

THE LEGAL REGIME OF STRAITS USED FOR INTERNATIONAL NAVIGATION

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1. Introduction

- A 'strait' is a narrow stretch of sea connecting two extensive areas of sea (or a narrow passage connecting two sections of the high seas).
- Almost by definition, therefore, straits are of crucial strategic and commercial importance.
- The principal maritime powers made it clear , in the course of negotiations in UNCLOS III, that, for them, satisfactory provision for passage through straits was a *sine qua non* of a new convention on the law of the sea.

Introduction [Cont.]

- Not every geographical strait presents a problem.
- Problems arose when:
 - Breadth of the TS - expanded from 3 to 12 miles and thus most of the international Straits have become part of the TS of Straits states; disappearance of high seas corridors.
- Straits States wanted to stick to the regime of innocent passage .
- But the regime of '*innocent passage*' was not acceptable to maritime States, which claimed for '*freedom of navigation*'.
- This is the problem of what have come to be known as straits used for international navigation.
- Regime of '*transit passage*': the result of negotiations and a compromise formula.

2. The state of the law prior to UNCLOS III

The Corfu Channel case

The key passage in the Court's judgment is as follows:

- 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 war ships through straits used for international navigation between the 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.

UNCLOS I and the Geneva Convention

Article 16 (4) of the Geneva convention on the Territorial sea and Contiguous Zone reads as follows:

“There shall be no suspension of 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.”

UNCLOS I and the Geneva Convention [Cont.]

- Article 16 (4) extends to straits between the high seas and the territorial sea of a foreign State.
- This extension was strongly opposed by Indonesia and Saudi Arabia because it would raise the *Straits of Tiran* to the “international strait’ status.
- Unhappiness over this issue was indicated.
- Despite the efforts of UNCLOS I, there was still a measure of uncertainty.

3. The negotiations during the UNCLOS III: Freedom of passage v. Innocent passage

- The negotiations during the UNCLOS III reflected the rivalry between two competing interest groups:
 - (1) the maritime powers wishing to freely navigate through the strait; and
 - (2) Straits States who were concerned to protect its security and other interests in their territorial waters.

3.1 The interests of the maritime powers: freedom of passage/ free transit

- The main problem: there were some 116 straits which would become entirely territorial sea straits if a 12-mile breadth were to be generally accepted, whereas, at that time, there existed in these straits a central belt of high seas in which the freedom of the high seas might be enjoyed.
- The idea of freedom of passage/ free transit is primarily based on the freedom of navigation, one of the traditional freedoms of the high seas.
- All ships are free to navigate on the high seas (Art. 87).
- The flag State has an exclusive jurisdiction over ships flying their flags on the high seas (Art. 92; *Lotus* case).

3.2 The interests of coastal States: innocent passage

- The coastal States were firm in their opposition to anything more than 'innocent passage' through straits.
- Example: draft articles proposed by the following eight States: Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain and Yemen (the Eight Power draft).
- Regarding the Straits of Malacca and Singapore, in the Joint Statement dated 16 November 1971, Indonesia and Malaysia agreed that the Straits of Malacca and Singapore are not international straits, while fully recognizing their use for international shipping in accordance with the principle of innocent passage.
- Singapore simply took note of their position.

Malaysia's stand in UNCLOS III in respect of the Straits of Malacca and Singapore

- However, during UNCLOS III, the three States reached an understanding with the principal user States, which allowed them to accept the application of the UN Convention to the straits, while safeguarding their powers of enforcement.
- (See Letter dated 28 April 1982 from the Representative of Malaysia to the President of the Conference A/CONF. 62/L. 145).

3.3 Transit passage: the compromise formula

- After long and arduous negotiations, the two competing interest groups finally reached agreement to adopt the *compromise formula* of the ‘transit passage’ regime.
- This agreement on transit passage is an important component of the overall “package” of the new Convention.
- Acceptance of this regime made it possible for the Conference to reach agreement on 12 nautical miles as a maximum breadth of the territorial sea.

4. The regime of straits under the UN Convention on the Law of the Sea 1982

- UNCLOS III finally adopted the United Nations Convention on the Law of the Sea on 30 April 1982.
- Part III of the Convention (Articles 34 to 45) deals with “Straits Used for International Navigation.”

4.1 Different regimes for different straits: the overall idea of the UNCLOS 1982

Under Part III of the UNCLOS, the regime applicable to any particular strait depends upon the category into which it falls.

The four categories of straits

1. Straits governed by long-standing special conventions;
2. Straits with central corridors of high seas or EEZ;
3. Straits subject to the regime of innocent passage; and
4. Straits subject to the regime of transit passage.

