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PART III

STRAITS USED FOR INTERNATIONAL NAVIGATION

PART III. STRAITS USED FOR INTERNATIONAL NAVIGATION

INTRODUCTION

III.1. Part III (articles 34 to 45) sets out the regime for straits used for international navigation with regard to the passage of ships[1] through those straits and of aircraft over them. Maintenance of a regime of unimpeded passage through such straits is an important component of the overall "package" of the Convention, and reflects the significance of global navigation in the negotiations at UNCLOS III. Acceptance of this regime made it possible for the Conference to reach agreement on 12 nautical miles as the maximum breadth of the territorial sea, and on the provisions concerning the exclusive economic zone.

III.2. The right of passage through straits has been of international concern at every conference on the law of the sea. The Preparatory Committee for the 1930 Hague Conference for the Codification of International Law addressed the subject of straits only in the context of the delimitation of the territorial sea within straits. It did not consider navigation through straits consisting entirely of the territorial sea of one or more coastal States as an issue distinct from the subject of innocent passage of foreign ships through the territorial sea generally.[2]

At the 1930 Conference, the subject of straits was assigned to the Second Sub-Committee of the Second Committee (Territorial Sea), and the subject of innocent passage was assigned to the First Sub-Committee. The First Sub-Committee succeeded in adopting 13 articles on such matters as the legal status of the territorial sea and the right of passage for merchant ships and warships, but was unable to agree on the breadth of the territorial sea or on the exercise of special jurisdiction in a zone contiguous to the territorial sea.

The work of the Second Sub-Committee was less successful. As stated in the report of the Second Committee:

> The absence of agreement as to the breadth of the territorial sea affected to an even greater extent the action to be taken on the Second Sub-Committee's report. The questions which that Sub-Committee had to examine are so closely connected with the breadth of the territorial sea that the absence of an agreement on that matter prevented the

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[1] The question of the applicability of the right of passage through straits of certain drill ships and oil rigs was raised in the International Court of Justice in the *Passage through the Great Belt* case, 1991 ICJ Reports 12, 17, para. 22 (provisional measures); 1992 ICJ Reports 348 (discontinuance).

[2] See Bases of Discussion Drawn Up by the Preparatory Committee, part II, Territorial Waters, Points VII and IX–XIII, League of Nations doc. C.74.M.39.1929.V. Reprinted in 24 Am. J. Int'l L. Supp. 35, 38 (1930). Reproduced in Sh. Rosenne (ed.), 2 *League of Nations Conference for the Codification of International Law [1930]*, at 273, 283–309 (1975).

> Committee from taking even a provisional decision on the Articles drawn up by the Sub-Committee. These Articles nevertheless constitute valuable material for the continuation of the study of the question, and are therefore also attached to the present report [as Appendix II].[3]

With regard to the subject of navigation through straits, the most significant aspect of the work of the Second Sub-Committee was the provision entitled "Passage of Warships Through Straits," which read:

> 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.
>
> *Observations*
>
> 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.[4]

III.3. In the *Corfu Channel* case, the International Court of Justice (ICJ) laid down two important principles regarding navigation through straits used for international navigation.[5] In reference to Albania's contention that the United Kingdom had violated Albanian sovereignty by sending warships through the North Corfu Strait without prior authorization, the Court noted:

> It is, in the opinion of the Court, generally recognized and in accordance with international custom 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 that 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.[6]

Addressing Albania's contention that the North Corfu Channel was only of secondary importance and was used almost exclusively for local traffic, the

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[3] Conference for the Codification of International Law, Report of the Second Committee (Territorial Sea), League of Nations doc. L.230.M.117.1930.V. Reprinted in 24 Am. J. Int'l L. Supp. 234, 237 (1930). Also reproduced in Rosenne, supra note 2, Vol. 3, at 825, 827.

[4] Report of the Second Committee, supra note 3, 24 Am. J. Int'l L. Supp. 253; Rosenne, supra note 2, Vol. 3, at 836.

[5] This was the first time the issue had been addressed in major international litigation and was the first of the ICJ's pronouncements on the law of the sea, which have had such an important influence on the reconstruction of the law accomplished in the three United Nations Conferences on the Law of the Sea.

[6] *Corfu Channel* case (merits) (United Kingdom v. Albania), 1949 ICJ Reports 4, 28.

