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International Straits and Navigational Freedoms

by

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It is good to see so many old LOS hands both on the panels and in the audience. My remarks today cause me once again to think back to the seventies and the long hours and memorable moments we all spent crafting the 1982 United Nations Convention on the Law of the Sea (hereafter "LOS Convention"). We all knew we couldn't spell out every conceivable permutation and combination of ocean space problems. What we tried to do -- what we did -- was carve out a strong framework, with basic rules that apply across the board, to solve the specifics of any given issue. One such current issue here in Europe is the question of bridges across straits used for international navigation, particularly the Danish proposal for a bridge over the Great Belt.

As you may know, Finland filed an application instituting proceedings before the International Court of Justice on May 17, 1991 in the Case entitled "Passage through the Great Belt (Finland v. Denmark)." Finland complains that the proposed bridge across the Great Belt (the only deep draught route through the Straits connecting the Baltic with the North Sea) would be a fixed span with 65 metres' clearance, preventing Finnish drilling rigs from being towed in their vertical position under the bridge and thus in Finland's view contrary to international law. Denmark filed its Memorial with the ICJ December 31, 1991. Finland filed its Counter-Memorial by the June 1, 1992 deadline.

The United States is not a party to the ICJ case, but my government feels strongly that the basic rules codified in the LOS Convention control. Although the LOS Convention straits articles do not per se address the issue of bridges across straits, the transit passage articles would clearly prohibit the unfettered, unilateral construction of a bridge across a strait used for international navigation (hereafter, an "international strait").

My paper is not confined merely to the issue of bridges (although it does attempt to provide the requisite legal analysis for determining how bridges should "legally" be built across international straits). Although LOS old timers were, as Dean Acheson might have said, "present at the creation" and have a sound knowledge of the lingua franca of the Convention's navigational terms of art, I have observed there now is a whole new generation of lawyers and officials in the US Government, as well as in foreign ministries, who may not appreciate the vital significance of the technical terms in the navigational articles -- and the role those navigation articles play -- in precisely regulating the various types of navigation regimes and the six categories of international straits recognized in the Convention.

Some elements of the United States' position regarding the straits articles have been made in US Delegation statements to the Conference during the Conference years as well as in remarks contained in US official documents since then. I should add that

we operate our freedom of navigation program in complete conformance with international law as reflected in the navigation articles of the 1982 LOS Convention. I believe it well worth our while here to recap the official United States position on the LOS Convention's navigational articles. Please note I say "official" for these remarks, for once, do not come with the usual caveat that they are my personal views only and do not necessarily represent the views of the United States--they do.

My discussion is organized into five sections. The first deals with the very practical problems that bridge building poses for international maritime navigation and commerce. The second section identifies and explains the LOS Convention's navigational terms of art, with primary emphasis on their relationship and relevance to transit passage. It also comprehensively sets forth the correlative duties and obligations of both user and coastal States. The third section sets forth the six categories of international straits the Convention recognizes and the important juridical distinctions involved. The fourth section examines in more detail the overlay that exists between the regime applying to Article 38 straits ("normal" straits) and the regime in Article 35(c) straits (straits governed in whole or in part by long-standing conventions in force). The fifth section presents an international approach the United States suggests for appraising future proposals for the construction of bridges over international straits, the reasons why we believe it is justified, and the reasons why we believe it protects navigation

interests while equitably balancing the legitimate interests of both coastal and user States, thus furthering the central principle underlying the navigation articles of the LOS Convention.

I. BRIDGES POSE PRACTICAL PROBLEMS IN INTERNATIONAL STRAITS

The problem a bridge poses is obvious--it can impede, if not stop, navigation. If it is a non-fixed span, such as a drawbridge, and the width of the non-fixed span is of sufficient width, the problem is greatly reduced, assuming, of course, that the main channel is under the non-fixed span and it is of sufficient depth to allow deep draught vessels to pass. In important straits of restricted width and congested traffic, a single movable span would also cause problems if its width were not sufficient to allow sufficiently broad traffic separation schemes for traffic to pass in both directions. Even if these criteria are satisfied, problems with the strait's hydrographic characteristics, such as severe tides and currents, and perhaps even habitually occurring strong winds, may effectively negate an otherwise acceptable design.

Another issue which is squarely joined in the Danish Bridge case currently before the Court is how "high is high enough," i.e. how much vertical clearance must there be under a fixed span in the main channel. Should it be of sufficient height to allow all existing ships to pass through, or enough to permit all ships presently under construction or planned for construction, or even

more than that so as to allow for as yet uncontemplated designs to pass through? As was the case in balancing user and coastal State interests in formulating the Convention, the United States believes the correct response is between the two extremes. An acceptable fixed span bridge should clearly accommodate ship designs which are reasonably foreseeable.

Part and parcel of this question is what constitutes a "ship," again an issue which clearly will have to be addressed on the merits. It is the view of the United States that a ship in this context includes any sea-going vessel which is designed for and is capable of self-propulsion and such propulsion is incident to the primary purpose for which it is normally used. Thus a drilling rig or other mobile unit which is self-propelled and such means of propulsion is normally used for transporting it and positioning it in place for exploitation would be a ship. A corollary of this view, of course, is that an object being towed would enjoy the same rights of navigation provided it did not exceed the same height criterion.

II. CONVENTION NAVIGATIONAL REGIMES AND TERMS OF ART WITH EMPHASIS ON THEIR RELEVANCE TO TRANSIT PASSAGE AND APPLICABLE U.S. INTERPRETATIONS

Central to any meaningful understanding of the navigation rights and correlative duties of user and straits States is an appreciation of the rationale behind the terms of art and definitions in the navigation provisions of the LOS Convention,

which in the US view reflect customary law. These terms and definitions are not dead verbiage. They must be grasped and applied carefully. They enable the practitioner to trace logically through complex factual situations which arise, such as the Great Belt. The LOS Convention provides excellent analytical tools to come up with a very logical, persuasive conclusion. I shall next discuss various words of art, necessary facts and official United States interpretive positions on which analysis of the various straits regimes depend.

a. Genesis of the Regime of Transit Passage

The regime of transit passage in straits used for international navigation arose from: (a) the emergence of 12 mile territorial sea claims; (b) the distinction between the right of innocent passage and high seas freedom of navigation; (c) geography; and (d) reality.

