows:

The provisions of this Chapter shall 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.<sup>53</sup>

In preparing his ISNT, the Chairman of the Second Committee accepted the results of the discussions in the Group; but, instead of making a separate article, he incorporated the formula into his Article 35<sup>54</sup> and he changed the term 'legal regime' to 'legal status'. The Chairman's approach in the ISNT was eventually accepted by the Conference as Article 35(c) of the Convention, but the term 'legal regime' was reinstated.

Sub-paragraph (c) means that Part III does not affect the legal regime in certain straits. This regime may be made up of the terms of the relevant convention and the practice of States (including of course that of the coastal State) and would include the regime of passage. The straits concerned are those in which passage is regulated by long-standing conventions relating specifically to those straits. The conventions may be bilateral or multilateral

<sup>50</sup> Ibid., L. 11.

<sup>51</sup> Ibid., L. 15.

<sup>52</sup> *Official Records*, vol. 2, p. 129 (12th meeting, 22 July 1974). Similar statements had been made by Denmark and Finland in introducing their amendment (L. 15) at the 11th meeting earlier that day (ibid., pp. 124-5).

<sup>53</sup> Article 10 of the draft articles produced by the Group, in Platzoder, *op. cit.* above (n. 16), p. 194.

<sup>54</sup> *Loc. cit.* above (n. 44).

and may be any kind of treaty. The regulation may be extensive, as in the case of the Montreux Convention of 1936 about the Turkish straits, or may be partial, as in the cases of the Treaty of Copenhagen of 1857 about the Danish Straits and the Treaty of 1881 between Argentina and Chile about the Straits of Magellan. The term 'long-standing international conventions in force' was chosen with those examples in mind:<sup>55</sup> a brand new convention about another strait somewhere in the world was not intended to count. In those straits to which Part III does not apply by virtue of Article 35(c), the local, existing regime was expected by the Conference to persist.

*Article 36*

*High seas routes or routes through exclusive economic zones through straits used for international navigation*

This Part does not apply to a strait used for international navigation if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics; in such routes, the other relevant Parts of this Convention, including the provisions regarding the freedoms of navigation and overflight, apply.

Article 36 was derived from Article 1(4) of the UK proposals,<sup>56</sup> which read:

Transit passage shall apply in a strait only to the extent that:

(a) an equally suitable high seas route does not exist through the strait; . . .

The intention was that the right of transit passage should not exist through

. . . what might be described as a broad strait: if the strait was rather more than 24 miles wide, and had a good and wide enough high-seas route down the middle, it was unnecessary to provide a special right of transit passage since ships and aircraft could navigate on the high seas through the strait . . .<sup>57</sup>

The Fiji/UK Group modified the wording of the proposal and referred to the absence of a high seas route of similar convenience . . . through the strait.<sup>58</sup> 'Similar convenience' was considered a better test than 'equal suitability' in the original proposal since exact equality may never be found at sea.

The Chairman of the Second Committee accepted the gist of the Group's proposal, but recast it as a separate article of general application. Thus, his Article 36 read:

The provisions of this Part shall not apply to a strait used for international navi-

<sup>55</sup> In signing the Convention, Finland and Sweden each stated their understandings that 'the exception from the transit passage regime provided for in Article 35(c) of the Convention is applicable to the strait between Finland (Aaland Islands) and Sweden' and that 'the present legal regime in that strait will remain unchanged after the entry into force of the Convention'. The strait is subject to the regime created by the Convention of 20 October 1921 on the Non-Fortification and Neutralization of the Aaland Islands, which includes rules about passage through the archipelago.

<sup>56</sup> A/CONF. 62/C.2/L. 3.

<sup>57</sup> *Official Records*, vol. 2, p. 125 (Mr Dudgeon, UK).

<sup>58</sup> Platzoder, *op. cit.* above (n. 16), p. 194.

gation if a high seas route or a route through an exclusive economic zone of similar convenience exists through the strait.<sup>59</sup>

As will be seen, the Chairman introduced two new elements: first, the article referred not solely to the right of transit passage but rather to Part III as a whole; and, secondly, the article applied also to a route through waters having the status of EEZ as well as to high seas routes.

In informal discussion in 1975, it was pointed out that the word 'convenience' was too broad a test by itself and needed qualification by reference to conditions of navigation and hydrography, i.e. objective criteria. Thus the questions were posed: similar to what? and convenient for whom? The similarly convenient route was intended to be the one through the territorial sea in the strait and the convenience was that of the user, not the coastal State. In revising the ISNT, the Chairman of the Second Committee accepted the need to clarify the scope of the words 'similar convenience'<sup>60</sup> by adding the words 'with respect to navigational or hydrographic characteristics'. In interpreting the phrase as a whole, regard may be had to factors such as distance, safety, the state of the sea, visibility, depth of water (including the presence of shallows or shoals) and ease of fixing a ship's position. The balance may vary between, say, a very large crude carrier and smaller coasters.

In further informal discussion in 1978, Yugoslavia suggested the addition to the end of the words: 'in such routes freedom of navigation and overflight shall be maintained unimpeded'.<sup>61</sup> A modified formula<sup>62</sup> was circulated in 1980, but there were doubts as to the need for it since Parts V and VII would apply to the waters in question by virtue of their own terms. None the less, the Chairman of the Second Committee endorsed a further modified version of the concluding phrase at the end of Article 36 and this secured consensus at the Conference.

As a result, Article 36 excludes from the application of this Part every strait where there is a similarly convenient route through the strait in the high seas or an EEZ. The justification for transit passage or non-suspendable innocent passage does not exist if there is a route through the strait where ships of other States can remain outside the territorial sea and can exercise rights of navigation under the regime of the high seas or of the EEZ. But this route must be similarly convenient both in terms of navigation (e.g. overall distances, position-fixing, and the route's breadth and straightness) and in terms of hydrography (e.g. depth and lack of natural obstructions). A similar proposition is contained in Article 38(1).

In extending its territorial sea to twelve nm, Japan has, by special

<sup>59</sup> A/CONF. 62/WP.8/Part II.

<sup>60</sup> A/CONF. 62/WP.8/REV. I/Part II, Article 35.

<sup>61</sup> Amendment C2/Informal Meeting/2.

<sup>62</sup> *Ibid.*, Rev. 2: 'Parts VII and V respectively, including the provisions on freedom of navigation and overflight, apply.'

provisions, not extended it in certain straits, so as to leave a route through the straits which can be used without entering the territorial sea.<sup>63</sup> Sweden has also made similar arrangements<sup>64</sup> for certain areas in waters lying between Sweden and Denmark but outside the traditional Danish straits regulated by the Treaty of Copenhagen of 1857.

## SECTION 2. TRANSIT PASSAGE

### *Article 37*

#### *Scope of this section*

This section applies to straits which 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.

Section 2, which consists of nine articles, sets out the regime of transit passage.

Article 37, which defines the scope of Section 2, was put forward by the Chairman of the Second Committee in his ISNT<sup>65</sup> when the Part of the draft Convention about straits was first sub-divided into three sections. The Chairman followed the general approach to the question adopted by the Fiji/UK Group<sup>66</sup> whose Article 1(1) had applied the right of transit passage to 'any strait (which term includes any naturally formed<sup>67</sup> stretch of water whatever its geographical name) which: (a) is used for international navigation and (b) connects two parts of the high seas'. The Chairman omitted the references to straits being 'naturally-formed' and to the irrelevance of a strait's name, no doubt because both points were considered self-evident. He inserted references to the EEZ in line with the remainder of his proposed ISNT. Subject to minor drafting changes, the Chairman's text was accepted by the Conference.

As a result, the regime of transit passage applies only in straits which (i) are used for international navigation and (ii) connect areas of sea which have the status of high seas or EEZ. If a strait leads only to territorial sea or internal waters, then Section 2 does not apply: Section 3 (providing for non-suspendable innocent passage under Article 45) applies instead.

Article 37 must, of course, be read together with Section 1 which contains several exclusion clauses, as well as with Article 38(1) which creates a second exceptional type of strait to which Section 3 applies.

<sup>63</sup> Law No. 30 of 2 May 1977: *UN Legislative Series*, ST/LEG/SER. B/19. The territorial sea remains at 3 nm in the Soya, Tsugaru, Osumi and Tsushima Straits.

<sup>64</sup> Amendments of 1 January 1980 to the Law of 1 July 1979 extending generally to 12 nm: Department of State, *Limits in the Seas: National Claims to Maritime Jurisdictions*, No. 36 (5th Revision, 1985).

<sup>65</sup> A/CONF. 62/WP.8/Part II.

<sup>66</sup> Platzoder, *op. cit.* above (n. 16), p. 194.

<sup>67</sup> The words 'naturally formed' had been put forward by Canada in A/CONF. 62/C.2/L. 83 in order to make absolutely clear that canals were not included in the definition of what constituted a strait.

Article 37 employs the two key criteria—a strait must be ‘used for international navigation’ and must connect two parts of the high seas/EEZ—laid down in the judgment of the International Court of Justice in the *Corfu Channel* case.<sup>68</sup> The wording of Article 37 must be interpreted in the light of that judgment. The meaning of the term ‘used for international navigation’ has been analysed above. In deciding whether a strait ‘connects two parts’ of the high seas/EEZ, there may be difficulty where one part is very small in extent. Here again, a ‘common-sense’ rather than a mechanical or mathematical interpretation is called for. If such a ‘pocket’ of high seas is surrounded by territorial sea and is not used as part of a route, there is insufficient justification for applying Section 2: instead, Section 3 would apply.