Court made a statement of principle regarding the functional criterion. It wrote:

> 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.[7]

III.4. In its draft articles on the law of the sea prepared in 1956, the International Law Commission (ILC) adopted as article 17, paragraph 4, the following text:

> 4. There must be no suspension of the innocent passage of foreign ships through straits normally used for international navi- gation between two parts of the high seas.[8]

In its commentary on that article, the Commission wrote:

> (3) The Commission also included a clause formally prohibiting interference with passage through straits used for navigation between two parts of the high seas. The expression "straits normally used for international navigation between two parts of the high seas" was suggested by the decision of the International Court of Justice in the *Corfu Channel Case*. The Commission, however, was of the opinion that it would be in conformity with the Court's decision to insert the word "normally" before the word "used."[9]

III.5. At UNCLOS I, negotiations on the regime of the territorial sea centered on the issue of a maximum breadth of three nautical miles measured from the baselines. The topic of straits used for international navigation was treated in the context of innocent passage through the territorial sea (following the *Corfu Channel* case), together with the concept of nonsuspendable innocent passage through those straits (as formulated by the International Law Commission). The ILC's proposal was modified after difficult debate; in particular, there was objection to the word "normally" on the ground that it did not conform to the language used by the ICJ in the

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[7] Ibid.

[8] Report of the International Law Commission covering the work of its eighth session (A/3159), II YB ILC 1956, at 253, 273.

[9] Ibid., article 17 *Commentary*, para. (3). The Commission also examined the question of the delimitation of the territorial sea in straits. Ibid., article 12. See para. 15.2 above.

Corfu Channel case.[10] In its final form, article 16, paragraph 4, of the 1958 Convention on the Territorial Sea and the Contiguous Zone reads:

> 4. 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.

That text applies a rule of nonsuspendable innocent passage to straits connecting two parts of the high seas, and to straits connecting the high seas with the territorial sea "of a foreign State."

III.6. In later discussions, including those at UNCLOS II, maritime States made it clear that maintaining a regime of unrestricted passage through straits for ships and submarines, and of overflight for aircraft, was essential to obtaining agreement not only on the extension of the maximum permissible breadth of the territorial sea to 12 nautical miles, but also for other related issues including the adoption of the concept of an exclusive economic zone. At UNCLOS III, the negotiations regarding passage through straits were conducted on the basis of a 12-mile territorial sea, and a regime governing passage through and over straits used for international navigation emerged as a separate part of the Convention.[11]

III.7. With a territorial sea of three nautical miles, only a few straits used for international navigation were within the territorial sea of coastal States and accordingly were subject to the right of nonsuspendable innocent passage. Extension of the maximum breadth of the territorial sea to 12 nautical miles meant that straits up to 24 nautical miles in width could fall entirely within the territorial sea of coastal States. Waters in straits which were previously subject to the freedom of the high seas would become subjected to the regime of nonsuspendable innocent passage as set out in the 1958 Convention. It has been estimated that more than 100 sea routes through straits used for international navigation would come within the territorial sea of coastal States with a uniform increase in claims from 3 to 12 nautical miles.[12]

Maintenance of the freedoms of navigation and of overflight through and over straits used for international navigation was not only a matter of interest to maritime States. It was also of concern to many States whose international sea-borne trade has to pass through such straits, to flag States with large merchant marines, to States bordering enclosed or semi-enclosed seas, and to large island States in both the Atlantic and the Pacific oceans.

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[10] See, e.g., A/CONF.13/C.1/L.39 (1958), para. 4, comment (b), UNCLOS I, III Off. Rec. 220 (U.S.A.).

[11] See UN Office for Ocean Affairs and the Law of the Sea, *Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea*, Volume I (UN Sales No. E.91.V.14 (1992)) (Volume II is forthcoming).

[12] See, e.g., U.S. Dept. of State, Office of the Geographer, "World Straits Affected by a 12 Mile Territorial Sea," Chart # 510376 (1971).

Many of these States both bordered straits and were important user States (for commercial purposes and for military uses). As the representative of the United Kingdom noted early in the negotiations at UNCLOS III, his country

> which relied on the sea for a large part of its international trade and which had a long coastline as well as several straits, had a very real interest in the régime for navigation which would apply on the high seas, in the territorial sea and in straits used for international navigation.[13]

Indeed, there was no sharp differentiation between the States using the straits and the States bordering the straits, since in many instances a given State is both. The International Chamber of Shipping also expressed concern over the evolving regime, noting that:

> Many of the major trade routes of the world involve transit through straits. Extension of the territorial sea to twelve miles will increase the number of straits. If the freedom of navigation on the High Seas is the common right of mankind the right to pass from one part of the High Seas to another falls into the same category. The right of land-locked states to obtain access to the sea has the same moral and juridical basis.
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> The economic argument for a non-suspendable right of transit is even stronger. The effects of the closure of the Suez Canal, including changes in the pattern of trade and the design of ships illustrate what can happen. One has only to visualise in that light the effects of suspension of the right of transit in other straits to appreciate the importance of this Part.[14]

States bordering these straits, however, were concerned that a regime which gave recognition to freedom of navigation through "their" straits should not ignore their legitimate interests in protecting their territorial waters and coastlines from what they saw as possible threats to their security, their maritime and coastal environments, their fiscal and economic integrity, and other legitimate interests.