Even before the Third UN Law of the Sea Conference first convened in the early seventies, the critical importance and unique nature of international straits was recognized. These choke points form the lifeline between high seas areas. In order for the high seas freedoms of navigation and overflight to be preserved in international straits which would be overlapped by 12 mile territorial sea claims (displacing the earlier recognized 3 mile territorial sea norm), the navigational regime in international straits would have to share similar basic characteristics with these high seas freedoms. General support

existed in the Conference for a 12 mile territorial sea. Such support depended, however, on ensuring that in international straits less than 24 miles wide at their narrowest point, an adequate navigation regime be preserved to ensure essential elements of the right of freedom of navigation and overflight. The lesser navigational right of non-suspendable innocent passage was simply not enough.

Reality, in terms of fundamental international commerce and security interests, required open access through international straits. Regardless of the breadth of the strait, whether 5 or 24 miles, certain freedoms had to apply, such as continuous and expeditious transit in, under, and over the strait and its approaches. Any codification of the law of the sea had to reflect this state practice and political and military reality.

Before we proceed further, it is important to underscore that the regime of transit passage is crucial to the maintenance of world peace and order. By relieving littoral states of the political burdens associated with a role as gate keepers, the transit passage rules minimize the possibility of straits states being drawn into conflicts.

b. Innocent Passage

A separate concept, different from the right of transit passage through international straits, is innocent passage through a coastal state's territorial sea.

The customary international law definition of innocent

passage prevailing before the LOS Convention was that contained in Article 14 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.

Article 14(2) provides that "passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters or of making for the high seas from internal waters." Article 14(4) provides that "[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State." Other than a provision that submarines were required to navigate on the surface and to show their flag (Article 14(6)) and one relating to fishing vessels (Article 14(5)), what conduct "is not prejudicial to the peace, good order or security of the coastal State" was nowhere defined, thereby constituting a fundamental definitional lacuna. The important correlative restrictions on the coastal State in the territorial sea were that it must not hamper innocent passage through the territorial sea (Article 15(1)) and that there would be "no suspension of the innocent passage of foreign ships through straits which are used for international navigation." A final important geographic caveat (Article 5(2)) provided that "[w]here the establishment of a straight baseline in accordance with Article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage...shall exist in those waters." This was retained in the LOS Convention.

To my mind, the most significant change in the territorial sea regime is the exhaustive elaboration in LOS Convention Article 19 of what constitutes non-innocent passage and in Article 21 of what laws and regulations relating to innocent passage the coastal State can enact and enforce. Although the ILC prior to the 1958 Convention recommended a list of coastal State laws and regulations similar to those contained in Article 21 of the LOS Convention, it was never incorporated into the 1958 Convention.

It is the United States' view that the enumerations in Articles 19 and 21 are all-inclusive, i.e. a ship may engage in any activity while engaged in innocent passage if it is not prejudicial or proscribed in Article 19(2), and a coastal State can only enact those laws and regulations which are contained in Article 21.

Perhaps the most important factor to be noted in this connection is the unwavering position of the United States and other major maritime powers that Article 21 does not permit a coastal State to require prior permission from, or notification to, a coastal State in order to exercise the right of innocent passage. A number of developing coastal States maintain that although the Convention is silent on this point, earlier customary international law permitted a coastal State to require prior notification. They thus believe that this competence still exists. This is incorrect. The travaux preparatoires of the Convention unequivocally indicates that such is not the case.

During the Sea-Bed Committee (1970-73) discussions which were intended to produce a draft convention text, many developing States prepared amendments to the predecessor of Article 21(1) which would recognize such a coastal State right. The effort reached a climax during the final sessions of the Conference in 1980-82, and included the so-called Seven Power Proposal (Argentina, China, Ecuador, Peru, Madagascar, Pakistan, and the Philippines), which was introduced in both the ninth and eleventh sessions, and subsequently styled the Twenty Power Proposal, having gained additional developing State sponsors. A Twenty-Eight Power Proposal attempted to secure the same objective by adding "security" to Article 21(h), which enumerates the competences the coastal State can enforce in its territorial sea. The process culminated in a statement by the President of the Conference in Plenary that the sponsors of the amendment at his request had agreed not to press it to a vote. Although the erstwhile sponsors attempted to accomplish the same objective via declarations during the signing session, such declarations are ultra vires in that Article 310 of the LOS Convention prohibits declarations which exclude or modify the legal effect of provisions of the LOS Convention.

Lastly in this regard, if there is any doubt as to the law existing prior to 1982, the International Court of Justice, in the 1949 Corfu Channel Case, clearly stated that there is no right for a coastal State to prohibit innocent passage in time of peace, nor any right to subject the exercise of the right of

innocent passage to obtaining previous authorization from the straits State.

Two final points should be noted under the innocent passage regime. Article 23 of the 1958 Convention and Article 30 of the LOS Convention provide that "if any warship does not comply with the laws and regulations of the coastal State concerning passage in the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately." Second, I believe a useful document which illustrates the interpretation given to the innocent passage regime is the September 23, 1989 Joint Statement by the United States and the former Soviet Union on the Uniform Interpretation of the Rules of International Law Governing Innocent Passage. Since it sets forth the positions of two major maritime powers, I find it highly persuasive evidence and have included it at the end of this paper.

c. Non-Suspendable Innocent Passage.