*Article 38*  
*Right of transit passage*

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, 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.
2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.
3. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

Article 38 is a key provision in the Convention. Against the background of acceptance of 12 nm as the maximum breadth of the territorial sea, Article 38 provides for a regime of transit passage in certain straits used for international navigation. This link was described in the following terms:

Acceptance of a territorial sea of 12 miles would result in a large number of straits forming essential links for international navigation, both by sea and air, ceasing to have a strip of high seas down the middle. Hence the need to ensure that unrestricted navigation through those vital links in the world network of communications should remain available for use by the international community.<sup>69</sup>

The origins of Article 38 can be found in the separate proposals of the UK<sup>70</sup> (which, as indicated above, formed one starting point for the work of

<sup>68</sup> *ICJ Reports*, 1949, p. 4.

<sup>69</sup> Mr Dudgeon (UK), *Official Records*, vol. 2, p. 125 (para. 17).

<sup>70</sup> A/CONF. 62/C.2/L. 3, Article 1.

the Fiji/UK Group<sup>71</sup>) and of Bulgaria *et al.*<sup>72</sup> as well as in those of the Chairman of the Second Committee.<sup>73</sup> In introducing its proposals, the UK delegation put forward this explanation of the concept of transit passage:

Article 1 sets out the concept of transit passage through straits connecting two parts of the high seas. The concept his delegation had tried to describe corresponded to what it believed to be the best international practice at that time. It proposed that ships and aircraft exercising the right of transit passage should not be impeded or hampered during their passage. At the same time the right was given 'solely for the purpose of continuous and expeditious transit of the strait'.<sup>74</sup>

No doubt, the practice which the delegation had in mind was that whereby passage had been exercised in certain straits on the basis of freedom of navigation and overflight, rather than on the basis of the right of innocent passage as defined in the CTSCZ<sup>75</sup> and irrespective of whether the coastal States' claims had left a central 'corridor' of high seas/EEZ in the strait. The proposals attracted much interest and some opposition, especially from States which supported the application of the regime of innocent passage to all straits.<sup>76</sup>

Paragraph 1 makes clear that all ships and aircraft, including therefore warships and military aircraft, enjoy the right of transit passage. The references to aircraft (which were included in both the UK's proposal<sup>77</sup> and, as regards straits 'traditionally used' for overflights, that by Bulgaria *et al.*<sup>78</sup>) proved controversial; objections were advanced to the effect that these proposals were inconsistent with the Chicago Convention. An amendment by Spain<sup>79</sup> to remove all reference to aircraft was, however, not accepted by the Conference. It is a right the exercise of which may not be impeded by any agency, whether the coastal State (the duties of which are stated also in Article 44) or the ships or aircraft of third States. The right applies in principle in all straits used for international navigation between two parts of the high seas/EEZ (Article 37). At the same time, the right is subject to (i) the qualifications in Section 1 of Part III, and (ii) the exception in paragraph 1 of the present article.

The exception excludes from the ambit of Section 2 the strait which runs

<sup>71</sup> Draft Articles of 30 April 1975, in Platzoder, *op. cit.* above (n. 16), p. 194.

<sup>72</sup> A/CONF. 62/C.2/L. 11.

<sup>73</sup> A/CONF. 62/WP.8/Part II, Article 38.

<sup>74</sup> *Official Records*, vol. 2, p. 125 (para. 18).

<sup>75</sup> Special provisions about straits are to be found in the legislation of several States bordering straits used for international navigation, notably France (24 December 1971, Article 3: ST/LEG/SER.B/18, p. 17); Japan (1 July 1977: ST/LEG/SER.B/19, p. 56); Morocco (2 March 1973, Article 3: ST/LEG/SER.B/18, p. 29); Oman (10 February 1981); and Sweden (1 January 1980). As regards the Straits of Gibraltar, see Colombos, *International Law of the Sea* (1967), p. 220; O'Connell, *International Law* (1970), vol. 1, p. 567; and Truver, *The Strait of Gibraltar and the Mediterranean Sea* (1980), esp. chapter 5.

<sup>76</sup> Spain, China, Egypt, Albania, Iran, Greece and PDR Yemen were notable in this regard, making particular reference to the Chicago Convention of 1944.

<sup>77</sup> *Loc. cit.* above, n. 70.

<sup>78</sup> *Loc. cit.* above, n. 72.

<sup>79</sup> Amendment C2/4 of 1978 (Spain).

between an island of the coastal State and its mainland<sup>80</sup> if there exists a route seaward of the island through the high seas or EEZ which is of 'similar convenience with respect to navigational and hydrographical characteristics'. That expression bears the same meaning as in Article 36 and the commentary on that article need not be repeated here. An example of such a strait is the Pemba Channel off Tanzania. The Corfu Channel<sup>81</sup> is a less clear case since part of the strait lies between Corfu and Albania. The application of the exception in particular geographical situations (e.g. where there is an archipelago as in the Aegean or where there are several islands lying together, or where it is not clear what is a State's 'mainland') may not be free from difficulty; but the words should not be interpreted too mechanically. Instead, all the relevant geographical and other circumstances<sup>82</sup> should be taken into account and a 'commonsense' interpretation given, as described above.

The underlying rationale of the exception is clear: in a place where there exists an alternative route to seaward of the island of similar convenience, the interest of the international community in freedom of communication is not as strong as in the place where there is no such alternative route, and a different balance was struck between that interest and the interest of the coastal State. In those instances where a strait is excluded by Article 38(1) from the regime of transit passage, the strait is subject to that of innocent passage by virtue of Article 45.

Paragraph 2 defines the concept of 'transit passage'. It is the exercise of 'the freedom of navigation and overflight', freedoms to be found also in Article 87 (Freedom of the High Seas). However, whilst in principle the freedoms in paragraph 2 are of the same order as those in Article 87, paragraph 2 contains significant qualifications. First, the right of transit passage must be exercised in accordance with Part III, not Part VII. Secondly, the right must be exercised for a single purpose, namely transit from one part of the high seas/EEZ to another part of the high seas/EEZ. Thirdly, the purpose of the navigator (vessel or aircraft) must be that of 'continuous and expeditious' transit of the strait. This means that hovering, loitering or conducting manoeuvres (all of which are part of the freedom of navigation on the high seas) are not allowed when exercising the right of transit passage. There are at least two parallels between Article 38(2) and Article 18: the latter defines the meaning of (innocent) 'passage' in terms of specified purposes and also calls for passage to be 'continuous and expeditious' (subject to safety requirements, *force majeure*, distress or humanitarian duty<sup>83</sup>).

To the requirement of continuous and expeditious transit of the entire

<sup>80</sup> An informal suggestion by Poland to refer to 'continental territory' was not accepted, but the French text refers to '*le territoire continental*' nevertheless.

<sup>81</sup> In introducing the proposal, the UK representative referred to the case of 'a strait formed by an island lying less than 24 miles off the coast'.

<sup>82</sup> A relevant factor may be the existence of an IMO traffic scheme: compare Article 53 (archipelagic sea lanes passage).

<sup>83</sup> These are covered by Article 39(1)(c) in relation to straits.

length of a strait, there is a qualification for the case of transiting part of a strait, passing the coasts, say, of States A and C in order to enter, leave or return from the port or airport of State B which also borders the strait. A vessel or aircraft entering, etc., State B remains subject to its conditions of entry. An example of a State in the position of State B is Singapore. In introducing this part of its proposal, the UK representative in the Second Committee spoke as follows:

His delegation also had in mind the situation of the long strait which had more than one country bordering one side of the strait. Assuming a strait which had two countries on the western side, States A and B, and one country on the eastern side, State C, the United Kingdom draft proposed first, a right of transit should the ship or aircraft be going all the way northwards or southwards through the strait; secondly, a right of transit if the ship or aircraft was proceeding down the first part of the strait between States A and C with a view to calling at a port or airport of State B.<sup>84</sup>

The substance of the proposal was accepted in the second sentence of Article 38(2). The wording was refined during the course of the Conference and cast as an exception to the rule of 'continuous and expeditious' passage.

Paragraph 3 first appeared in the draft articles prepared by the Fiji/UK Group on Straits, dated 18 April 1975.<sup>85</sup> It was intended to make clear that any activity, including navigation in or over straits, which does not amount to an exercise of the right of transit passage as defined in Article 38 remains subject to the other provisions of the Convention. These include Article 34 (legal status of waters forming straits used for international navigation) and other articles in Part III, as well as Article 2 (legal status of the territorial sea, etc). In other words, if a vessel or aircraft is present in a strait used for international navigation but is not exercising the right of transit passage, then the vessel or aircraft is subject to provisions in the Convention other than those in Part III which regulate transit passage.

Proposals by Spain and Morocco<sup>86</sup> to add to the end of the paragraph the words 'and to other rules of international law' were not accepted. The proposals were advanced at a time when there remained controversy about overflight, it being argued by the proposers that it was contrary to rules of general international law contained in the Chicago Convention of 1944 on International Civil Aviation. The opposition to the proposals had a tactical element. Notwithstanding the rejection of the proposals, those rules of international law which are not excluded by the terms of the Convention (either expressly or implicitly—as are the rules in the Chicago Convention) would continue to be applicable. Reference to 'other rules of international law' was included in Article 34(2) concerning qualifications upon the sovereignty or jurisdiction of States bordering straits.

<sup>84</sup> *Official Records*, vol. 2, p. 125.

<sup>85</sup> Platzoder, *op. cit.* above (n. 16), p. 194.