Following UNCLOS I, the question of passage through straits assumed greater importance for the maritime States. With the breadth of the territorial sea left unresolved by UNCLOS I and UNCLOS II, an increasing number of States adopted territorial seas of 12 nautical miles or more. As a result, the waters in many of these straits became part of the claimed territorial seas of States bordering them. This gave rise to great concern amongst maritime States (and particularly those with major naval forces) that the regime of nonsuspendable innocent passage, as expressed in article

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[13] Second Committee, 3rd meeting (1974), para. 24, II Off. Rec. 101.

[14] International Chamber of Shipping (1976, mimeo.), "Part II–Straits." Reproduced in IV Platzöder 240, 244.

16, paragraph 4, of the 1958 Convention, would not be adequate to protect vital lines of communication through such straits.

III.8. Another important feature which remained of concern with the 1958 Convention was the possibility of subjective interpretation by "straits States" of what constitutes "innocent" passage under the ambiguous definition contained in article 14 of that Convention. In addition, the fact that submarines were required to navigate on the surface, and that aircraft enjoyed no general right of overflight comparable to the right of innocent passage for ships, were also matters of major concern. Accordingly, the United States of America and the Soviet Union initiated informal consultations about the possibility of a new international agreement fixing the maximum permissible breadth of the territorial sea at 12 nautical miles and providing for freedom of transit through and over straits. Discussions were held with a number of other governments on the possibilities of such an arrangement.[15] The formal policy of the United States of America was announced in 1970, when President Nixon, in a major address on oceans policy, called for a new law of the sea treaty that "would establish a 12-mile limit for territorial seas and provide for free transit through international straits."[16] At the same time, the Soviet Union, in connection with the discussion in the General Assembly (see para. Intro.4 above), pointed out that if the territorial sea were generally extended to 12 nautical miles pursuant to an international agreement, "the number of straits consisting wholly of territorial sea might be significantly increased, and it would thus become necessary to ensure the freedom of transit through straits used for international navigation."[17] Subsequently, General Assembly resolution 2750 C (XXV) of 17 December 1970 (Volume I, at 178) included "the question of international straits" among the issues to be examined at UNCLOS III.

III.9. During the next three years, in the deliberations of the Sea-Bed Committee, States and groupings of States began to stake out their positions on a regime for navigation through straits. These positions revealed two major trends. One trend was represented by many States bordering straits, which took the position that since straits formed part of the territorial sea they wanted to protect what they considered to be their legitimate interests. A statement by the representative of Spain reflected this position in noting that

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[15] A.L. Hollick, *U.S. Foreign Policy and the Law of the Sea* 174 (1981).

[16] President's Statement on United States Ocean Policy, 6 *Weekly Compilation of Presidential Documents* 677, at 678 (23 May 1970).

[17] A/8047 and Add.1, 3 and 4 (1970, mimeo.), "Explanatory memorandum" attached to the letter of 15 August 1970 requesting the inclusion of a supplementary item in the agenda of the 25th session of the General Assembly (Bulgaria, Czechoslovakia, Hungary, Iraq, Syria and USSR). See 25 GAOR, Annexes, agenda item 25, at 6. See also the statement by the representative of the USSR at the 1777th meeting of the First Committee (A/C.1/PV.1777), para. 63, 25 GAOR, First Committee.

> there was no reason to separate the question of straits from that of the territorial sea, since straits used for international navigation were an integral part of the territorial sea in so far as they lay within territorial waters. Any attempt to set up separate régimes for the territorial sea and for straits would clearly violate the fundamental principle of the sovereignty of the coastal State over its territorial sea; accordingly, any such attempt was quite unacceptable to his delegation.
>
> It was regrettable that one delegation had opposed what it termed its "vital interests" to the principle of the sovereignty of the coastal State over its territorial sea. While the legitimate interests of all States must be respected, inalienable rights and fundamental principles could not be sacrificed in order to satisfy what others considered their "vital interests".[18]

These States submitted proposals calling for a regime based on the concept of nonsuspendable innocent passage of ships, either in other respects identical to the regime in other parts of the territorial sea, or modified to take account of the special importance of straits to international navigation.[19]