Under Article 16(4) of the 1958 Convention, non-suspendable innocent passage applied to ships through straits used for international navigation between one part of the high seas and another part of the high seas or territorial sea of a foreign State. It was important because it recognized that in straits overlapped by opposite three mile wide territorial seas, the international community had unquestionable rights of navigation not subject to interference by the coastal nation. These rights

have evolved into a regime guaranteeing transit in, under, and over international straits codified as "transit passage" in the LOS Convention. The more limited regime of non-suspendable innocent passage is now applicable to international straits governed by Article 38(1) of the LOS Convention (the so-called "Messina Exception") and Article 45(1)(b) (the so-called "dead end strait exception").

The regime of non-suspendable innocent passage under current customary law of the sea is extremely limited in application. It has in almost all cases been superseded by the transit passage regime applying to straits connecting one part of the high seas or an exclusive economic zone with another part of the high seas or an exclusive economic zone. The dead end strait exception is only applicable in those few geographic instances in which high seas or exclusive economic zone areas connect with a territorial seas area of one state by means of a strait bordered by one or more other states. Without the right of non-suspendable innocent passage, the state at the end of the cul-de-sac would effectively be "landlocked" with a territorial sea leading nowhere.

The law reflected in the LOS Convention, with its elaboration of what constitutes innocent passage, its statement of when non-suspendable innocent passage applies, and its precision as to straits used for international navigation, is a great improvement over the status quo ante. Had it existed in 1946, it would have cleared up any confusion regarding navigational rights which led to the Corfu Channel Case in 1949.

The Corfu Channel, it will be remembered, is an example of a "Messina Exception" strait in which non-suspendable innocent passage applies. The legitimacy of the actions of the Royal Navy in steaming through the Corfu Channel on October 22, 1946, would not have been open to question. Albania would not have been able to maintain that the Corfu Channel was not a strait used for international navigation on the grounds that it was only a route of secondary importance and that it was not a necessary route between two parts of the high seas.

Articles 34 and 38 would have provided ready answers, but in 1949 it required the International Court of Justice to state clearly that the Corfu Channel was used for international navigation and that it was additionally a useful route for international maritime traffic. The inspiration for Article 38(1) and Article 45(1)(a) is directly attributable to the 1949 Judgment.

d. Transit Passage

One of the two most important achievements of the drafters of the LOS Convention was the codification of the transit passage regime under Articles 37-44. The regime is applicable in straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. The right of transit passage, unlike non-suspendable innocent passage, includes the right of overflight and submerged transit.

Following are some important United States interpretative positions applicable to the transit passage regime. First, the language referring to "straits which are used for international navigation" signifies all straits which are used or which may be used for navigation, i.e. straits which are capable of being used are included. This interpretation is not based solely on geography; prospective navigational use must be based on need, e.g., new commercial trade routes superseding the old, or a former trade route no longer suitable due to a change in tides or currents, environmental problems, change in depth, etc. Essentially, we place less emphasis on historical use and look instead to the susceptibility of the strait to international navigation.

Second, it is the United States' position that the right of transit passage applies not just to the waters of the straits themselves but to all normally used approaches to the straits. It would make no sense at all to have the right of overflight, for example, apply only within the cartographers' historical delineation of a certain strait, but not apply to restrictive geographical areas leading into/out of the strait, thereby effectively preventing exercise of the right of overflight.

It would defy navigational safety to require ships or aircraft to converge at the hypothetical "entrance" to the strait. It would also effectively deny many aircraft the right of transit passage if the pilot had to zigzag around the territorial seas of rocks and islands during the approaches to a

strait. For transit passage to have meaning, open over-water access through the approaches must be included.

Third, when the right of transit passage applies, it applies throughout the strait. The width of the transit corridor, in effect, is shore to shore (this is of course subject to any IMO-approved traffic separation scheme that may be in place).

It is perfectly legitimate for a strait state to avoid this shore-to-shore result by limiting its territorial sea claim. Japan, for example, has chosen to limit its territorial sea claim in five straits, thus creating a high seas corridor of similar convenience down the middle of those straits. In such a case, innocent passage applies within the territorial sea areas and high seas' freedom of navigation applies throughout the corridors. This is so because Article 36 provides that Part III does not apply when a high seas corridor exists through the strait: "... the other relevant Parts of this Convention, including the provisions regarding the freedom of navigation and overflight, apply."

The foregoing is what I would call the interesting "hard law" scenario in which Article 36 applies. Of course Article 36 was intended to apply in most instances to straits wider than 24 miles. Article 36 provides that "this part [straits used for international navigation] does not apply to a strait used for international navigation if there exists through the high seas or through an exclusive economic zone a route of similar convenience with respect to navigational and hydrographical characteristics;

in such routes, the other relevant parts of this Convention, including the provisions regarding the freedoms of navigation and overflight, apply."

Given the comparative complexity of the situations the "hard law" scenario of Article 36 envisages, it is useful to illustrate the various hypotheticals.

Consider an international strait eighteen miles wide with a different straits State on each side. State A extends its territorial sea to twelve miles; State B remains at three miles, thus leaving a high seas corridor three miles wide. In this instance innocent passage applies in both territorial seas as Article 36 is correctly invoked so as to make freedom of navigation apply only in the high seas corridor if it is a route of similar convenience. This is to a degree inequitable for State B, since State A gains full benefit from State B's restraint. However, if State B extends its territorial sea to nine miles (presumably it would force State A to roll back its claim to the equidistance line, or nine miles), State B would force State A by its action to have transit passage apply in both States' territorial seas as no high seas route of similar convenience would then exist. If both State A and State B extend to seven miles, however, innocent passage would apply in each territorial sea with freedom of navigation applying in the high seas corridor beyond.