<sup>86</sup> Amendment C2/4 of 1978 (Spain) and Amendment C2/22 of 1978 (Morocco).

*Article 39*  
*Duties of ships and aircraft during transit passage*

1. Ships and aircraft, while exercising the right of transit passage, shall:
  - (a) proceed without delay through or over the strait;
  - (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
  - (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;
  - (d) comply with other relevant provisions of this Part.
2. Ships in transit passage shall:
  - (a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;
  - (b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.
3. Aircraft in transit passage shall:
  - (a) observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation;
  - (b) at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.

Article 39, which specifies the duties of ships and aircraft during their exercise of the right of transit passage, is based upon the initial proposals of the UK.<sup>87</sup> The article applies, in principle, to all ships and aircraft, irrespective of their status (public or private, civil or military).

Paragraph 1 imposes four duties on ships and aircraft alike. They are, first, to proceed 'without delay', an expression in harmony with the requirements of 'continuous and expeditious transit' in Articles 38(2) and 39(1)(c). Navigators should proceed at their normal speed, having regard to all relevant factors, including safety requirements, weather conditions, the presence of other ships or aircraft in the strait, etc. Secondly, they are to refrain from the threat or use of force against the States bordering the strait. This wording applies the general obligation contained in Article 2(4) of the Charter of the United Nations<sup>88</sup> specifically to ships and aircraft in transit, whilst at the same time confining the beneficiaries of the obligation to the bordering States. The terms 'threat' and 'use' of force should be interpreted in the same way as in the Charter. A warship or a military aircraft does not

<sup>87</sup> A/CONF. 62/L. 3, Chapter Three, Article 2.

<sup>88</sup> The wording of Article 39(1)(b) is based on Article 2(4) of the UN Charter. The addition of the word 'sovereignty' adds little or nothing to 'territorial integrity'.

represent a threat of force by reason only of its presence in or over a strait.

Thirdly, and in many ways most importantly, ships and aircraft in transit are to 'refrain from any activities other than those incident to their normal modes of . . . transit'. In other words, ships and aircraft are to behave in their ordinary manner and do what is usual to effect their passage, and nothing else. In putting forward this approach, the intention was to avoid the need for a long list of prohibited activities such as the list of 'non-innocent' activities appearing in Article 19(2). Anything which is not incidental to transit in the normal mode is impermissible: clearly, most if not all the activities listed in Article 19(2) are not incidental. The term 'normal mode' was intended to mean, for example, that submarines could make their transits submerged, aircraft would fly at their normal altitudes, and surface vessels would follow their normal operating procedures whilst in transit. Regard would be had to all relevant circumstances, including in the case of submarines the depth of the water. The reference to 'the normal mode' avoided the need for a formula such as 'submarines may pass under water', which would have raised questions in the case of submersibles and other underwater vehicles which may come along in the future. This possibility of submerged transit took account of the fact that it is often much safer for a modern submarine to proceed dived. This approach was accepted in the Fiji/UK Group<sup>89</sup> and by the Chairman of the Second Committee.<sup>90</sup> It was challenged in the Second Committee's Working Group by certain delegations, notably Spain and Morocco who tabled amendments:<sup>91</sup> however, these were not accepted by the Conference. Others questioned the discretion which they understood was given to navigators in the phrase 'normal mode', for example in the case of an aircraft carrier or a flotilla, but they did not press their point and the term 'normal mode' was accepted. It may be noted that the term appears also in Article 53(3) concerning the rights of archipelagic sea lanes passage: the term carries the same meaning in both articles.

There is an exception to the obligation to refrain from non-incidental activity: Article 39(1)(c) accepts that a ship or aircraft in transit may have to slow or stop or take special action if this is made necessary by *force majeure* (e.g. collision or hurricane) or distress.

Finally, paragraph 1(d) obliges ships and aircraft to comply with the other relevant provisions of Part III: these include the obligations to respect sea lanes and traffic schemes in Article 41(7) and to observe applicable laws and regulations in Article 42(4), as well as obligations in the other provisions of Article 39. Paragraph 1(d), which originated in the Fiji/UK Group,<sup>92</sup> makes explicit a point which was left unstated in the UK's initial proposals.

Paragraph 2 specifies certain duties for ships in transit passage, arising

<sup>89</sup> Draft Articles of 30 April 1975 in Platzoder, *op. cit.* above (n. 16), p. 194.

<sup>90</sup> A/CONF. 62/WP.8, Part II, Article 39.

<sup>91</sup> Amendment C2/4 (Spain, 1978) and C2/22 (Morocco, 1978).

<sup>92</sup> Platzoder, *op. cit.* above (n. 16), p. 194 (Article 2(1)(d)).

from 'generally accepted international regulations, procedures and practices'. That expression was cast in deliberately wide terms and was intended to connote, in the first place, international conventions adopted for example under the auspices of the International Maritime Organization (IMO) which have secured wide acceptance within the world community, as well as subsidiary or related instruments and decisions. To such 'international regulations' must be added generally accepted 'procedures and practices', which include those normally followed by mariners. The duties specified are in two fields: safety and pollution. Ships in transit are to comply with international safety rules, including the International Regulations for Preventing Collisions at Sea. The current version of these Regulations is annexed to the Convention on the International Regulations for Preventing Collisions at Sea of 1972.<sup>93</sup> In particular, the regulations take account of sea lanes and traffic schemes, many of which relate to straits. Ships in transit are also to comply with international rules for the prevention, reduction and control of pollution: again, the IMO has adopted several conventions about marine pollution, notably the MARPOL Convention<sup>94</sup> of 1973.<sup>95</sup>

Paragraph 3 specifies similar duties for aircraft, designed to ensure safety. Aircraft in transit are to observe the Rules of the Air established by the International Civil Aviation Organization for civil aircraft: this means that military aircraft are to observe those Rules whilst in transit. The concept arose in the context of negotiations on an archipelagic regime. The US insisted on freedom of overflight for all aircraft. The Indonesians objected to this, stating that there was no place for such provision in the law of the sea and that it was a matter for ICAO. However, if such a provision was to be introduced then Indonesia wanted all aircraft, including military aircraft, to be subject to ICAO rules. This the US would not agree to. Eventually Fiji proposed the compromise whereby civil aviation would be subject to ICAO rules and military aircraft would normally comply with those rules. For strategic reasons the US did not want military aircraft to be subject to reporting requirements at all times. The normal practice is for military aircraft to observe and comply with ICAO rules, even though strictly they apply only to civil aircraft. The rules are applied worldwide. The relevant part of the Rules, according to a statement made by the UK delegation during discussions in the Second Committee's Working Group, is that relating to the high seas. In a study dated 20 January 1984, the Secretariat of ICAO noted that Article 39(3) would extend the legislative jurisdiction of the ICAO Council from the high seas to the air space above straits used for international navigation.<sup>96</sup>

Sub-paragraph (b) supplements the foregoing duties. Aircraft in transit are obliged to monitor either the radio frequency assigned by the air traffic

<sup>93</sup> In force 15 July 1977: IMO Publication 904. 85. OIE.

<sup>94</sup> International Convention for the Prevention of Pollution from Ships, London, 2 November 1973.

<sup>95</sup> See also Article 211(1).

<sup>96</sup> C-WP/7777, Secretariat Study of 20 January 1984.

control authority designated for the area concerned by ICAO (i.e. the authority listed in the local Regional Air Navigation Plan, as approved by the Council of ICAO), or the international distress radio frequency. This radio frequency is the one referred to in Annex 10 to the Chicago Convention, Aeronautical Communications, i.e. 121.5MHz. It has been argued by the ICAO Secretariat that aircraft are under a duty 'according to firmly established practice and international standards adopted by the ICAO Council' to monitor *both* the frequency assigned by the ATC authority *and* the distress frequency; that Article 39(3) contains an error in allowing alternatives; and that the relevant standards are *lex specialis* which will be complied with in practice.<sup>97</sup> It may well be true that those standards will always be complied with in practice: however, Article 39(3) is also a *lex specialis* for the overflight of straits by aircraft of all types and it should not be thought to contain errors. Aircraft in transit are to operate at all times with reasonable regard for the safety of navigation and so should be capable of knowing about other aircraft in the vicinity. In the case of State aircraft, the obligation to maintain continuous listening watch of the local air traffic control arises from requirements of safety and paragraph 3, rather than from the Rules of the Air. Standard 3.6.5.1 requires continuous listening watch in the case of a controlled flight and similar requirements exist in the visual flight rules (Standard 4.7, Annex 2) and in the instrument flight rules (Standard 5.3.2, Annex 2). Proposals by Morocco<sup>98</sup> to impose more specific restrictions and duties on aircraft in transit were not accepted by the Conference.

#### *Article 40*

#### *Research and Survey activities*

During transit passage, foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the States bordering straits.

The idea of this article was first put forward in the proposals of Fiji<sup>99</sup> in the twin contexts of innocent passage and passage through straits. The present wording first appeared in the Informal Composite Negotiating Text,<sup>100</sup> in the light of informal discussions. In effect, it supplements the general rules in Article 39 by adding specific rules about research and survey activities on the part of ships exercising the right of transit passage. The prior authorization of the State(s) bordering a strait is required for such activities. Where an agreed maritime boundary exists in a strait, the consent

<sup>97</sup> Ibid., paragraph 9.12.

