

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.

SOURCES

1. A/AC.138/SC.II/L.4 and Corr.1, article II, paragraph 1, reproduced in SBC Report 1971, at 241 (U.S.A.).
2. A/AC.138/SC.II/L.7, first article, paragraph 1, and second article, paragraph 1, reproduced in SBC Report 1972, at 162 (USSR).
3. A/AC.138/SC.II/L.30 and Corr.1, paragraph (a), reproduced in III SBC Report 1973, at 70 (Italy).
4. Item 4.2, "Other related matters . . . ," Variant C, article 1(1), reproduced in IV SBC Report 1973, at 49.
5. Item 4, "Straits used for international navigation," Variant D, first article, paragraph 1, and second article, paragraph 1; and Variant E, paragraph 1, reproduced in IV SBC Report 1973, at 50-51.
6. A/CONF.62/C.2/L.3 (1974), Chapter III, article 1, paragraphs 1, 2 and 4, III Off. Rec. 183, 185 (U.K.).
7. A/CONF.62/C.2/L.11 (1974), article 1, paragraph 1, III Off. Rec. 189 (Bulgaria, Czechoslovakia, German Democratic Republic, Poland, Ukrainian SSR and USSR).
8. A/CONF.62/L.8/Rev.1 (1974), Annex II, Appendix I [A/CONF.62/C.2/WP.1], Provision 57, Formula A, paragraph 1; Formula B, paragraphs 1, 2 and 4; and Formula C, paragraph 1, III Off. Rec. 93, 107, 116 (Rapporteur-general) [Main Trends].
9. A/CONF.62/WP.8/Part II (ISNT, 1975), article 38, IV Off. Rec. 152, 158 (Chairman, Second Committee).
10. A/CONF.62/WP.8/Rev.1/Part II (RSNT, 1976), article 37, V Off. Rec. 151, 159 (Chairman, Second Committee).

11. A/CONF.62/WP.10 (ICNT, 1977), article 38, VIII Off. Rec. 1, 10.
12. A/CONF.62/WP.10/Rev.1 (ICNT/Rev.1, 1979, mimeo.), article 38. Reproduced in I Platzöder 375, 404.
13. A/CONF.62/WP.10/Rev.2 (ICNT/Rev.2, 1980, mimeo.), article 38. Reproduced in II Platzöder 3, 33.
14. A/CONF.62/WP.10/Rev.3* (ICNT/Rev.3, 1980, mimeo.), article 38. Reproduced in II Platzöder 179, 209.
15. A/CONF.62/L.78 (Draft Convention, 1981), article 38, XV Off. Rec. 172, 181.

Drafting Committee

16. A/CONF.62/L.67/Add.1 (1981, mimeo.), at 59–61.
17. A/CONF.62/L.67/Add.1/Rev.1 (1981, mimeo.), at 56–58.
18. A/CONF.62/L.67/Add.14 (1981, mimeo.), at 4.
19. A/CONF.62/L.72 (1981), XV Off. Rec. 151 (Chairman, Drafting Committee).

Informal Documents

20. Informal Working Paper No. 2, Provision IV, Formula A, para. 1, Formula B, paras. 1, 2 and 4(b), Formula C, and Formula D, para. 1; No. 2/Rev.1, Provision IV, Formula A, para. 1, Formula B, paras. 1, 2 and 4(b), Formula C, and Formula D, paras. 1 and 2; No. 2/Rev.2, Provision VII, Formula A, para. 1, Formula B, paras. 1, 2 and 4(b), Formula C, and Formula D, paras. 1 and 2 (all 1974, mimeo.). Reproduced in III Platzöder 263, 270 and 279.
21. Spain (1976, mimeo.), article 38 (ISNT II). Reproduced in IV Platzöder 274, 275.
22. Greece ([1976], mimeo.), article 38 (ISNT II). Reproduced in IV Platzöder 282.
23. Malaysia (1976, mimeo.), article 37 (RSNT II). Reproduced in IV Platzöder 396.
24. Morocco ([1976], mimeo.), article 37 (RSNT II). Reproduced in IV Platzöder 399 [French only].
25. Spain ([1977], mimeo.), article 37 (RSNT II). Reproduced in IV Platzöder 393.
26. C.2/Informal Meeting/4 (1978, mimeo.), article 38 (Spain). Reproduced in V Platzöder 6.
27. C.2/Informal Meeting/22 (1978, mimeo.), article 38 (Morocco). Reproduced in V Platzöder 30.