Fourth, it is the unequivocal United States' position that transit passage is customary international law which the

provisions of the LOS Convention reflect. This is independent of the question whether or not the 1982 Convention is in force and whether or not States signatory to it have ratified or non-signatories have acceded to it. The fact that the vast majority of States today claim a twelve nautical mile wide territorial sea and that the majority of coastal States claim exclusive economic zones, concepts both not recognized (indeed, the latter not even conceived) prior to the 1982 Convention, clearly reflects the validity of this position.

Fifth, and in parallel vein to the all-inclusive list of the user/coastal States rights/duties under Article 19 and 21 of the innocent passage regime, Article 42 is an all-inclusive list of the laws and regulations that straits States may adopt relating to transit passage.

III. THE SIX CATEGORIES OF INTERNATIONAL STRAITS

I shall now discuss the different categories of international straits provided for in the LOS Convention, for the regimes differ to some degree both in content and in area of application depending on the nature of the strait involved. The categories are: (1) the normal international strait connecting one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone, as provided under Article 37 and overlapped by opposite territorial seas; (2) the Article 36 strait in which a route through the high seas or exclusive economic zone of similar convenience with respect to

navigational and hydrographic characteristics exists; (3) the Article 38(1) strait, the so-called "Messina Exception" strait; (4) the Article 45(1)(b) strait, the so-called "dead end strait exception" strait; (5) international straits which occur within archipelagic waters of archipelagic States as provided for in Articles 46-54; and (6) the Article 35(c) strait in which passage is regulated by long-standing international conventions in force, which is discussed separately in Part IV of this paper.

(1) The "Normal" Strait Used for International Navigation

Having discussed at length the five official United States' interpretative positions on transit passage, I shall note other points in the regime important to United States interests.

The "normal" international strait is from a geographic vantage the most frequently occurring strait of importance to international commerce and navigation. There are well over 100 such international straits at present.

As I mentioned at the beginning of the discussion of transit passage, with regard to straits "used" for international navigation, there is no list of such straits. It is not a static concept--the only exception to this being the number of Article 35(c) straits, i.e. ones subject to long-standing conventions, which number <u>is</u> limited.

In the United States' view it is immaterial whether or not ice covers such a strait during most or all of the year, as the right of transit passage, it will be remembered, covers

overflight as well as submerged transit. Submerged transit of submarines through international straits is addressed in Article 39(1)(c), which provides that ships and aircraft, while exercising the right of transit passage, shall "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit...."(emphasis added). As the normal mode for submarines to transit is under the surface, such an unquestionable right is accorded them under the Convention both in transit passage and archipelagic sea lanes passage. While this is not explicitly included under Article 38 (right of transit passage) as it is under Article 53(3) (definition of archipelagic sea lanes passage), such a distinction is not a substantive one and does not diminish the right. This was done in order to avoid any ambiguity in the archipelagic sea lanes passage articles in that the duties of ships and aircraft under Article 54 incorporate mutatis mutandis the transit passage articles 39, 40, 42, and 44. The drafters wished there to be no doubt that subsurface navigation was included in such waters although archipelagic waters also constitute the waters within archipelagic sea lanes. This conclusion is confirmed by comparison with Article 20(2) in the innocent passage articles which requires submarines to navigate on the surface and to show their flag. Moreover, since the waters of international straits were formerly high seas until overlapped by twelve-mile territorial seas, it is a conservative interpretation to maintain that what was specifically allowed before continues to be allowed

unless specifically prohibited.

"In the normal mode" also means in the case of transit passage (and archipelagic sea lanes passage) that ship's aircraft may both land and be launched. (As an example, it is normal practice for military ships to have fixed-wing or helicopter assets aloft during transit, consistent with the security needs of the force). This conclusion is corroborated by comparison with Article 19(2)(e) regulating innocent passage, which prohibits the launching, landing or taking on board of any aircraft. If such were not permitted under transit passage, a prohibition would have been included under those articles.

Another unambiguous duty provided under Article 44 requires that straits States "shall not hamper transit passage" and that "there shall be no suspension of transit passage." This is a far greater navigational right than that accorded ships under innocent passage, as Article 25(3) recognizes the right of a coastal State to "suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises." If suspension of innocent passage in the territorial sea occurs, it must be done "without discrimination in form or in fact among foreign ships" and "only after having been duly published."

As in the case in all maritime jurisdictional belts, i.e. the territorial sea, the exclusive economic zone, and archipelagic waters, warships and other government ships operated for non-