<sup>98</sup> Amendment C2/22 of 1978. Restrictions proposed were no exercises, use of weapons, photography, refuelling in flight, dive-bombing and interference with the coastal State's telecommunications—many of which are excluded by virtue of paragraph 1 of Article 39. Greece proposed (in amendment C2/17 of 1978) to make the duty 'to comply' with the ICAO Rules, but this too was not accepted.

<sup>99</sup> A/CONF. 62/C.2/L. 19, Article 5(5).

<sup>100</sup> A/CONF. 62/WP.10; *Official Records*, vol. 8, Article 40. The ICNT's draft article began with the words 'In their': the words were changed to 'During transit' by the Drafting Committee.

of the appropriate coastal State is needed for activities in that part of the strait under its sovereignty or jurisdiction. The relevant activities are marine scientific research (a subject regulated by Part XIII of the Convention) and hydrographic surveying. Both activities are mentioned in Article 19(1)(j) concerning the meaning of innocent passage; and Article 40 (like Article 39) applies by virtue of Article 54 to ships exercising the right of archipelagic sea lanes passage.

Article 40 adds little to what is implicit in Article 39: it appears to have been included largely for the avoidance of doubt. It may have particular relevance in long straits, for example those of Malacca, and archipelagic waters.

*Article 41*

*Sea lanes and traffic separation schemes in straits used for international navigation*

1. In conformity with this Part, States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships.
2. Such States may, when circumstances require, and after giving due publicity thereto, substitute other sea lanes or traffic separation schemes for any sea lanes or traffic separation schemes previously designated or prescribed by them.
3. Such sea lanes and traffic separation schemes shall conform to generally accepted international regulations.
4. Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits, after which the States may designate, prescribe or substitute them.
5. In respect of a strait where sea lanes or traffic separation schemes through the waters of two or more States bordering the strait are being proposed, the States concerned shall co-operate in formulating proposals in consultation with the competent international organization.
6. States bordering straits shall clearly indicate all sea lanes and traffic separation schemes designated or prescribed by them on charts to which due publicity shall be given.
7. Ships in transit passage shall respect applicable sea lanes and traffic separation schemes established in accordance with this article.

Article 41 gives further recognition in international law to the institution in recent times of traffic schemes for promoting the safety of shipping.<sup>101</sup> The article is based upon proposals made by the UK<sup>102</sup> and Fiji<sup>103</sup> and incorporates modifications and additions suggested by other delegations during informal discussions. In introducing the proposals, the UK

<sup>101</sup> Traffic schemes are also dealt with in Articles 22 (territorial sea) and 53 (archipelagic waters), as well as in the Collision Regulations and the Convention for the Safety of Life at Sea.

<sup>102</sup> A/CONF. 62/C.2/L. 3, Article 3.

<sup>103</sup> A/CONF. 62/C.2/L. 19, Article 5(6) to (10).

representative noted there was often a concentration of shipping in straits and continued: 'In view of the general interest of the international community in navigation through straits, we propose that traffic separation schemes should be fully considered before their promulgation.'<sup>104</sup>

The article has two parts: first, paragraphs 1 to 6 specify the rights and duties of States bordering straits in the matter of traffic schemes; and, secondly, paragraph 7 imposes a corresponding duty upon ships exercising the right of transit passage to respect such schemes.

Paragraph 1 confirms that States bordering straits are competent to designate sea lanes and to prescribe traffic separation schemes, including the making of laws and regulations,<sup>105</sup> where this is necessary to promote the safe passage of ships in straits. The necessity will often arise in straits used for international navigation and many traffic schemes already exist in such straits. The schemes take account both of ships in transit and local traffic, including traffic across a strait. There are also schemes which take account of the existence of shallows or shoals in a strait by defining 'deep draught routes'. Although the express reference to 'depth separation schemes' in the proposals by Fiji<sup>106</sup> was not incorporated in Article 41, they are covered as a type of traffic separation scheme. On 28 April 1982, a letter and statement were circulated to the Conference about the Straits of Malacca and Singapore by the delegations of Malaysia, Indonesia and Singapore:<sup>107</sup> this statement, although made with particular reference to Article 233 (safeguards with respect to straits used for international navigation), contained the point that traffic separation schemes could include 'the determination of under keel clearance for the Straits provided in Article 41'. The statement met with wide support.<sup>108</sup> Since then an agreement about under keel clearance has been drawn up by Indonesia, Malaysia, Singapore and Japan, making provision for the special characteristics of the Straits of Malacca.

Paragraph 2 recognizes that circumstances in a strait may change (e.g. natural changes such as silting may take place, or changes in traffic such as the introduction of large tankers following an oil discovery). Where the new circumstances require a change in the traffic scheme, a substituted scheme may be prescribed or designated. However, the coastal State has to respect the terms of the article and in particular give appropriate publicity to the change.

Paragraphs 3 and 4 take account of the worldwide interest in the safety of navigation in straits by requiring that traffic schemes conform to generally

<sup>104</sup> Statement by Mr Dudgeon (UK), *Official Records*, vol. 2, pp. 101-2.

<sup>105</sup> See Article 42(1)(a).

<sup>106</sup> A/CONF. 62/C.2/L. 19, Article 5(6).

<sup>107</sup> A/CONF. 62/L. 145 (Letter by Malaysia).

<sup>108</sup> A/CONF. 62/L. 145, Add. 1 to 8 (Indonesia, Singapore, France, UK, USA, Japan, Australia and FRG).

accepted international regulations, notably the Collision Regulations and the Safety of Life at Sea Convention.<sup>109</sup> Whereas Article 22 gives wide discretion to the coastal State with regard to traffic schemes in the territorial sea generally, Article 41(3) contains a safeguard for the international community in the particular case of traffic schemes in straits. Paragraphs 3 and 4 were the products of the Fiji/UK Group which sought to find a balance between the interests of States bordering on straits and other States.

In the initial proposals of the UK,<sup>110</sup> a State bordering a strait would have been in a position to designate or prescribe a traffic scheme 'only as approved by' the competent international organization (i.e. the IMO). This went too far for delegations such as Singapore and Fiji, which wished the role of the IMO to be purely advisory. Paragraph 4 represents a compromise between these approaches (which was worked out in the Fiji/UK Group). The procedure is as follows: first, the State(s) bordering a strait has to submit its proposals to the IMO; the latter may, secondly, adopt a scheme only in agreement with that State(s) (i.e. modifications have to be agreed); finally, the State bordering a strait may then proceed to designate or prescribe the traffic scheme. The same procedure applies to substitutions.

Paragraph 5 was first proposed in the Fiji/UK Group. It makes explicit provision for cases where there exist two or more States bordering the same strait and requires the States concerned to co-operate in formulating proposals in consultation with the IMO (i.e. the procedures indicated in paragraph 4).<sup>111</sup>

Paragraph 6 requires a State bordering a strait to mark on charts the traffic schemes which it has prescribed in the strait and to give appropriate publicity to the charts. It is similar to Article 53(10) concerning traffic schemes in archipelagic waters and Article 22(4) concerning sea lanes and traffic schemes in the territorial sea. Unlike Article 16 concerning charts depicting baselines, there is no obligation to deposit a copy of each chart with the Secretary-General of the United Nations.

Paragraph 7 requires ships to 'respect' sea lanes and traffic schemes. For example, they must not sail along a sea lane in the wrong direction. Whilst the paragraph does not in terms confine the exercise of the right of transit passage to sea lanes, in practice ships in transit can be expected to follow them. To 'respect' a scheme includes respecting its operating rules as well as the lines on the chart, although the obligation is less precise than one to 'comply with' a scheme.

<sup>109</sup> Convention on the International Regulations for Preventing Collisions at Sea, 1972 (referred to in Article 39(2)(a)).

<sup>110</sup> A/CONF. 62/C.2/L. 3, Article 3(3).

<sup>111</sup> Amendment C2/4 (1978) by Spain would have added a sentence requiring the agreement of all the States bordering the strait in the IMO before the scheme could be prescribed. However, this amendment was not adopted.

*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.

Article 42 contains three elements: the powers of States bordering straits to prescribe laws and regulations relating to transit passage (paragraphs 1, 2 and 3); the duty of foreign ships in transit (paragraph 4); and the enforcement of laws, especially in the case of ships and aircraft entitled to sovereign immunity (paragraph 5).

In the UK's initial proposal,<sup>112</sup> the power to prescribe laws was confined to two matters: the implementation of traffic schemes and international regulations regarding discharges of oil. It was made clear that:

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 . . . vessels entitled to sovereign immunity . . . there would be liability on the international level or, in other words, state responsibility.<sup>113</sup>

In Fiji's proposal,<sup>114</sup> a much longer list was given of matters on which the State could legislate: this list applied both to straits and to the territorial sea generally. The Fiji/UK Group reviewed these and other proposals over a series of meetings. Suggestions were made to expand the UK's list in order

<sup>112</sup> Article 4 of A/CONF. 62/C.2/L. 3.

<sup>113</sup> *Official Records*, vol. 2, Summary Record of the 11th meeting of the Second Committee, paragraph 23, p. 125.