COMMENTARY

38.1. Article 38 provides that all ships and aircraft enjoy the right of transit passage in straits used for international navigation, and that such passage shall not be impeded. It makes an exception to the right of transit passage where the strait “is formed by an island of a State bordering the strait and its mainland.” This exception only applies, however, if a route “of similar

convenience with respect to navigational and hydrographical characteristics” exists seaward of the island through the high seas or an exclusive economic zone. (In this respect, the language runs parallel to article 36.) In such island/mainland straits, the right of nonsuspendable innocent passage exists, by virtue of article 45.

Paragraph 1 indicates the straits to which the article applies, namely “straits referred to in article 37.” Paragraph 2 gives the meaning of the term “transit passage,” requiring that the passage be “continuous and expeditious,” and that such passage be exercised “in accordance with this Part.” Paragraph 3 states that activities which are not an exercise of the right of transit passage are subject to “the other applicable provisions of this Convention.”

38.2. In the Sea-Bed Committee, proposals by the United States of America (Source 1) and the Soviet Union (Source 2) both provided that in straits used for international navigation ships and aircraft enjoyed “the same freedom of navigation and overflight, for the purpose of transit through and over such straits, as they have on the high seas.” Similar wording appeared in a draft article on straits submitted by Italy (Source 3). These proposals were reflected in the list of variants annexed to the Committee’s 1973 Report (Sources 4 and 5).

38.3. At the second session of the Conference (1974), the United Kingdom introduced a proposal (Source 6) that incorporated the essential freedoms of navigation and overflight sought by the maritime States, and included the safeguards which the United Kingdom felt appropriate for the protection of the legitimate interests of the States bordering the straits. The U.K. proposal formulated the right of transit passage in the following terms:

1. In straits to which this article applies, all ships and aircraft enjoy the right of transit passage, which shall not be impeded.

2. Transit passage is the exercise in accordance with the provisions of this chapter of the freedom of navigation and overflight for the purpose of continuous and expeditious transit of the strait between one part of the high seas and another part of the high seas or a State bordering the strait.

. . . .

4. 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; or

(b) if the strait is formed by an island of the coastal State, an equally suitable high seas passage does not exist seaward of the island.

The U.K. proposal introduced the term “transit passage,” and paragraph 4 described the circumstances in which it would apply (by excluding certain circumstances).

The representative of the United Kingdom stressed that acceptance of a 12-mile territorial sea would affect several straits forming “essential links for international navigation” and thus created “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.”¹ Concerning article 1, the U.K. representative explained that:

18. Article 1 set out the concept of transit passage through straits connecting two parts of the high seas. The concept . . . corresponded to what [his delegation] 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”.

19. In the context of the geographical situations to which that right would apply, his delegation had first and foremost in mind the strait linking one part of the high seas with another part of the high seas. However, as particular straits were called by other names, such as “channel” or “passage”, and often did not begin at a precise line, paragraph 3 of article 1 stipulated that the article applied to “any strait or other stretch of water whatever is geographical name”, as long as it was sea.

20. 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. Such was the purpose of the words “or a State bordering the strait” at the end of article 1, paragraph 2.

21. Paragraph 4 of article 1 concerned two exceptional cases. The first was 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. The second case was the not infrequent one of a strait formed by an island lying less than 24 miles off the coast of a State. There again his delegation saw insufficient justification for according the right of transit passage between the island and the coast of the State, so long as an equally suitable high seas route was available on the seaward side of the island.²

¹ Second Committee, 11th meeting (1974), para. 17, II Off. Rec. 125.

² *Ibid.*, paras. 18–21.

The representative of the U.K., in his explanatory remarks, referred to a "State bordering the strait," the first use of this term (although it was not incorporated in the text until the RSNT (see para. 38.5 below)).