The second trend was represented by the United States of America, the Soviet Union and Italy. They introduced proposals for separate regimes for the territorial sea and for straits used for international navigation, and sought a regime of passage through those straits based on the freedom of navigation of the high seas for ships and the freedom of overflight for aircraft under conditions that would safeguard the interests of States bordering straits.[20] As explained by the U.S. representative in Sub-Committee II:

> One of the most important tasks of the Conference on the Law of the Sea would be to protect the interests which all nations had in the freedoms of navigation and overflight. The preservation of those freedoms was essential in order to maintain the flow of trade and communications and stable and peaceful international relations. . . . The community interest with regard to international straits was far more vital than simply the right of innocent passage in the territorial sea.

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[18] A/AC.138/SC.II/SR.60 (1973, mimeo.), included in A/AC.138/SC.II/SR.48–62 (1973, mimeo.), at 187–88.

[19] See, e.g., A/AC.138/SC.II/L.18, reproduced in III SBC Report 1973, at 3 (Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain and Yemen); A/AC.138/SC.II/L.34, ibid. 71 (China); and A/AC.138/SC.II/L.42 and Corr.1, ibid. 91 (Fiji). A similar position was adopted by the Organization of African Unity in its "Declaration on the issues of the law of the sea," A/AC.138/89, reproduced in II SBC Report 1973, at 4; replaced at UNCLOS III by A/CONF.62/33 (1974), III Off. Rec. 63.

[20] A/AC.138/SC.II/L.4, reproduced in SBC Report 1971, at 241 (U.S.A.); A/AC.138/SC.II/L.7, reproduced in SBC Report 1972, at 241 (USSR); and A/AC.138/SC.II/L.30, reproduced in III SBC Report 1973, at 70 (Italy).

> The principal goal of the Conference must be to agree on a régime which would minimize the possibility of conflicts among nations arising from uncertainty as to legal rights and responsibilities. Such uncertainty might occur if a régime for straits used for international navigation could be subjectively interpreted by strait States.[21]

Thus the approaches in the debate in the Sea-Bed Committee and in the early stages of the Conference differed fundamentally. The regime to be applied in straits used for international navigation became one of the cardinal issues on which the successful adoption of a Convention would depend.

III.10. One of the key issues was how the subject of international straits was to be expressed in the agenda for the Conference. After a series of difficult discussions,[22] in 1972 the list of subjects and issues was approved by the Committee. The formulation of the straits issue in that list read:

> 4. Straits used for international navigation
>
> 4 1
>
> Innocent passage
>
> 4 2
>
> Other related matters including the question of the right of transit

This list was accepted on the understanding that it "is not necessarily complete nor does it establish the order of priority for consideration of the various subjects and issues," and that it "does not prejudice the position of any State or commit any State with respect to the items on it or to the order, form or classification according to which they are presented."[23]

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[21] See A/AC.138/SC.II/SR.58 (1973, mimeo.), included in A/AC.138/SC.II/SR.4—62 (1973, mimeo.), at 129.

[22] See, e.g., statements during meetings of Sub-Committee II, at the 5th meeting by Japan (A/AC.138/SC.II/SR.5 (1971, mimeo.), at 3); at the 6th meeting by Chile (A/AC.138/SC.II/SR.6 (1971, mimeo.), at 15); at the 7th meeting by Denmark (A/AC.138/SC.II/SR.7 (1971, mimeo.), at 35); at the 10th meeting by Nepal (A/AC.138/SC.II/SR.10 (1971, mimeo.), at 79); at the 16th meeting by Gabon (A/AC.138/SC.II/SR.16 (1971, mimeo.), at 182); at the 18th meeting (A/AC.138/SC.II/SR.18 (1971, mimeo.)) by Chile (at 199), the Philippines (at 201), the USSR (at 202), and Mexico (at 203); at the 19th meeting by Spain (A/AC.138/SC.II/SR.19 (1971, mimeo.), at 216); at the 29th meeting (A/AC.138/SC.II/SR.29 (1972, mimeo.)) by the Philippines (at 58), Peru (at 68), and Spain (at 73); and at the 44th meeting by Japan (A/AC.138/SC.II/SR.44 (1971, mimeo.), at 72).