<sup>114</sup> Article 5 of *ibid.*, L. 19.

to meet the legitimate concerns of States bordering straits. It was pointed out that a ship in transit might commit a pollution offence, or engage in fishing or smuggling, thereby giving rise to a need for the State to protect its interests. Waiting for a suspected ship to enter port would not be enough. It was also pointed out that a navigation offence might be committed which was not to do with sea lanes or traffic schemes, or a pollution offence which did not lead to damage so much as expense on the part of the State concerned. After detailed discussions, the list in the UK proposal was expanded and wording similar to Article 42(1) was accepted by the Group.<sup>115</sup>

The Group's text struck a balance between (i) the wish of States bordering straits to have specific regulatory powers (broadly the same as those in Article 21) so as to ensure safety and to protect their coastal interests along the shores of the strait, and (ii) the wish of flag States to see their ships pass through straits without interference from or the imposition of special rules by the bordering States. The Group's text on this issue formed the main basis for Article 41 of the ISNT proposed by the Chairman of the Second Committee;<sup>116</sup> and this text, with minor modifications made in the light of subsequent discussions, eventually became Article 42 of the Convention. Several amendments, the general effect of which was to broaden the powers of States bordering straits, were tabled in 1978;<sup>117</sup> but these amendments were not accepted by the Conference.

Paragraph 1 specifies under four headings the content of the legislation which States bordering straits may adopt about transit passage. First is the safety of navigation and the regulation of traffic, in the terms set out in Article 41. In concrete terms, such a State may give effect within its legal order to a scheme for sea lanes or traffic regulation which satisfies Article 41's requirements. It may do so for all foreign ships exercising the right of transit passage, so that in effect internationally adopted schemes for a strait may be made applicable to all ships in transit passage there regardless of their flags, i.e. even if the flag State has not enacted legislation for ships flying its flag. Secondly, in order to prevent, reduce and control pollution, legislation may be adopted giving effect to those applicable international regulations (such as the Convention on Marine Pollution, 1973) which prohibit the discharge of oil, oily wastes and other noxious substances<sup>118</sup> close to shore and therefore in straits. Similarly, this legislation can be applied to ships flying the flag of States which have not ratified the relevant

<sup>115</sup> Platzoder, *op. cit.* above (n. 16), p. 194.

<sup>116</sup> A/CONF. 62/WP.8/Part II, Article 41.

<sup>117</sup> Amendment C2/4 (Spain) would have broadened powers in regard to pollution and protection of facilities etc., and imposed requirements concerning liability. Amendment C2/17 (Greece) would have extended paragraph 1(a) to encompass laws about air traffic. Amendment C2/22 (Morocco) would have included in the list of legislative powers the protection of navigational aids, other installations, cables and pipelines; the conservation of living resources; and research and hydrographic surveys.

<sup>118</sup> Annex 1 to the Convention of 1973 concerns the discharge of oil and oily wastes, whilst Annex 2 deals with other noxious substances. Proposals in the Drafting Committee to replace 'applicable' by 'generally accepted' and to delete 'oily' before 'wastes' were not reflected in the text as adopted.

regulations. Thirdly, fishing vessels may be prohibited from fishing in straits, as well as from sailing with their gear unstowed in straits since failure to stow gear would be taken as *prima facie* evidence of a violation of the straits State's fishing laws. Finally, the legislation of a State bordering a strait prohibiting the loading or unloading of goods, currency or persons may be applied to ships exercising the right of transit passage. In short, the four headings envisage the adoption of legislation about traffic safety and the prevention of pollution, fishing and smuggling in straits, all issues of special concern to States bordering straits. The legislative powers are, however, 'subject to the provisions' of Section 2 of Part III—including, therefore, the rules in Article 44 (duties of States bordering straits).

Paragraph 2 excludes from the legislation any discrimination between foreign ships, as well as any measures in implementation or application of legislation which in their practical effect would deny, hamper or impair the right of transit passage. The rule of non-discrimination was proposed by both the UK and Fiji:<sup>119</sup> its content appears to be similar to that of Article 24(1)(b), although its wording is less specific as regards cargo. The rule about the application of laws and regulations was formulated in the Fiji/UK Group following several discussions of the question of the enforceability of legislation in straits. On the one hand, it was pointed out that there was a need to deter vessels, as well as to compensate anyone who had suffered damage, for example from pollution. On the other hand, it was noted that the terms of Articles 38(2) and 39(1)(c) contained safeguards for States bordering straits; that to give a right of arrest in a strait would undermine the right of transit passage (arrest in port, in an appropriate case, in respect of something done in a strait, was a different matter); and that, in the case of a warship, there was no power (comparable to that in Article 30 in relation to the territorial sea) to require it to leave a strait immediately so long as it was exercising the right of transit passage. The question of enforcement arose in the context of laws and regulations about the prevention of pollution, a topic also then being considered by the Third Committee and now dealt with in Article 233. That article makes clear that if a vessel not entitled to sovereign immunity violates legislation about the safety of navigation or the prevention of pollution (as referred to in Article 42(1)(a) and (b)) and thereby causes or threatens major damage from pollution, a State bordering a strait may take appropriate enforcement measures in relation to the vessel. Such a case would be an exceptional one: enforcement measures in a strait could well create hazards and are not contemplated in Article 42(2).

Paragraph 3 requires appropriate publicity to be given to any laws and regulations of a State bordering a strait and applying there.

Paragraph 4 contains the important obligation of foreign ships in transit passage, whether warships or merchant ships, to comply with laws and regulations made in accordance with paragraph 1.

<sup>119</sup> Article 4(2) of A/CONF. 62/C.2/L. 3 and Article in *ibid.*, L. 19.

Paragraph 5 recognizes that whilst such legislation cannot be enforced through the courts against a warship (or other vessel or aircraft entitled to sovereign immunity), the coastal State should not be left without a remedy. The paragraph confirms that international responsibility is borne by the flag State for any loss or damage resulting from acts contrary to such legislation and incurred by States bordering straits. The same rule applies to acts contrary to Part III, including therefore Article 39, which result in loss or damage. The proposal of the Fiji/UK Group<sup>120</sup> to refer also to damage incurred by other States 'in the vicinity of the strait' was not included in Article 42 on account of its vagueness: in such a case, the general rules on State responsibility would apply.

*Article 43*

*Navigational and safety aids and other improvements and the prevention, reduction and control of pollution*

User States and States bordering a strait should by agreement co-operate:

- (a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and
- (b) for the prevention, reduction and control of pollution from ships.

This article, which seeks to promote co-operation between States bordering straits and the flag States of vessels and aircraft using straits, is based on a proposal by the UK.<sup>121</sup> The proposal recognized that the international interest in navigation through straits used for international navigation imposed certain restrictions on the rights of States bordering straits and therefore sought to foster co-operation as far as appropriate between those States and the flag States of vessels and aircraft using the strait over such matters as safety aids and the avoidance of pollution from ships. The article, which was put forward with the case of shipping passing through straits such as Malacca particularly in mind, aroused little comment and no controversy. In informal discussions in the Fiji/UK Group and later in the Second Committee Working Group when it was discussing the ISNT,<sup>122</sup> it was noted that the article was cast in conditional, non-mandatory terms: informal suggestions (a) to make it obligatory for user States to co-operate and (b) to make it clear that decisions about safety aids were for the straits State to make, were not pressed. In 1978, Morocco put forward an amendment<sup>123</sup> designed to make the article obligatory and to extend its scope to

<sup>120</sup> In their Article 4(5). Similarly, their Article 4(6), concerning the responsibility of a State bordering a strait for loss or damage to foreign ships or aircraft resulting from actions contrary to Part III, was not included in the Convention. The matter is governed by the general rules of international law.

<sup>121</sup> A/CONF. 62/C.2/L. 3, Article 5.

<sup>122</sup> A/CONF. 62/WP.8/Part II, Article 42.

<sup>123</sup> Amendment C2/22, reading: 'User States and States bordering a strait shall co-operate, by agreement, in the establishment and maintenance in the strait of necessary safety and environmental protection installations and navigation aids, as well as any other device calculated to safeguard the exercise of the right of transit passage in accordance with the provisions of this Part and of other rules of international law.'

cover safety installations and other devices; but this amendment was not accepted by the conference.

Sub-paragraph (a) would form a basis for international co-operation to defray the cost of such things as new lighting or buoying schemes, as well as the dredging of new channels for deep draught vessels, particularly if the new facilities were intended to benefit the ships of third States rather than those of the State(s) bordering the strait.<sup>124</sup> Sub-paragraph (b) would form a basis for co-operation in the provision of navigational aids in order to prevent the grounding or collision of vessels. That course would reduce the risks of pollution. As a whole, the article should encourage co-operation, whether on a bilateral or a wider basis, between States bordering straits and flag States.

#### *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.

This article, which specifies three important duties on the part of States bordering straits, follows closely the wording of a proposal by the UK.<sup>125</sup> That proposal was similar in certain respects to Article 1(2)(e) and (f) of the proposals by Bulgaria and other States, to the effect that:

- (e) No state shall be entitled to interrupt or suspend the transit of ships through the straits, or engage therein in any acts which interfere with the transit of ships, or require ships in transit to stop or communicate information of any kind.
- (f) The coastal state shall not place in the straits any installations which could interfere with or hinder the transit of ships.<sup>126</sup>

The UK proposal was put forward with the decision of the ICJ in the *Corfu Channel* case<sup>127</sup> in mind: the Court found that States were obliged to give notice of dangers to navigation in waters under their sovereignty. This duty was codified in Article 15 of the CTSCZ and is repeated in Article 24 of the present Convention. Those articles also contain the concept of not hampering passage, whilst Article 16(4) of the CTSCZ contained a prohibition against the suspension of passage through straits used for international navigation between two parts of the high seas.

In discussions in the Second Committee in 1974, Denmark pointed out, with reference to paragraph 2(f) of the proposals by Bulgaria and its co-

<sup>124</sup> Some suggestions were voiced during the Conference that lighting, buoying and dredging should be paid for by the imposition of tolls. However, these suggestions were rejected. Japan has agreed to defray the cost of certain dredging work in the Straits of Malacca.