A proposal by six East European Socialist States (Source 7) phrased the text to provide that "all ships in transit shall enjoy equally the freedom of navigation for the purpose of transit passage through" straits used for international navigation. It included special provisions for "narrow straits" and "particular channels of navigation" where designated corridors could be maintained to ensure the safety of navigation. Referring to that proposal, the representative of the Soviet Union

underlined the importance of the principle that . . . all ships in transit would enjoy equal freedom of navigation for the purpose of transit passage between straits used for international navigation between two parts of the high seas. . . . The adoption of the principle of innocent passage with regard to these straits would entail the risk of hampering international trade, to the serious detriment of certain countries and the international community as a whole.³

The Soviet representative also stressed that matters relating to navigation through straits used for international navigation did not admit "unilateral solutions."

In the Main Trends Working Paper (Source 8), the different proposals for the right of transit passage appeared in Provision 57; the proposals based on retaining the right of innocent passage in that part of straits which constitute territorial sea appeared in Provisions 52 and 54.

38.4. At the third session (1975), the U.K. proposal served as the basis for the work of the Private Group on Straits. That Group adopted a text on passage of straits used for international navigation, article 1 of which largely retained the U.K. text. That text read:

. . . .

2. In straits to which this article applies, all ships and aircraft enjoy the right of transit passage, which shall not be impeded.

3. Transit passage is the exercise in accordance with provisions of this Chapter 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 and another part of the high seas or between the high seas and a State bordering the strait.

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

- (a) a high seas route of similar convenience does not exist through the strait; or
- (b) if the strait is formed by an island of the coastal State, a high seas route of similar convenience does not exist seaward of the island.

³ Second Committee, 12th meeting (1974), para. 1, *ibid.* 126 (see also para. 2).

5. 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.⁴

That text also replaced the reference to “equally suitable” routes through the high seas with “a route of similar convenience,” and indicated that passage was to be “solely” for the purpose of continuous and expeditious transit of the strait. Paragraph 3 was expanded to also include straits “between the high seas and a State bordering the strait.”⁵ Paragraph 5 was new, stipulating that any activity that was not transit passage would be subject to the “other applicable provisions” of the Convention.

Following further informal negotiations, the new paragraph 5 was incorporated into a reorganized text in the ISNT/Part II (Source 9), article 38 of which read:

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 the strait State, transit passage shall not apply if a high seas route or a route in an exclusive economic zone of similar convenience exists seaward of the island.

2. Transit passage is the exercise in accordance with the provisions of this part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone.

3. The right of transit passage recognized under this article may also be exercised for the purpose of transit to or from another strait State, subject to the conditions of entry to that State.

4. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of the present Convention.

That text combined elements from the proposals submitted by both the U.K. and the Private Group on Straits, incorporating the language used by the Private Group on Straits and adding the references to the exclusive economic zone. The “islands exception” was moved into paragraph 1 and, in a new paragraph 3, a provision was included regarding transit “to or from another strait State, subject to the conditions of entry to that State.” The provision regarding broad straits, which had been addressed in paragraph 4(a) of the earlier proposals, was moved to a separate article (see para. 36.3 above).

⁴ Private Group on Straits (1975, mimeo.), article 1, paras. 2–5. Reproduced in IV Platzöder 194.

⁵ In an “Aide Memoire” submitted by Canada, Chile and Norway, objection was taken to this change, noting that “it would be legally and politically erroneous to envisage new categories of straits.” See IV Platzöder 223 (at fourth para.).

38.5. At the fourth session (1976), Spain submitted an informal proposal (Source 21) for a number of changes, including: (i) the deletion of all references to aircraft; (ii) changing all references to “transit passage” to simply “passage”; (iii) new wording for the latter half of paragraph 1 and the first half of paragraph 2; and (iv) in paragraph 3, changing “for the purpose of transit” to read “for the purpose of navigation.”

Greece also submitted a proposal (Source 22) to delete all references to aircraft and overflight. In addition, it proposed including in the islands exception of paragraph 1 a reference to an island “or group of islands.”

Neither of these informal amendments was accepted.

Following further informal discussions, the article was revised in the RSNT/Part II (Source 11), article 37 of which read:

Right of transit passage

1. In straits referred to in article 36, 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 a high seas route or a route in an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists seaward of the island.