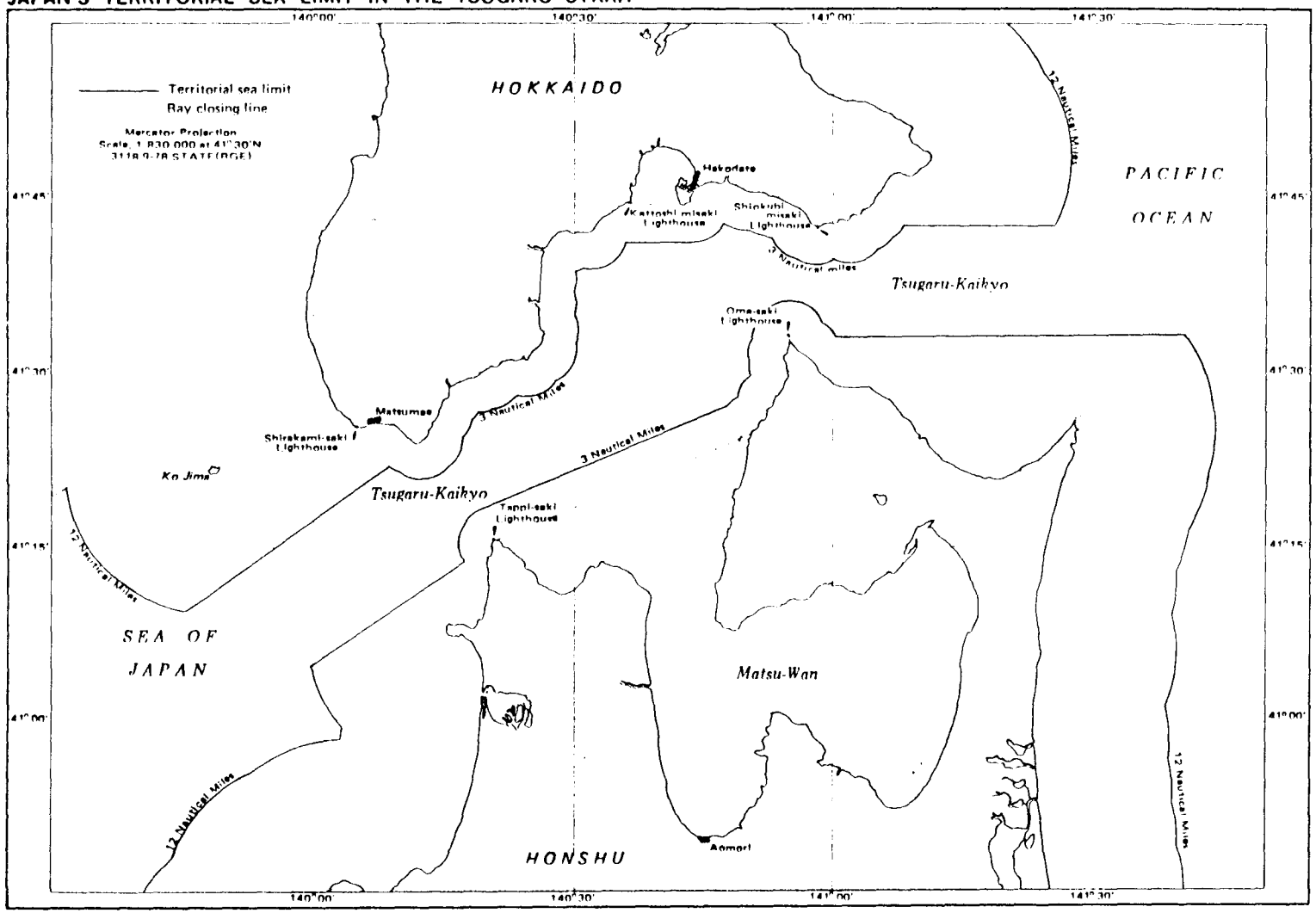
commercial purposes enjoy sovereign immunity. In the straits articles this is provided under Article 34(2) which states that "the sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law" and Article 42 (laws and regulation of States bordering straits relating to transit passage), paragraph (5), which provides that "the flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results in States bordering Straits." The applicable articles for the territorial sea are Articles 30-32.

(2) Article 36 Straits

As discussed above with relation to transit passage, Article 36 in its most interesting "hard laws" applications refers to straits in which one or more straits States choose not to extend their territorial sea out to twelve miles or out to a limit which results in no territorial sea overlap and the continued existence of a high seas corridor.

It may also apply to international straits which are wider than twenty-four miles in their entirety, which was the principal situation envisaged by the United Kingdom when it introduced the original version of Article 36 in the Single Negotiating Text in 1975. As a practical matter, of course, there is a point at

JAPAN'S TERRITORIAL SEA LIMIT IN THE TSUGARU STRAIT



which this becomes meaningless as the strait is no longer a strait but merely a high seas area in which freedom of navigation applies and the transit passage articles are inapplicable.

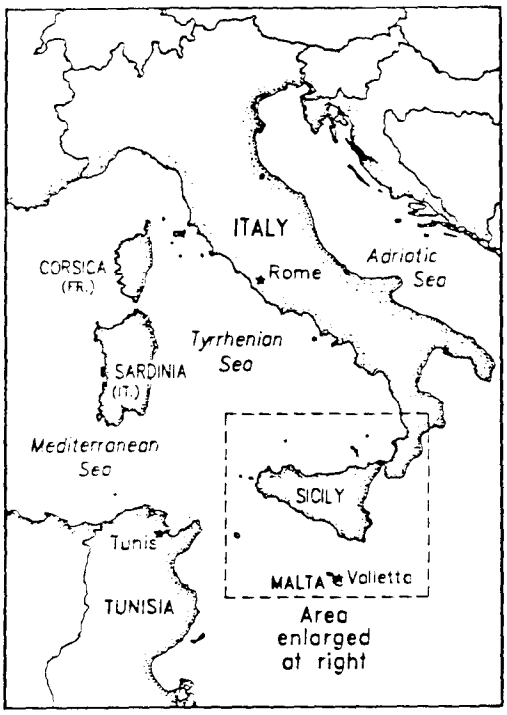
(3) Article 38(1) Straits

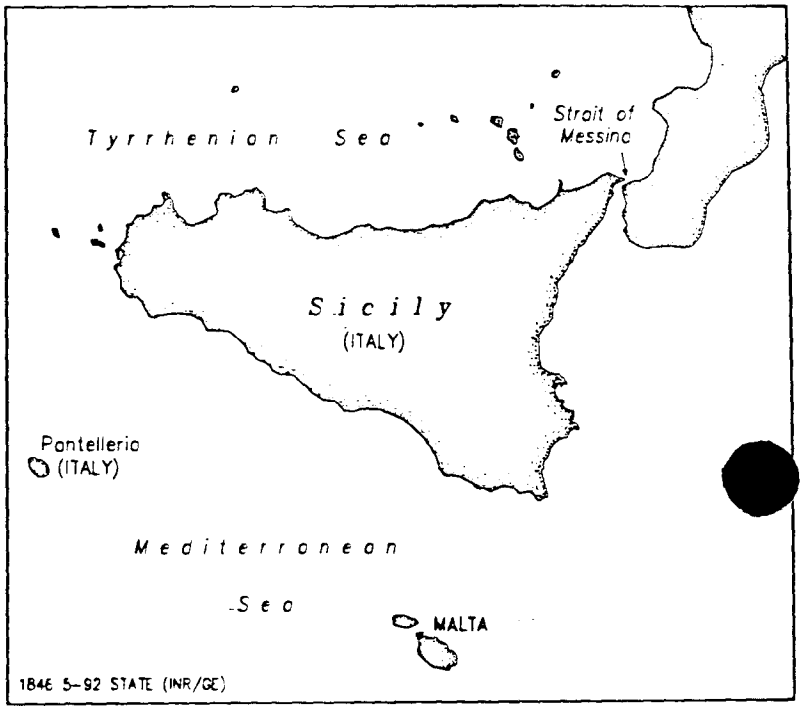
This category of international straits, conceived due to the Strait of Messina, provides that "transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics." It is to note that the regime of non-suspendable innocent passage shall apply in an Article 38(1) strait in the area between the mainland and the island.