<sup>125</sup> A/CONF. 62/C.2/L. 3, Article 6. It appeared as Article 6 of the Fiji/UK Group's proposed text and as Article 43 of the ISNT.

<sup>126</sup> A/CONF. 62/C.2/L. 11, Article 1(1)(e). A similar proposal was contained in Article 3(2)(d) about overflight.

<sup>127</sup> *ICJ Reports*, 1949, p. 3.

sponsors, that Denmark's main island was separated from other parts of the country and from Sweden by narrow straits and that it was of vital social and economic importance to be able to build bridges and tunnels across those straits. Denmark's plans 'took full account of the obligation not to hamper the free passage of ships in transit'.<sup>128</sup>

In the Fiji/UK Group, the questions were raised of the difference between 'impede' and 'hamper' and of whether building a high bridge would amount to hampering, even if navigation was not affected. In reply, it was pointed out that the article was designed to forbid activities which could have the incidental effect of inhibiting passage. It was decided to retain the word 'hamper' in the Group's draft articles on that basis.

In subsequent discussions in the Second Committee, the draft article was not subject to much questioning or opposition. Suggestions to qualify the word 'hamper' by the adverb 'unduly' were not accepted, no doubt because it would have weakened the duty and introduced great scope for subjective interpretations. Suggestions about the liability of the flag State of a warship for loss or damage were not pressed in this article.<sup>129</sup> A suggestion about prior notification or authorization was not accepted by the Conference. In 1978, Spain put forward an amendment<sup>130</sup> to delete reference to overflight, but this failed to achieve the requisite support. Morocco tabled proposals specifying certain duties of States making use of straits<sup>131</sup> (insurance requirements and the liability of ships and aircraft for damage caused to the State bordering a strait); but again these proposals were not accepted in the form presented.

Article 44 contains three elements. The first—not hampering passage—means that movement has not to be obstructed by material obstacles or retarded, hindered or 'impeded' (a word used in Article 38). A State bordering a strait may not seek to impose legislative requirements which would in effect retard or prevent passage, nor seek to arrest ships in transit,<sup>132</sup> nor allow the construction of works or installations which would impede ships or aircraft in transit. The second element—notification of dangers—is confined to matters within the knowledge of the State bordering a strait. It was probably not intended to extend the duty of such a State beyond waters under its sovereignty: where, for example, two such States are on opposite sides of a strait, each is responsible for the waters on its side of the boundary running through the strait. Notification is effected by Notices to Mariners and other appropriate means. The third element—non-suspension—is a rule to which no exceptions are made in the Convention. This rule reflects the special status of straits used for international navigation.

<sup>128</sup> *Official Records*, vol. 2, p. 124 (Second Committee, 11th meeting, 22 July 1974).

<sup>129</sup> But see Article 42(5).

<sup>130</sup> Amendment C2/4.

<sup>131</sup> Amendment C2/22.

<sup>132</sup> To attempt an arrest in the middle of a busy strait may be a hazardous operation, e.g. in the case of a large tanker. Arrest in port is a different matter, as is the policing of fishing operations or illicit traffic in narcotics by small boats.

STRAITS USED FOR  
SECTION 3. INNOCENT PASSAGE

*Article 45*  
*Innocent passage*

1. The regime of innocent passage, in accordance with Part II, section 3, shall apply in straits used for international navigation:

- (a) excluded from the application of the regime of transit passage under article 38, paragraph 1; or
- (b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State.

2. There shall be no suspension of innocent passage through such straits.

Section 3, which contains a single article, deals with those types of straits used for international navigation in which the basic regime of passage is not transit passage but rather innocent passage.

Article 45 was derived from proposals by the UK<sup>133</sup> and by Bulgaria and others.<sup>134</sup> Both sets of draft articles proposed the regime of non-suspendable innocent passage in the case of a strait used for international navigation between the high seas and the territorial sea of a foreign State. This was the rule in Article 16(4) of the CTSCZ.<sup>135</sup> The UK also proposed the same regime of non-suspendable innocent passage for certain types of straits connecting two parts of the high seas which were excluded from its proposals concerning transit passage, i.e. 'broad' straits through which a good high seas route existed and straits formed by an island of the coastal State to seaward of which a good high seas passage existed. In addition, the rules about traffic schemes in straits (now Article 41) were to apply in such straits. These proposals were accepted by the Fiji/UK Group on Straits.<sup>136</sup> In his ISNT, the Chairman of the Second Committee followed those proposals for the most part. He accepted the main elements, but added references to the EEZ and altered the structure, no doubt in order to give the article greater clarity. This ISNT made two other changes. It removed completely the 'broad' strait from the application of Part III, by means of the new Article 36 (high seas routes, etc.); and, secondly, it did not apply the proposed rules about traffic schemes in other straits (now Article 41) to the straits covered by section 3.

In discussion of the ISNT, the proposal attracted criticism on various

<sup>133</sup> A/CONF. 62/C.2/L. 3, Article 8.

<sup>134</sup> A/CONF. 62/C.2/L. 11, Article 2.

<sup>135</sup> In introducing the proposals, the UK delegation (Mr Dudgeon) stated: 'With regard to straits used for international navigation between one part of the high seas and the territorial sea of a foreign State, the interest of the International Community in free navigation is not so strong as in the case of straits linking two parts of the high seas. This difference is recognized by Article 8 of our proposals. Straits linking the high seas with the territorial sea of a foreign State would be subject to the regime of innocent passage as defined in Chapter 2 of our proposals instead of to the regime of transit passage described in Chapter 3 but, because no alternative way of sailing to the territorial sea of the State concerned would exist, we propose that the regime of innocent passage would not be subject to suspension. What we propose in short corresponds with the present position in such straits.'

<sup>136</sup> Article 7 of its Draft Articles. In discussion, it was noted that account should be taken in referring to the 'high seas' of the concept of the EEZ, then under active discussion in the Conference.

grounds, as well as much support. The article was criticized because it divided straits into different categories and did not treat them equally: against this, it was pointed out that different considerations applied to straits connecting two parts of the high seas from those connecting the high seas to the territorial sea of a foreign State.<sup>137</sup> The prohibition against suspension was criticized; but this position attracted little support, probably because it ran counter to Article 16(4) of the CTSCZ. The proposals of Malaysia and its co-sponsors,<sup>138</sup> to the effect that non-suspendable innocent passage should be the regime in all straits used for international navigation, were recalled; but this was in effect a criticism of the whole of section 2 and did not attract much support. The UK again put forward its proposal that the special rules about traffic schemes in other straits should apply also to section 3: although some support was voiced, this proposal was not accepted, with the result that the rules in Article 22 about sea lanes and so forth in the territorial sea apply as part of the regime of innocent passage to straits covered by Article 45. A UK drafting suggestion to make paragraph 1(a) of the article into a simple cross-reference to Article 38(1) was, however, accepted in the ISNT and now appears as Article 45(1)(a). Three informal proposals to the effect that in straits to which Article 45 applies the coastal State could (a) require prior notification or authorization for the passage of foreign warships, (b) confine the passage of research or survey ships, tankers and ships carrying nuclear materials to designated traffic lanes, and (c) require prior notification of the passage of foreign nuclear powered ships, were not accepted by the Conference. Finally, attention was drawn to the need to adopt similar methods for establishing baselines in straits where two States were adjacent or opposite each other before tackling the issue of delimitation; however, this subject is regulated by Part II (Territorial Sea), not by Part III (Straits).

Article 45 applies to two types of strait used for international navigation:

- (a) a strait which is formed by an island of the State bordering the strait and its mainland and which is situated in a place where there exists seaward of the island a route through the high seas or EEZ of similar convenience; such a strait is excluded from the transit passage regime by Article 38(1);
- (b) a strait connecting the high seas or EEZ and the territorial sea of a foreign State; 'foreign' means the same as in Article 16(4) of the CTSCZ, i.e. a State situated beyond the coastal State(s) bordering the strait. The French text uses the formulation '*d'un autre état*', consistent with that meaning, as is the Spanish '*de otro Estado*'.

In those types of strait, the regime of innocent passage as it is defined in

<sup>137</sup> The questions raised by the *aide-mémoire* of Canada, Chile and Norway of 30 April 1975 (Platzoder, *op. cit.* above (n. 16), p. 223) about the categories of strait put forward in the Fiji/UK Group's proposals were raised again in these discussions in the Second Committee's working group. These questions were no doubt prompted by particular geographical configurations in those States. The situation in the Aegean Sea was also alluded to by the coastal States concerned.