(1) Straits governed by long-standing special conventions

- Article 35 (c): The straits regime laid down in Part III of the Convention does 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.”
- A good example is the Turkish Straits the *Bosphorus and Dardanelles*, passage through which is regulated by the Montreux Convention of 1936.

(2) Straits with central corridors of high seas or EEZ

- Article 36: Part III does not apply to straits through which there is a high seas route, or a route through an EEZ, of similar convenience with respect to its navigational and hydrographical characteristics.
- This situation will normally be possible in a strait wider than 24 miles.
- The general (non-straits) regime of innocent passage will apply to those parts of the strait which lie within the territorial sea limits and the regime of freedom of navigation through the high seas or the EEZ will apply in the middle section through the strait.
- The so-called Florida Strait between USA and Cuba would be an example.

(3) Straits subject to the regime of innocent passage

- Under the UNCLOS, the two special types of straits are subject to the regime of *innocent passage*.
- First, under Article 38 (1), a strait formed by an island of a State bordering the strait and its mainland, where there exists seaward of the island a route of similar convenience through high seas or EEZ, is entirely excluded from the 'transit passage' regime.
- This is known as *Messina exception* because the Straits of Messina between Italy and Sicily illustrates this very well.

Straits of Messina (Sicily)



- Secondly, under Article 45(1) (b), the regime of innocent passage applies in straits connecting a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State. A good example would be the *Straits of Tiran*.
- In respect of both categories of straits, there shall be *no suspension of innocent passage* through them (non-suspendable innocent passage) (Article 45 (2)).

Strait of Tiran



(4) Straits subject to the regime of transit passage

- Article 37: The regime of transit passage applies to straits which are used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ.
- For the application of the regime of transit passage, two conditions must be met: geographical and functional.
- The geographical condition is that the strait connects one part of the high seas or an EEZ and another part of the high seas or an EEZ.
- The functional condition is that the strait is 'used for international navigation'.
- These two criteria are taken (and adapted) from the judgment of the ICJ in the *Corfu Channel* case.

Are Straits of Malacca and Singapore straits used for international navigation?

- Do the Straits of Malacca and Singapore satisfy these criteria?

Yes.

Why?

- (a) Because they connect one part of the high seas, the Indian Ocean, with another part of the high seas, the South China Sea. And
 - (b) because these Straits have been used for hundreds of years for international navigation.
- As the Straits of Malacca and Singapore are straits used for international navigation as defined under Article 37 of the Convention, they are subject to the transit passage regime.

Straits of Malacca and Singapore



4.2 What is transit passage?

- Transit passage is defined by Article 38(2) as follows:

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.

The essence of transit passage

- The essence of transit passage is reflected in the phrase '*freedom of navigation* ... **solely** for the purpose of continuous and expeditious transit.'
- Because of the phrase "freedom of navigation," one might think that the passing ships can freely do anything they like.
- The exercise of freedom of navigation is for one purpose only – that of continuous and expeditious transit.
- Since it is a transit through an area subject to the sovereignty of the coastal State, this freedom of navigation has to be subject to a number of limiting rules designed to protect the interests of the coastal State and promote safety of navigation.

Sovereignty of the strait State and the regime of transit passage

Article 34(1):

The regime of passage through straits used for international navigation...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 airspace, bed and subsoil.

- The strait regime is without prejudice to the sovereignty or jurisdiction of strait States with respect to activities not related to passage.

Article 34(2): “The sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law.”

This paragraph 2 sets out the legal limit to sovereignty of the coastal State.

Transit passage: somewhere between freedom of passage and innocent passage.

- The foreign ships, when exercising transit passage, are not as free as when they are exercising freedoms of the high seas.
- On the other hand, they are freer than when they are exercising the right of innocent passage in the territorial sea of a coastal state.
- This new regime of “transit passage”, therefore, lies somewhere (or half-way) between “freedom of passage” and “innocent passage.”

4.3 Duties of ships and aircraft during transit passage

Under Article 39(1), while exercising the right of transit passage, ships and aircraft are required to:

- (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.

Article 39(2): Ships in transit are required to:

- (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.
- The effect of this provision is to incorporate by reference all the 'generally accepted' international conventions: SOLAS conventions and the IMO pollution conventions would be applicable to ships in the strait.

Article 39(3): Aircraft in transit are required to:

- (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.

4.4 Sea lanes and traffic separation schemes

Under Article 41, the coastal States may designate sea lanes and traffic separation schemes in the strait. But two requirements must be complied with in doing so:

- (a) The sea lanes and traffic separation schemes must conform to generally accepted international regulations”; and
- (b) They must first be submitted to and adopted by the International Maritime Organization (IMO).

In the case of the Straits of Malacca and Singapore:

(a) The three Straits States, Indonesia, Malaysia and Singapore have cooperated with one another, consulted the major user States, and submitted their proposals to the IMO.