Cf., however, statements at the 15th meeting by Venezuela (A/AC.138/SC.II/SR.15 (1971, mimeo.), at 161) (the list must be "detailed enough to cover all aspects of the problem" and "should not be restrictive"); at the 18th meeting by Mexico (A/AC.138/SC.II/SR.18 (1971, mimeo.), at 202) (the list should be "comprehensive and reasonably detailed"); and at the 20th meeting by Chile (A/AC.138/SC.II/SR.20 (1971, mimeo.), at 232) (the list "should faithfully reflect the spirit of General Assembly resolution 2750 (XXV)" and should therefore "be long and complete").

[23] See SBC Report 1972, para. 23, at 4. See also Volume I of this series, at 32. See further SBC Report 1972, paras. 193–196, at 47.

III.11. At the 1973 session of the Sea-Bed Committee, additional proposals were introduced regarding a regime for straits used for international navigation. Neither Sub-Committee II nor the Sea-Bed Committee as a whole, however, could consolidate those proposals into negotiating texts. Instead, the Committee compiled a list of "variants submitted by delegations," clustering under the appropriate headings of the list of subjects and issues all of the proposals submitted by the various delegations pertaining to those items.[24]

III.12. At the second session of the Conference (1974), variations on the different approaches regarding the regime to be established for straits used for international navigation continued to be presented.[25] A number of delegations reintroduced proposals made in the Sea-Bed Committee, either in their original terms or modified to take account of the views expressed by other delegations. Some States favored a regime of free transit through straits for all ships; others preferred a regime of nonsuspendable innocent passage. Despite these differences, there was general agreement that the regime should balance the right of navigation with the legitimate interests of States bordering straits. That general agreement formed a framework for future agreement on the specific regime for straits used for international navigation.

A proposal by the United Kingdom, entitled "Draft articles on the territorial sea and straits," was a major turning point in the evolution of Conference thinking on this central issue.[26] This document itself was prepared after a careful study of all proposals submitted to Sub-Committee II of the Sea-Bed Committee, particularly proposals from the so-called "straits States group," Fiji, the U.S.A. and the USSR.[27] Chapter III of the U.K. proposal combined elements of the regime of innocent passage in the territorial sea with a separate regime entitled "Passage of Straits Used for International Navigation." In explanation of that proposal, the representative of the U.K. indicated that his delegation "had endeavoured to find a middle way . . . between the interests of the international community as a whole and the legitimate concerns of the straits States."[28] This proposal, which was based on a territorial sea of 12 nautical miles, had three essential elements: (i) a new "right of transit passage" for most straits used for international navigation, incorporating the elements of the freedom of navigation and overflight between parts of the high seas; (ii) a regime of

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[24] Reproduced in IV SBC Report 1973, at 48.

[25] See, e.g., statements in the Second Committee, at the 11th meeting by Iran, para. 3, II Off. Rec. 123; Denmark, para. 6, ibid. 124; Finland, paras. 14 and 15, ibid.; and Sri Lanka, para. 29, ibid. 126; at the 12th meeting by the USSR, para. 1, ibid. 126; German Democratic Republic, paras. 7 and 9, ibid. 127; Cuba, paras. 13–14, ibid.; U.S.A., para. 16, ibid. 128; and Sweden, paras. 22–23, ibid. 129; and at the 13th meeting by Canada, para. 2, ibid. 130; Poland, paras. 15–17, ibid. 131; Morocco, para. 28, ibid. 132; and Ghana, paras. 59–63, ibid. 134.

[26] A/CONF.62/C.2/L.3 (1974), III Off. Rec. 183, 185 (U.K.).

[27] Second Committee, 3rd meeting, para. 25, II Off. Rec. 101.

[28] Second Committee, 11th meeting (1974), para. 26, II Off. Rec. 126.

nonsuspendable innocent passage in straits excluded from the rule of transit passage; and (iii) provisions seeking to assure States bordering straits[29] that their interests would be protected. In addition, passage through straits which was governed by existing treaties would remain subject to that treaty regime. The U.K. proposal attracted considerable support in the initial debates in the Second Committee.[30]

III.13. At the third session (1975), the U.K. proposal was taken as the basis for the work of an informal Private Group on Straits formed under the joint chairmanship of Fiji (Satya N. Nandan) and the United Kingdom (Harry Dudgeon).[31] This Group brought together the two major moderate approaches that had developed–those States which favored some form of free transit through straits (transit passage) and those which favored a modified form of nonsuspendable innocent passage. This informal group produced a slightly modified version of the U.K. proposal.[32]

Most of the provisions drafted by the Private Group on Straits were incorporated into the ISNT/Part II.[33] In that text, the provisions on straits used for international navigation were divided into three sections: Section 1 (General) set out general provisions on Straits; Section 2 (Transit Passage) covered the regime of transit passage; and Section 3 (Innocent Passage), consisting of one article, addressed nonsuspendable innocent passage.