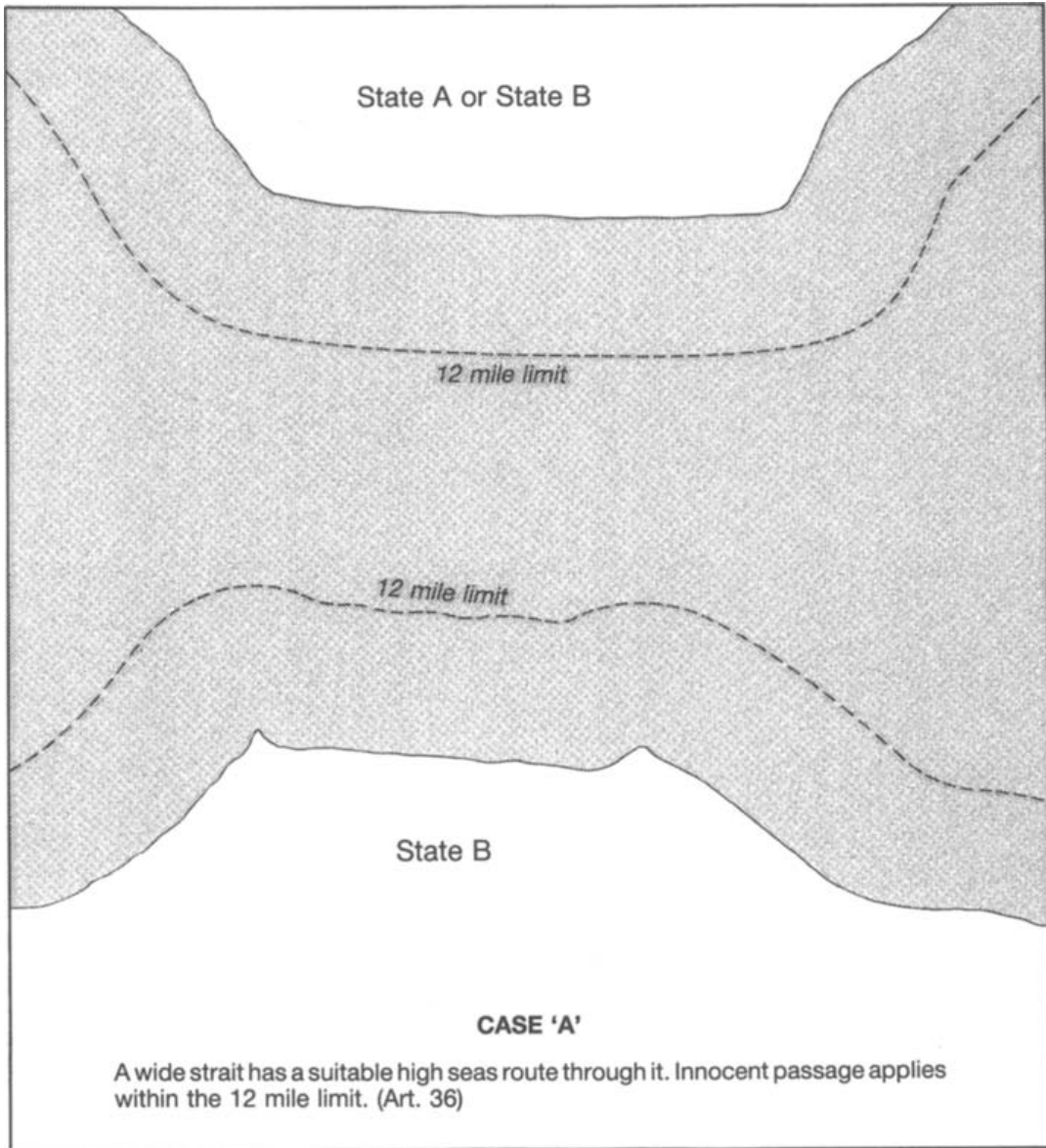
<sup>138</sup> A/CONF. 62/C.2/L. 16, Part II.

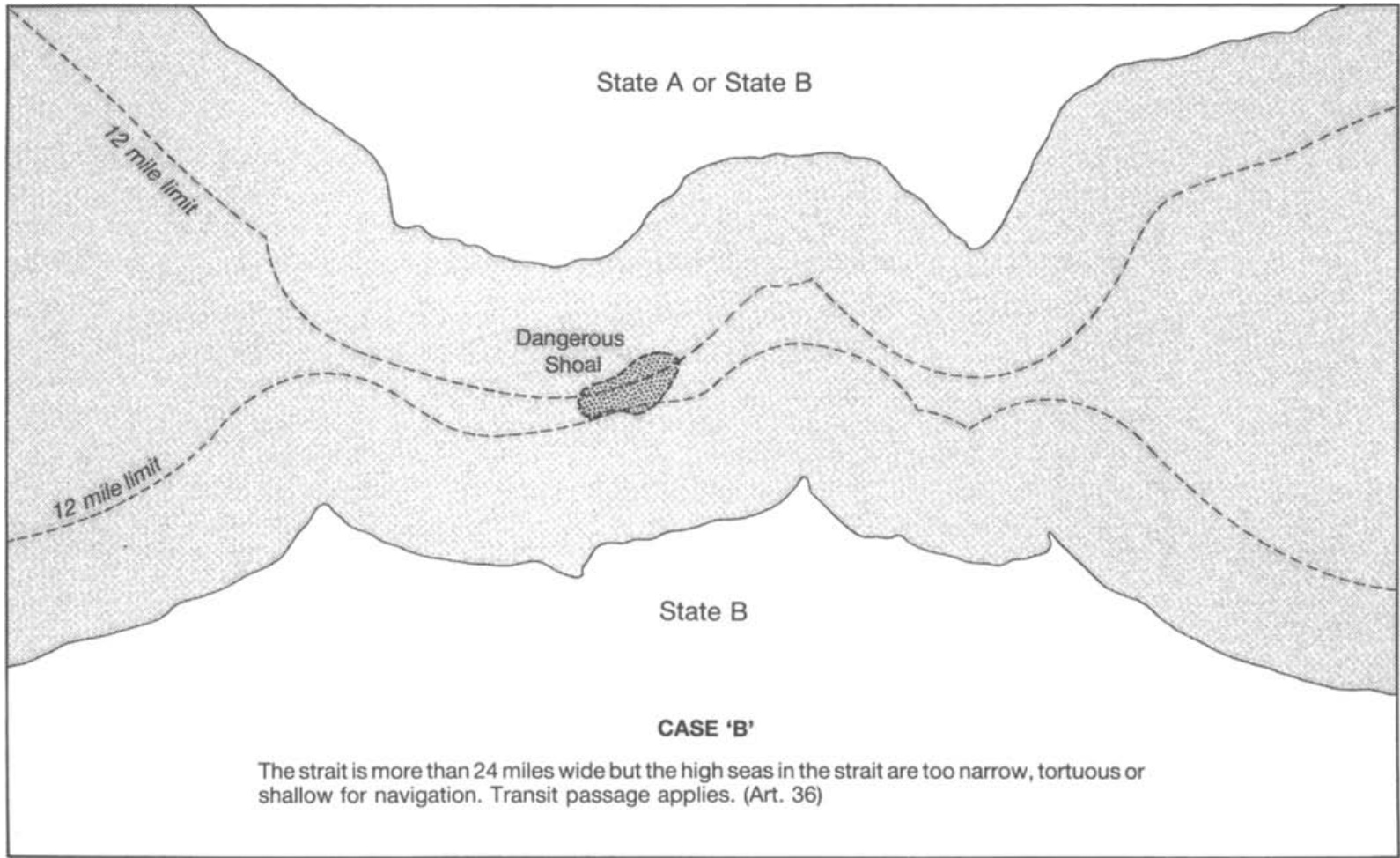
Part II applies in all its respects, subject to the exception that the right of innocent passage through such straits may not be suspended.<sup>139</sup>