2. Transit passage is the exercise in accordance with this Chapter of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one area of the high seas or an exclusive economic zone and another area 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 the present Convention.

The title was added at this stage. In paragraph 1, a qualification was added in referring to routes of similar convenience “with respect to navigational and hydrographical characteristics” (the same adjustment was made in article 36). Paragraph 2 combined paragraphs 2 and 3 of the ISNT; it also referred to “a State bordering the strait.” Paragraph 3 repeated paragraph 4 of the ISNT.

38.6. At the fifth session (1976), Malaysia (Source 23) proposed an expansion of paragraph 3 to the effect that activities other than transit passage would be subject to the provisions of the Convention “and to other rules of international law.” A similar proposal was submitted by Morocco (Source 24).

At the sixth session (1977), Spain (Source 25) repeated its earlier proposal to delete references to aircraft from this article, and proposed the expansion of the scope of application of paragraph 3.

None of the informal proposals at the fifth or sixth session was accepted, and article 38 of the ICNT (Source 11) repeated the substance of the RSNT, incorporating only minor drafting changes.

38.7. At the seventh session (1978), Spain (Source 26) and Morocco (Source 27) repeated their earlier proposals, but again these changes were not accepted.

The text remained substantively unchanged thereafter, incorporating only drafting changes made on the recommendation of the Drafting Committee (Sources 16 to 19). Most of these changes were intended to bring paragraph 1 into conformity with article 36.⁶

38.8(a). From the standpoint of States using the straits, paragraph 1 is the most important provision of Part III. It affirms that *all* ships and aircraft enjoy the right of transit passage elaborated in Part III—the phrase “all ships and aircraft enjoy the right” is clear, unequivocal and without exceptions.⁷ It includes all types of ships. Paragraph 1 confirms that the right of transit passage is enjoyed without regard to nationality, ownership, or status as warship or merchant ship or vessel, or as civil or state aircraft (within the meaning of the 1944 Convention on International Civil Aviation⁸). This right is exercisable in the straits to which article 37 refers, regardless of their width.

Article 38, paragraph 1, embodies an exception to the regime of transit passage for a limited category of straits—namely straits formed by an island of a State bordering the strait and the mainland of that same State if a high seas route or a route through an exclusive economic zone “of similar convenience with respect to navigational and hydrographical characteristics” exists seaward of the island. (On the term “of similar convenience . . .” see paras. 36.7(a) and 36.7(b) above.) This exception for an “island/mainland”

⁶ For the difficulties in the Drafting Committee over the harmonization of paragraph 2, see DC/Part III/Article 38 (1981, mimeo.), at 6; DC/Part III/Article 38/Add.1 (1981, mimeo.); and Informal Paper 27 (1982, mimeo.), Part III, at 23. The Drafting Committee made no recommendations addressing this point.

⁷ On signature of the Convention, Iran noted, with particular regard to article 38, that “only States parties to the Law of the Sea Convention shall be entitled to benefit from the contractual rights created therein.”

On ratification, Yugoslavia declared that on the basis of article 38, paragraph 1, and article 45, paragraph 1(a), it could determine which of the straits used for international navigation in its territorial sea “will retain the regime of innocent passage.” A similar declaration was made by Greece (see para. 36.7(a), note 6, above).

See latest edition of *Multilateral Treaties Deposited with the Secretary-General* (ST/LEG/SER.E/-), Ch. XXI.6.

⁸ See article 3 of that Convention, ICAO doc. 7300/6 (1980), incorporating all amendments to date. For the original text see 15 UNTS 295; TIAS 1591; 3 Bevens 929; IOI, Vol. I.B, at I.B.1.6.

type of strait was intended to apply to cases such as the Pemba Channel off the coast of Tanzania. It is less clear how this exception would apply in other geographical circumstances, such as cases where there is an archipelago or a group of islands off the coast. In any event, the exception should not be interpreted too mechanically, and should be applied using common sense, taking into account the relevant geographical and other circumstances.