In the course of the Conference some modifications were accepted and included in later negotiating texts. The basic structure of the regime set out in the ISNT/Part II was unchanged, however, and became Part III of the Convention. At the same time, several delegations supporting a regime of

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[29] This was the first use of the term "States bordering straits," subsequently adopted in the RSNT/Part II.

[30] See generally the discussion on this topic in the Second Committee, at the 11th to 15th meetings (1974), II Off. Rec. 123–42.

[31] In addition to the two cochairmen, the group consisted of representatives of Argentina, Australia, Bahrain, Bulgaria, Denmark, Ethiopia, Iceland, India, Italy, Kenya, Lebanon, Nigeria, Singapore, United Arab Emirates and Venezuela. See Volume I of this series, at 107. See also M.H. Nordquist and C. Park (eds.), *Reports of the United States Delegation to the Third United Nations Conference on the Law of the Sea*, Law of the Sea Institute Occasional Paper No. 33, at 98 (1983). See further J.N. Moore, "The regime of straits and the Third United Nations Conference on the Law of the Sea," 74 Am. J. Int'l L. 77 (1980); H. Caminos, "The Legal Régime of Straits in the 1982 United Nations Convention on the Law of the Sea," Academy of International Law, 205 *Recueil des Cours* 9 (1987–V); and 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," 60 Brit. YB Int'l L. 159, 163 (1989). Moore was Deputy Special Representative of the United States in the early part of the Conference. Nandan was leader of the Fiji delegation (and Rapporteur of the Second Committee) and Anderson was a member of the U.K. delegation at the Conference, and together they played a major role in the negotiations leading to Part III. Caminos was a Deputy Director in the Conference Secretariat during UNCLOS III.

[32] See the proposal of the Private Group on Straits (1975, mimeo.). Reproduced in IV Platzöder 194.

[33] A/CONF.62/WP.8/Part II (ISNT, 1975) , articles 34–44, IV Off. Rec. 151, 157–59 (Chairman, Second Committee).

innocent passage continued to press their proposals until the very end of the negotiating process,[34] with the result that the matter was brought to a vote.[35]

III.14. At the fourth session (1976), in the informal meetings of the Second Committee, the ISNT/Part II was examined article by article. The procedure of the "rule of silence" was followed (see para. Intro.16 above), in which silence on a proposed amendment was interpreted as a lack of support for that amendment. The amendments proposed to the articles on straits by and large attracted little support, and those articles were subjected to amendment in only a few matters of detail.

III.15. There are two further points regarding Part III. The first is the absence of a definition of "strait." The second is the use of the term "States bordering the straits" in place of "coastal States."

In the course of the negotiations at least one delegation proposed a partial definition of an international strait for inclusion in the Convention. A Canadian proposal provided that:

> An international strait is a natural passage between land formations which:
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> (a) (i) Lies within the territorial sea of one or more States at any point in its length and
>
> (ii) Joins . . .
>
> (b) Has traditionally been used for international navigation.[36]

Other delegations felt either that the meaning of the term was self-evident, or that a definition was not necessary since the articles they proposed made it clear to what waters they applied without regard to the name given to them. For example, the U.K. proposal, which, as already mentioned, became the framework on which Part III was constructed, stated:

> 3. This article applies to any strait or other stretch of water, whatever its geographical name, which:
>
> (a) is used for international navigation;
>
> (b) connects two parts of the high seas.[37]

It may also be noted that the "Brief Geographical and Hydrographical Study of Straits which Constitute Routes for International Traffic," prepared for UNCLOS I, did not include a definition, but covered bodies of water

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[34] Particularly Spain. See J.A. de Yturriaga, *Straits Used for International Navigation: A Spanish Perspective* (1990). Yturriaga was a member of the Spanish delegation at UNCLOS III.

[35] This applied in particular to amendments proposed by Spain to articles 39 and 42. See A/CONF.62/L.109 (1982), XVI Off. Rec. 223. For the voting on these amendments see 176th plenary meeting (1982), paras. 5–10, XVI Off. Rec. 132.

[36] A/CONF.62/C.2/L.83 (1974), III Off. Rec. 241 (Canada). See also the joint "Aide Memoire" of Canada, Chile and Norway (1975, mimeo.). Reproduced in IV Platzöder 223.