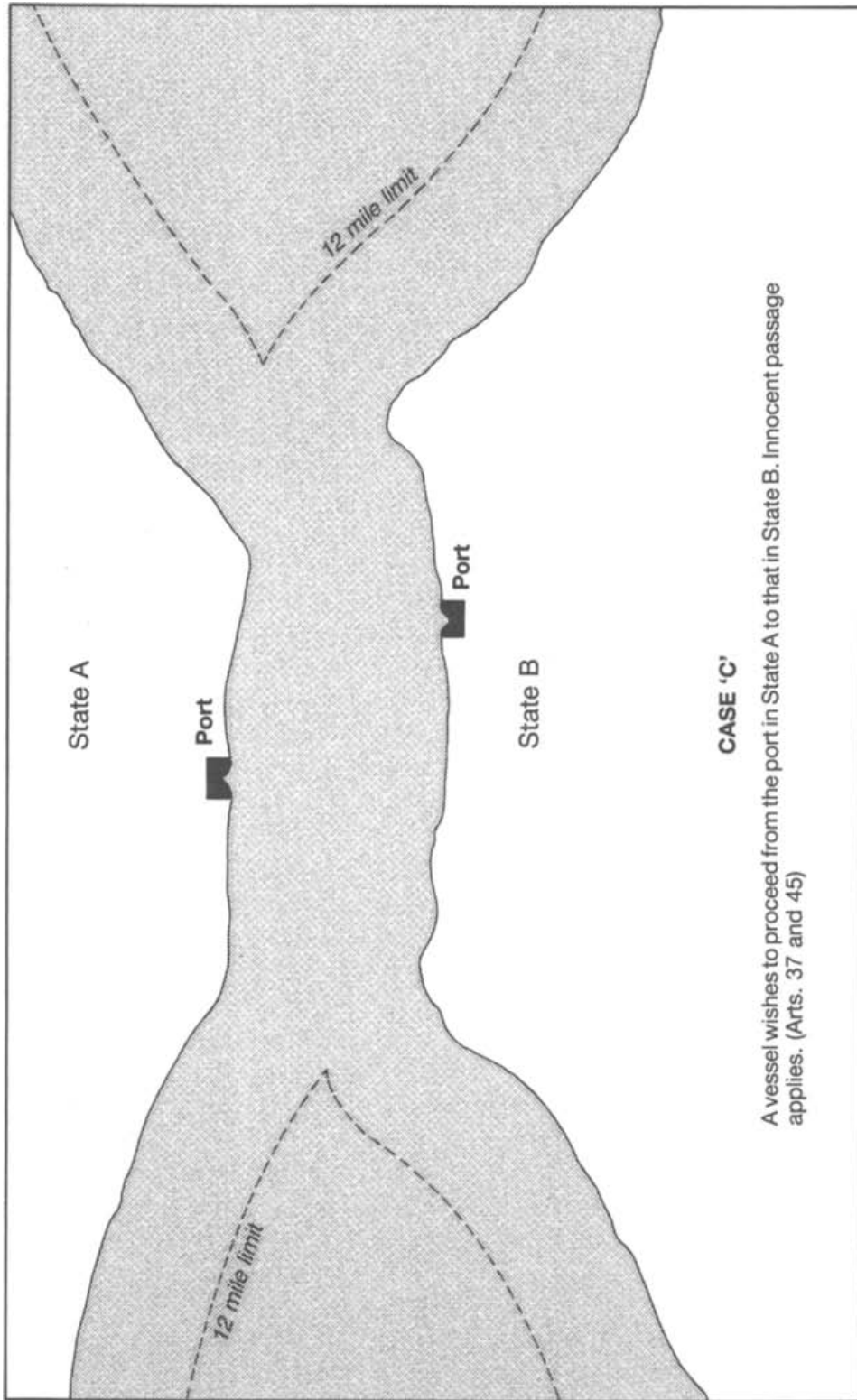
#### APPENDIX

Set of chartlets derived from those made available in the Second Committee by the UK Delegation in 1974. (The numbers of the articles correspond with those in the Convention.)

<sup>139</sup> Article 25(3) permits temporary suspension of the right of innocent passage in specified areas of the territorial sea. Article 45(2) prohibits suspension in straits where it would prevent passage through them.

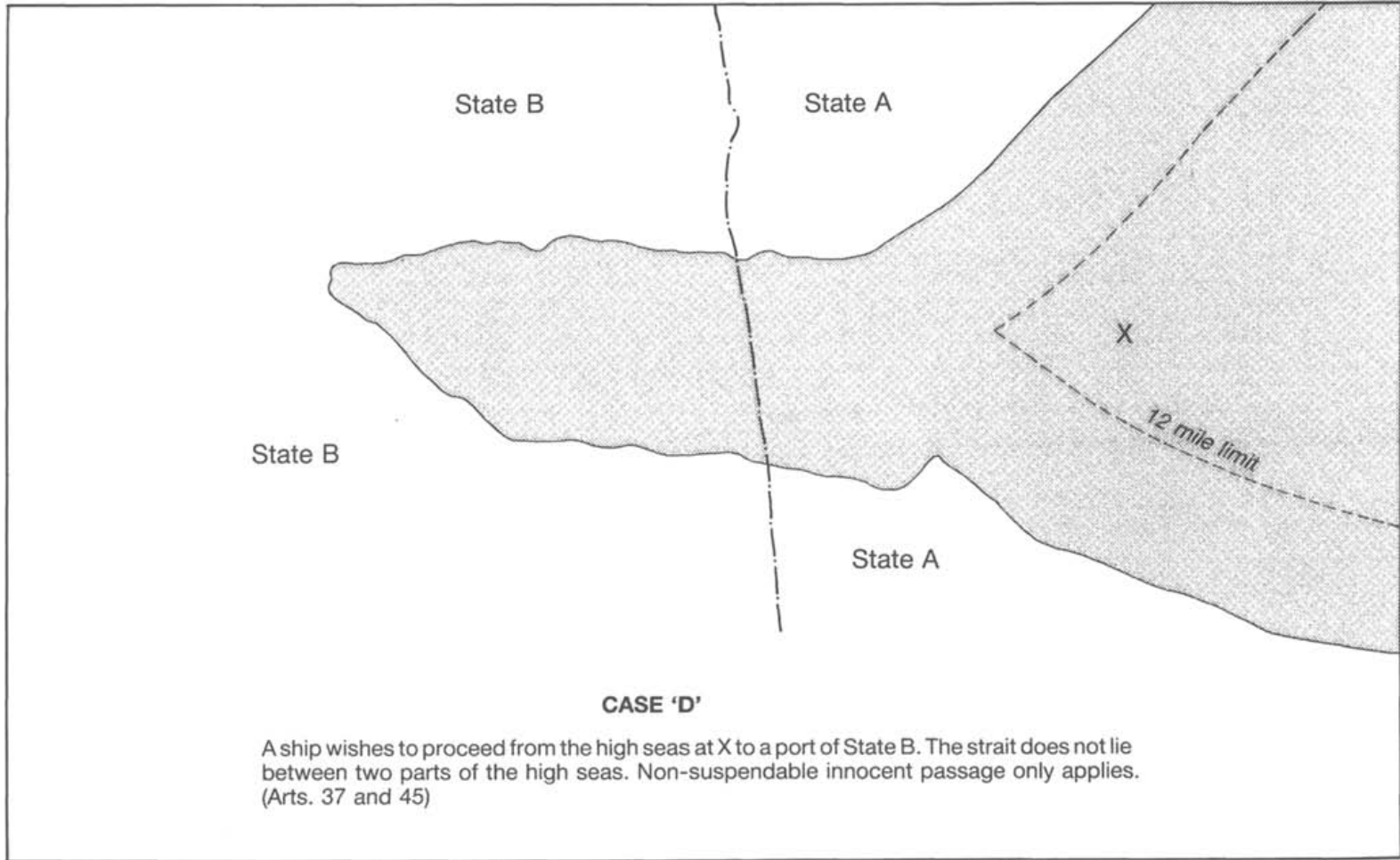


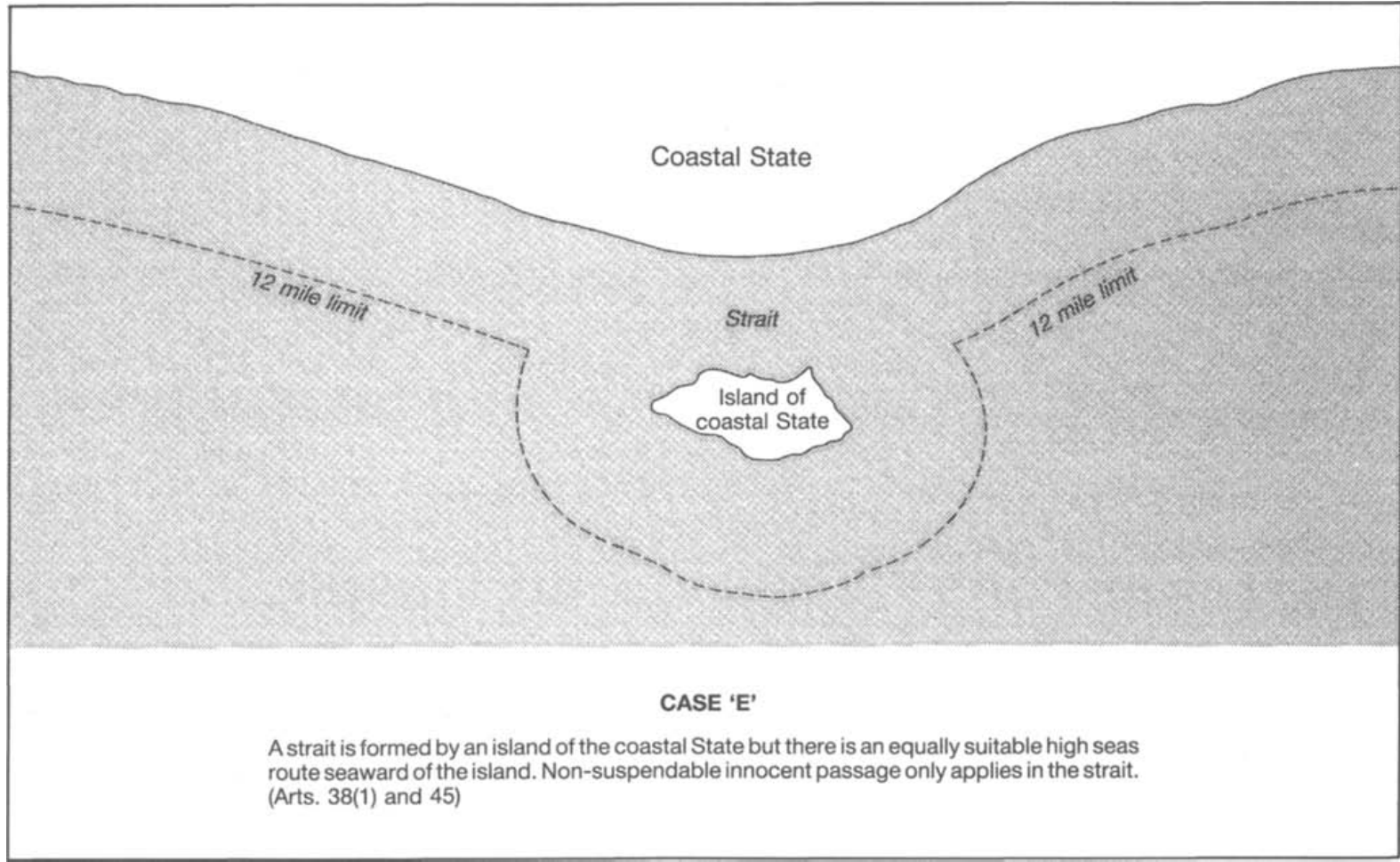




**CASE 'C'**

A vessel wishes to proceed from the port in State A to that in State B. Innocent passage applies. (Arts. 37 and 45)





## STRAITS USED FOR