(4) Article 45(1)(b) Straits

This category, conceived to provide an adequate regime of navigation in dead-end straits, also provides that the regime of non-suspendable innocent passage shall apply in an international strait between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State. In that such a strait does not in its entirety fit the Article 37 definition of a strait to which transit passage applies, and as a regime of innocent passage would not be sufficient to meet a 45(1)(b) State's interests, the Convention recognizes the right of non-suspendable innocent passage in these situations.

Strait of Messina



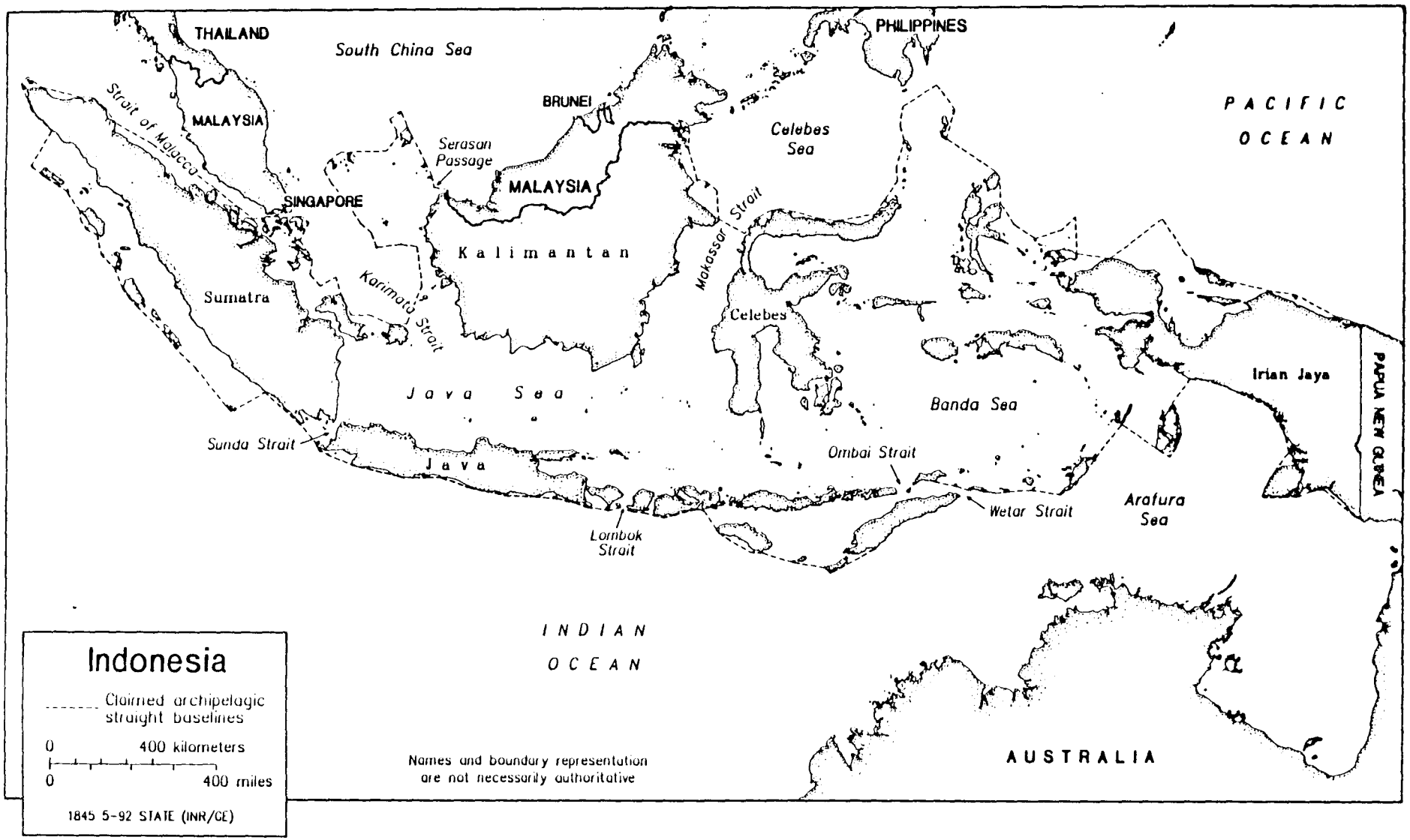


(5) International Straits which Occur within Archipelagic Waters

This important category of international straits is treated slightly differently from straits in which transit passage applies in that they fall in whole or in part within the archipelagic waters of mid-oceanic archipelagic States, a creation the genesis of which in the first instance originated as a recognized concept of international law with the nailing down of all the necessary elements and archipelagic rights in the 1982 Convention.