[37] Supra note 26, Chapter III, article 1, paragraph 3.

bearing the appellations of "straits," "mouths," "channels" and "sound."[38]

The use of the somewhat cumbersome term "States bordering the straits" in Part III reflects the clear distinction between the regime for navigation through that part of the territorial sea of a State the territory of which borders the strait, and the regime of innocent passage for navigation in other parts of the territorial sea. As originally proposed by the United Kingdom, the expression used was "strait State," which meant "any State bordering a strait to which the Chapter applies."[39] In the RSNT/Part II, the term was changed to "States bordering straits" because of difficulty encountered in other languages, particularly French (see para. 34.8(a) below).

III.16. An element of ambiguity exists in the English expression "Straits used for international navigation," although the expression is taken from the judgment of the ICJ in the *Corfu Channel* case.[40] That ambiguity does not occur in the other languages, which clarify that Part III applies to straits whenever they are being used for international navigation.

In article 37, the words "which are" appear between the words "straits" and "used for international navigation" in the English text. Those words may introduce a temporal aspect into the criterion of "used for international navigation." Such an interpretation would suggest that only those straits that are used for international navigation at the time the Convention enters into force will be governed by the regime of transit passage set out in section 2. It seems clear, however, that the words were meant to have a descriptive, not a temporal, effect. This interpretation is borne out by all the other language versions. Nevertheless, the Drafting Committee considered a suggestion to delete the phrase "which are" in the English text and *que sean* ("which may be") in the Spanish text. The Spanish change was accepted,[41] and the word *utilizados* brings the Spanish text into conformity with the other languages.

III.17. Part III is divided into three sections. Section 1 (articles 34 to 36) contains general provisions applicable to the whole Part and articulates the relationship of Part III with other provisions of the Convention. Section 2 (articles 37 to 44) is the heart of Part III. It defines the regime of "the right of transit passage," describes the waters in which that regime applies, and

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[38] A/CONF.13/6 and Add.1 (1957), UNCLOS I, I Off. Rec. 114 (prepared by Commander R.H. Kennedy, R.N.).

[39] Supra note 26, Chapter III, article 11.

[40] Supra note 6, at 28. The authoritative French text of that judgment speaks of *détroits qui servent, aux fins de la navigation internationale*. This indicates that in this context "used" is descriptive and adjectival. As has been noted: "Taking the English and French texts together, 'used' and '*servant*' can be said to be the present continuous." See Nandan and Anderson, supra note 31, at 168.

[41] See ELGDC/6 (1981, mimeo.), and DC/Part III/Article 37 (1981, mimeo.). See further A/CONF.62/L.152/Add.21 (1982, mimeo.), at 6 (on article 37).

sets out the correlative rights and duties of States bordering straits and user States whose ships and aircraft are exercising the right of transit passage. Section 3 contains a single article (article 45) which confirms the right of nonsuspendable innocent passage through straits used for international navigation to which the right of transit passage does not apply and which are not covered by article 35, subparagraph (c), or article 36.

III.18. In addition to the articles of Part III, Part XII (Protection and preservation of the marine environment), article 233 (safeguards with respect to straits used for international navigation), completes the statement of the law governing this matter, with a cross reference to article 42. The settlement of disputes is governed by Part XV, and article 297 specifically lays down that disputes concerning the interpretation or application of the Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction shall be subject to the procedures entailing a binding decision, when it is alleged that a coastal State has acted in contravention of the provisions of the Convention in regard to the freedoms and rights of navigation and overflight. Article 297, paragraph 1, retains the complete protection of the compulsory procedures contained in Part XV, section 2, with regard to the basic freedoms and rights at sea (see Volume V, at 105, para. 297.19).

III.19. Within the framework of the 1982 Convention, Part III, together with the cited provisions of Part XII and Part XV, is not the sole point of contact in the Convention with straits used for international navigation. Issues concerning straits arose toward the end of the Conference in connection with Part XVII (final provisions, articles 305 to 320). State practice since UNCLOS III indicates that, provided the necessary conditions are met, article 311 (on relations of this Convention to other conventions and international agreements), can bring new treaties regarding passage through straits within the scope of the Convention.[42]

III.20. Since the commencement of UNCLOS III, several straits used for international navigation have become regulated by international treaties. Straits coming within this category include, e.g., the Torres Strait,[43] the Strait of Tiran,[44] the Strait of Dover,[45] the Straits of Magellan and the

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[42] Cf. *Digest of United States Practice in International Law 1980*, at 623 (1986). The provisions of the law regarding treaties and third States could also be relevant in this context.

[43] Treaty between the Independent State of Papua New Guinea and Australia concerning Sovereignty and Maritime Boundaries in the Area between the two Countries, including the Area Known as Torres Strait, and Related Matters, 18 December 1978, UNTS Registration No. 24238; Australian Treaty Series No. 4 (1985); 18 ILM 291 (1979).