38.8(b). The island/mainland exception is drawn in the same terms, and was subject to the same amendments in wording, as the exception made in article 36 for straits in which there exists a route of similar convenience through the high seas or an exclusive economic zone, and presumably should be interpreted in the same way (cf. para. 36.7(c) above). Unlike that exception, the exception in article 38, paragraph 1, is complemented by article 45, paragraph 1(a), which specifically makes applicable to these excepted straits the regime of nonsuspendable innocent passage. In consequence, the most significant practical effect of the exception is on the right of overflight by aircraft and submerged transit by submarines through such straits.

38.8(c). Paragraph 1 contains an important substantive aspect of the regime of transit passage—that is, transit passage “shall not be impeded.”⁹ This is complemented by article 44, which provides that “States bordering straits shall not hamper transit passage.”

38.8(d). Paragraph 2 provides substantive content to the regime of transit passage. It gives the meaning of “transit passage,” and significantly does so in terms of the “freedom” of navigation and overflight. This language corresponds to articles 58 and 87 of the Convention, and carries the same meaning that it has in those provisions (see paras. 58.10(a) and 58.10(b) below; see also the Commentary on article 87, in Volume III). It is taken from article 2 of the 1958 Convention on the High Seas. The use of this high-seas term in Part III emphasizes the inherent character of the regime of transit passage and the integrity of global navigation patterns.

A second element of transit passage is that it is “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.” This element thus has two components: the passage must be “continuous and expeditious” (language which also appears in article 18, paragraph 2, on innocent passage, and in article 53, paragraph 1, on archipelagic sea-lanes passage); and it is to be between parts of the sea which are either high seas or exclusive economic zone. As

⁹ A proposal by four straits States on navigation through the territorial sea, including straits used for international navigation, would have empowered the coastal State to regulate the passage through straits in its territorial sea of nuclear-powered ships or ships carrying nuclear weapons. See A/CONF.62/C.2/L.16 (1974), article 8, para. 1(a), and article 21, III Off. Rec. 192 (Malaysia, Morocco, Oman and Yemen). No related provision appears in Part III.

used in this article the expression “continuous and expeditious” appears as a constituent element of the right. The concept is reasserted in terms of an obligation for ships and aircraft in transit passage through article 39, paragraph 1(a), which requires that they proceed through or over the strait without delay. The obligation on the States bordering the straits not to interfere with continuous and expeditious transit is found in article 42, paragraph 2, which requires that the laws and regulations of such States shall not have the practical effect of denying, hampering or impairing the right of transit passage.

38.8(e). The second sentence of paragraph 2 deals with the special case of a ship or aircraft transiting the strait for the purpose of entering, leaving or returning to the territory of a State bordering the strait. Such a right is particularly significant where the strait is lengthy and is the only access route to a port of one of the States bordering the strait. An example is the Strait of Malacca, which provides the only sea access to Singapore (see Volume IV, at 388, para. 233.8). For this reason, this clause was sometimes known in the Conference as the “Singapore clause.” In the absence of the clause, transit to a port within the strait might not be considered as “continuous and expeditious,” and the ship or aircraft would not be entitled to the right of transit passage but could be forced to rely on some less extensive right, such as innocent passage for ships or prior permission for aircraft. The sentence makes it clear that such an event (that is, calling at a port in a State bordering the strait) does not prejudice the entitlement of the ship or aircraft to transit passage, provided, of course, that the entry, exit or return to the port or airport in the State bordering the strait is in accordance with the conditions of entry to that State.

38.8(f). Paragraph 3 deals with activities which are inconsistent with the exercise of the right of transit passage, particulars of which are spelled out in paragraph 2. This is one of the consequences of the words “in accordance with this Part” in the opening words of paragraph 2. Paragraph 3 accordingly sets out that in those circumstances, any activity (whether conducted by a ship or aircraft) which is not an exercise of the right of transit passage remains subject to the other applicable provisions of the Convention. As indeed has been written:

These [other applicable provisions] 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.¹⁰

¹⁰ S.N. Nandan and D.H. Anderson, "Straits used for international navigation: A commentary on Part III of the United Nations Convention on the Law of the Sea 1982," 60 *Brit. YB Int'l L.* 159, 182 (1989).