The concept of the mid-oceanic archipelagic State permits States which fulfill the definition and criteria of land/water ratios contained in Articles 46 and 47 to enclose within straight baselines surrounding their outermost islands ocean areas previously high seas in nature, subject to the navigational right of archipelagic sea lanes passage. This concept is customary international law as reflected in Articles 46-54 of the LOS Convention, requiring the archipelagic State to recognize and respect the navigational rights and freedoms applicable within archipelagic waters. Archipelagic sea lanes passage applies to all international straits as well as to all other international sea lanes and air routes.

One of the key navigational freedoms is the right of archipelagic sea lanes passage as provided in Article 53. This regime applies to all sea lanes and air routes designated by the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Makassar Strait
Sumatra
Karimata Strait
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archipelagic State. The lanes and routes shall include all normal passage lanes and routes used for international navigation and overflight and be approved before their designation by the International Maritime Organization. If an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.

Article 53(3) defines archipelagic sea lanes passage as "the exercise in accordance with the Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone (the definition being almost verbatim to that of the right of transit passage). Article 54 provides that certain of the transit passage articles (Articles 39, 40, 42, and 44) apply mutatis mutandis to archipelagic sea lanes passage. In straits within the archipelago, the only substantive difference between archipelagic sea lanes passage and transit passage is the 10% rule continued in Article 53(5).

Four interpretative positions regarding the right of archipelagic sea lanes passage are, from our view and that of the international community, controlling.

First, as the territorial sea of an archipelagic State extends seaward of the baselines enclosing the archipelagic waters and therefore surrounding the latter, the approaches to

the archipelagic sea lanes (and thus international straits) through the territorial sea are subject to archipelagic sea lanes passage and not innocent passage. If this were not the case a right of archipelagic sea lanes passage existing within archipelagic waters would be meaningless.

Second, only mid-oceanic island States such as Fiji and Indonesia qualify as archipelagic States. Mainland or continental States which have island possessions cannot treat those islands as archipelagic States even if they would otherwise fulfill the definitions and land/water ratios.

Third, if an archipelagic State designates only a percentage of its sea lanes and air routes, this does not mean that only those so designated may be used; on the contrary, the other normal sea lanes and air routes will still be subject to the exercise of archipelagic sea lanes passage even if they are never so designated.

Fourth, Article 52 means what it says; the right of innocent passage applies to all archipelagic waters which do not comprise sea lanes. I mention this only because some doubt was earlier expressed by an archipelagic State representative whether or not Article 53 on archipelagic sea lanes passage obviated the need for innocent passage in archipelagic waters as contained in Article 52.

IV. STRAITS GOVERNED IN WHOLE OR IN PART BY LONG-STANDING INTERNATIONAL CONVENTIONS IN FORCE

The issue of bridges over international straits has focused attention during the past year on straits which are governed in whole or in part by long-standing international conventions in force, simply because Denmark claims Great Belt Strait over which the controversial bridge is to be constructed happens to be such a strait as provided for under Article 35(c). Article 35(c) provides that transit passage articles do 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."

During the Conference years, the Baltic straits were the subject of much discussion. The Treaty for the Redemption of the Sound Dues of 14 March 1857 and the parallel Convention for the Discontinuance of the Sound Dues between Denmark and the United States of 11 April 1857, ensure free navigation, and from that perspective, it is somewhat academic whether or not the Belts are considered 35(c) straits. My friend, Peter Brueckner, however, maintained that subsequent Danish domestic law (such as the claimed restrictions on warship passage) also applied as a form of retroactive overlay on the 1857 provisions, a position the United States cannot accept. If such straits constitute 35(c) straits, subsequent domestic legislation, absent concurrence of at least the maritime states, cannot restrict navigational

freedoms enjoyed under the applicable "long standing convention." Article 35(c) straits were recognized as a special exception to Part III of the LOS Convention only on the understanding that the 35(c) navigation regimes would not unilaterally be restricted. It is the US position that if such restriction occurs, the basis for this special exception disappears and Part III and transit passage apply.

At this point, it will be useful to discuss several United States interpretive positions regarding Article 35(c) straits.

To my mind a most interesting linguistic issue presented in Article 35(c) are the words "in whole or in part." The phrase is susceptible of two interpretations.

The first interpretation might be called pre-emptive. If a 35(c) convention regulates the strait regime: (a) only in certain aspects (e.g., commercial vessels but not airplanes, airplanes and commercial vessels but not warships); or (b) in whole (e.g., airplanes, commercial vessels, and ships entitled to sovereign immunity), that strait regime is totally independent of the normal transit passage regime, which does not apply. This is so because the chapeau of Article 35 states "[n]othing in this part affects" Article 35 subparagraphs (a), (b) and (c). Under this interpretation those categories of vessels not regulated by the regime are regulated by other rules of customary international law as evident in State practice.

The second interpretation would support the position that if a 35(c) regime regulates only in part certain classes of ships

(e.g., commercial vessels, but not airplanes or vessels entitled to sovereign immunity), only those vessels so regulated fall within the Article 35(c) regime, and the non-regulated categories are governed by the transit passage regime. This interpretation is truer to the intent of the straits articles. Transit passage is the norm, and 35(c) a narrow exception. In circumstances where the exceptional regime does not cover every angle, the normal regime should be used to fill in the gaps.

Usage plays a role in each 35(c) strait in determining more precisely the nature of the applicable 35(c) convention regime. As each 35(c) strait regime is sui generis depending on the regime established under the "long standing convention" in question, the precise nature of the regime can most accurately be determined by the extent and nature of the navigational use developed therein. This usage is more indicative and determinant in cases in which the regime itself is imprecise. It is also valid to maintain that the less usage is evinced, particularly in the case of an imprecise conventional regime, the greater the justification in maintaining that "normative" customary international law standards will define the regime. A caveat, however, should be noted in the case in which separate bilateral agreements are in existence collaterally with the long-standing convention regime. For the parties to these bilateral agreements, their provisions will determine the precise relationship, in that the specific prevails over the general.