[44] Treaty of Peace between the Arab Republic of Egypt and the State of Israel, 26 March 1979, 1136 UNTS 100, and 1138 UNTS 59. Article V, paragraph 2, provides that:

> The Parties consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight.

Beagle Channel,[46] the Strait of Malacca,[47] and the straits between Venezuela and the Netherlands Antilles,[48] and the straits between Venezuela and Trinidad and Tobago.[49]

III.21. Part III applies to all straits used for international navigation, both where the coasts belong to two or more States, and where the coasts belong to a single State. In the former case, where the strait is less than 24 nautical miles in width, any part of the strait which is not part of the territorial sea will be subject to the regime of navigation on the high seas under articles 58 and 87. Where such a strait is more than 24 nautical miles in width, a route through the high seas or exclusive economic zone will exist in that strait. If either State bordering the strait has proclaimed itself to be an archipelagic State within the meaning of Part IV, waters within the archipelagic baselines, including straits in those waters, come within the scope of Part IV. In that regard, under article 54, articles 39, 40, 42 and 44 apply *mutatis mutandis* to archipe-lagic sea-lanes passage.

Upon ratifying the Convention, Egypt noted that the provisions of the 1979 Peace Treaty regarding the Strait of Tiran and the Gulf of Aqaba "come within the general régime of waters forming straits referred to in Part III of the [1982] Convention." See 3 *Law of the Sea Bulletin* 13, 14 (March 1984). Israel, in a note verbale of 9 December 1984, noted that under the 1979 Treaty of Peace "the Strait of Tiran and the Gulf of Aqaba are considered . . . to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight." See 4 *Law of the Sea Bulletin* 23 (February 1985).

[45] Joint Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic, 2 November 1988, on the occasion of the signature of the Agreement relating to the delimitation of the territorial sea in the Strait of Dover, UNTS Registration No. 26858; France No. 1 (1989), Cm. 557; 92 RGDIP 1043 (1988); 14 *Law of the Sea Bulletin* 14 (December 1988). And see 59 Brit. YB Int'l L. 524 (1988). This Declaration notes that

> the two Governments recognize rights of unimpeded transit passage for merchant vessels, state vessels and, in particular, warships . . . , as well as the right of overflight, in the Straits of Dover. . . . such passage will be exercised in a continuous and expeditious manner.

[46] Treaty of Peace and Friendship, 29 November 1984, between Argentina and Chile, Annex No. 2, article 4, 1399 UNTS (Registration No. 23392); 24 ILM 11 (1984); 4 *Law of the Sea Bulletin* 50, 63 (February 1985). This agreement is to be read in light of article 5 of the 1881 Boundary Treaty between the Argentine Republic and Chile, 159 CTS 45. See further para. 35.7(c) below.

[47] See the statements by Malaysia, Indonesia, Singapore, France, United Kingdom, United States of America, Japan, Australia and Federal Republic of Germany relating to article 233 of the draft Convention on the law of the sea in its application to the Strait of Malacca and Singapore, A/CONF.62/L.145 and Adds.1–8 (1982), XVI Off. Rec. 250–53. And see Volume IV, at 388, para. 233.8.

[48] Delimitation Treaty between the Kingdom of the Netherlands and the Republic of Venezuela, 31 March 1978, 1140 UNTS 311; *Tractatenblad van het Koninkrijk der Nederlanden*, No. 61 (1978); Gaceta Oficial de la República de Venezuela, No. 2291, Extraordinario, 26 July 1978. And see A.H.A. Soons, "International and National Regulations Concerning Environment Protection," in Q.B. Richardson and J. Sybesma (eds.), *Milieurecht Congress* 71, 88 (1991).

[49] See Agreement between the Republic of Trinidad and Tobago and the Republic of Venezuela on the Delimitation of Marine and Submarine Areas, 18 April 1990 (especially Article VI); 19 *Law of the Sea Bulletin* 22 (October 1991).

III.22. There is a conceptual interlocking between the provisions on innocent passage (Part II, articles 17 to 32), transit passage (Part III, articles 34 to 44) and archipelagic sea-lanes passage (Part IV, article 53), although all three are distinct legal regimes. Retention of similar phrases in each Part, or changes in one place or another, were often deliberate, and these were examined in the Drafting Committee. This is especially so as regards sea lanes and traffic separation schemes and related navigational aspects. Although identical terms are used in several places, their application will be determined according to the circumstances in which the terms are to be applied, having regard to all relevant factors.