(b) IMO has adopted their proposals for deep draft vessels and VLCCs to maintain a minimum, under-keel clearance of 3,5 metres, to prescribe traffic separation schemes in 3 critical areas and to designate a deep water route in the Straits of Singapore for ships whose draught exceeds 15 metres.

4.5 Laws and Regulations concerning transit passage

Under Article 42(1), the strait State may make laws and regulations 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.

The issue of enforcement

- Part III of the Convention is silent on the question of enforcement of these laws against such ships.
- One possibility is that the general territorial sea rules apply (by virtue of Article 34), under which enforcement *should* only be exercised where the good order of the territorial sea or coastal State is disturbed or competent authorities of the flag State request assistance.
- On the other hand, there is one provision in Part XII (Marine Environment): Article 233, expressly allowing the strait States the exercise of enforcement jurisdiction.

Article 233

Safeguards with respect to straits used for international navigation

Nothing in sections 5, 6 and 7 affects the legal regime of straits used for international navigation. However, if a foreign ship other than those referred to in section 10 has committed a violation of the laws and regulations referred to in article 42, paragraph 1(a) and (b), causing or threatening major damage to the marine environment of the straits, the States bordering the straits may take appropriate enforcement measures...

Statement relating to Article 233 of the convention on the law of the sea in its application to the Straits of Malacca and Singapore [29-April 1982]

1. Laws and regulations enacted by States bordering the Straits under article 42, 1 (a) of the convention, refer to laws and regulations relating to traffic separation schemes, including the determination of under keel clearance for the Straits provided in article 41.
2. Accordingly, a violation of the provision of resolution A.375(X),a by the IMO adopted on 14 November 1977, whereby the vessels referred to therein shall allow for an under keel clearance of at least 3.5 metres during passage through the Straits of Malacca and Singapore, shall be deemed, in view of the peculiar geographic and traffic conditions of the Straits, to be a violation within the meaning of article 233. The States bordering the Straits may take appropriate enforcement measures, as provided

Statement relating to Article 233 [Cont.]

for in article 233. Such measures may include preventing a vessel violating the required under keel clearance from proceeding. Such action shall not constitute denying, hampering, impairing or suspending the right of transit passage in breach of articles 42, paragraph 2 or 44 of the draft convention.

3. States bordering the Straits may take appropriate enforcement measures in accordance with article 233, against vessels violating the laws and regulations referred to in article 42, paragraph 1 (a) and (6) causing or threatening major damage to the marine environment of the Straits.

4.6 Duties of the strait State

Article 42(2):

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

Article 44:

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.

4.7 Cooperation between straits States and user States

Article 43

User States and States bordering a strait should by agreement cooperate:

- (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.

Cooperation between straits States and user States [Cont.]

- The strait States perceive themselves as bearing the economic burdens of installing and maintaining navigational and safety aids, and enduring pollution, without receiving any corresponding benefit.
- They feel that the user States, which can benefit enormously by using the straits should share this economic burden with strait States.
- This article is not mandatory. It contains no mechanisms to compel such cooperation among User States and Straits States.
- It is, however, in the self-interests of both the User States and Straits States to cooperate.

4.8 Innocent passage and transit passage distinguished

- (1) Aircraft: There is no right of innocent passage for air craft but the right of transit passage is enjoyed by air craft as well as ships.
- (2) Submarines: Although submarines in innocent passage are required to navigate on the surface and show their flags, there is no such requirement for submarines in transit passage.
- (3) Nuclear powered ships: Innocent passage – (Article 23) Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall... carry documents and observe special precautionary measures established for such ships by international agreements. Transit passage – no special provision comparable to that.

Innocent passage and transit passage distinguished

[Cont.]

- (4) Conditions relating to Sea lanes and traffic separation schemes: Innocent passage – the coastal State is required *simply to 'take into account'* the recommendations of competent international organizations. Transit passage – the coastal State may designate and prescribe *only after its proposals have been adopted* by the competent international organization.
- (5) The conditions of transit passage (Article 39) and the subjects on which the coastal State may make laws and regulations (Article 42) are less numerous than those specified for innocent passage.
- (6) Cooperation between strait States and user States (article 43): There is no corresponding provision in relation to the regime of innocent passage.

5. Conclusion

- The primary legal regime for straits used for international navigation is 'transit passage'.
- Transit passage is the exercise of freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait.
- It is a compromise formula and is somewhere (half-way) between 'freedom of passage. and 'innocent passage'.
- Despite the considerable advances the development of the transit passage regime contribute to the law of the sea, a number of practical problems remain; one example is the issue of 'enforcement'.
- These problems can be resolved only by the tripartite cooperation among straits States, user States and the competent international organization (IMO).

THANK YOU

FOR YOUR KIND ATTENTION