Another characteristic of an Article 35(c) strait is that it

be recognized by the international maritime community as such to qualify. This does not mean that all States must be parties to the convention regulating the specific strait. The 1885 Convention governing the Magellan Strait has but two parties (Chile and Argentina), but all States enjoy the international transit rights enshrined in its provisions. As another example, the United States is not a party to the 1936 Montreux Convention, but we always have complied with its longstanding provisions.

The only caveat attaching to this status is that 35(c) conventions, although they can be amended by the original parties, have created rights affecting non-parties. Thus, as a general principle, such amendments are not binding on non-parties, since they share neither the longstanding character nor international acceptance of the original provisions. Common sense must be applied in instances in which a strait State, bound by a 35(c) convention, is faced with significantly altered conditions, and reasonable changes gain wide acceptance. (Example: Strait state bound by the 35(c) convention to accept Weimar Republic currency which subsequently becomes worthless.) This is, however, a subject which requires its own examination and is outside the scope of this paper. Suffice it today that we recognize that ancillary provisions (those not having to do with fundamental navigation rights) contained in a 35(c) convention are not necessarily treated as immutable.

Third, Article 35(c) straits can only be those governed by long-standing conventions in force -- this is corroborated by the

travaux preparatoires of the LOS Convention. However, it is equally important to observe in this connection that if the Article 35(c) convention lacks specificity or its language is obscure due to terminology which has fallen into desuetude, this does not absolve the straits State of its duty under customary international law to follow the appropriate customary international law norm even though the "long-standing Convention" language at issue may appear to be narrower than that norm.

At this point, it will be useful to discuss the 35(c) principles in relation to the only straits that were submitted by the straits negotiating group as falling within the 35(c) exception (an exception which was espoused actively from the very beginnings of the negotiations by Denmark): the Danish Straits, the Aaland Strait, the Turkish Straits (Bosphorus and Dardanelles) and the Strait of Magellan.

(a) The Danish Straits

The Treaty for the Redemption of the Sound Dues of 14 March 1857 and the parallel Convention for the Discontinuance of the Sound Dues between Denmark and the United States of 11 April 1857, among others, recognized "entire freedom of the navigation of the Sound and the Belts" (Article I) and "free and unencumbered navigation" (Article II). Although only surface navigation and neither overflight nor submerged transit was in the contemplation of the parties in 1857, one cannot reasonably maintain that they are ipso facto excluded from the central

intent of the agreement i.e. transit rights free from dues and interference. In a similar vein, as the regime established was ostensibly as broad a regime as it was possible to grant, subsequent developments in customary international law would be a legitimate means of interpreting its continued significance. The regime would preclude the Danes from applying their domestic laws to foreign flags transiting the straits except as recognized under modern international law (LOS Convention) and preclude them from applying their internal 1976 Ordinance to foreign warships.

(b) The Turkish Straits

The Convention Regarding the Regime of the Straits signed at Montreux 20 July 1936, commonly styled the Montreux Convention, regulates transit and navigation in the Straits of the Dardanelles, the Sea of Marmara and the Bosphorus, and replaces the Lausanne Convention of 24 July 1923 which formerly regulated the Straits. It is a multilateral convention signed by the significant maritime powers of the day. It is comprehensive and explicit in regulating passage and is the classic example of an Article 35(c) convention. The major provisions state that in time of peace, merchant vessels enjoy complete freedom of transit and navigation (Article 2), as well as in time of war subject to certain provisions. Warships consisting of light surface vessels, minor war vessels and auxiliary vessels enjoy in time of peace freedom of transit, subject to certain conditions and other warships in time of peace enjoy a right of transit subject to

certain conditions (Article 10). Submarines of Black Sea Powers may transit on the surface by day for the purpose of rejoining their base, provided prior notification is given (Article 12). Warships in transit cannot launch or otherwise utilize any aircraft (Article 15). Civil aircraft in order to pass between the Mediterranean and Black Seas may use air routes prescribed by Turkey and must remain outside of forbidden zones established in the Straits, and must give prior notification (Article 23).

In that the Convention is detailed, it is a convention which can be said to regulate the regime of passage "in whole" and the regime is sui generis. The United States has not protested any of its provisions, although it is clearly less than the right of transit passage and in certain facets less than the right of non-suspendable innocent passage.

(c) The Aaland Island Strait

The Convention on the Non-Fortification and Neutralization of the Aaland Islands signed at Geneva 20 October 1921 is a multilateral convention to which the United States is not a party but conducts itself consistent with the treaty's terms. Article 5 thereof provides that "the prohibition to send warships into the zone described in Article 2 or to station them there shall not prejudice the freedom of innocent passage through the territorial waters. Such passage shall continue to be governed by the international rules and regulations in force." This regime regulates warship passage within 3 miles of the islands.

The 3 mile zone takes up a small corner of the strait between Sweden and Finland. Some have argued that the no-warship rule applies to the strait as a whole, but this is totally inconsistent with the terms of the 1921 treaty itself. Historically, it might be interesting to note that the 3 mile zone was independent of Finland's territorial sea claim, which was 4 miles.

(d) The Strait of Magellan

The Boundary treaty between the Argentine Republic and Chile signed at Buenos Aires 23 July 1881, provides in Article 5 that "Magellan's Straits are neutralized for ever, and free navigation is guaranteed to the flags of all nations." The applicable juridical regime is free navigation. I already mentioned some thoughts on that phrase in my discussion of the Danish 1857 Convention.

V. AN INTERNATIONAL APPROACH TO FUTURE BRIDGE PROPOSALS OVER STRAITS USED FOR INTERNATIONAL NAVIGATION

From the foregoing, it should be evident that the construction of a bridge across a strait used for international navigation, if not subject from its inception to certain internationally accepted safeguards and readily applicable standards, could destroy the carefully crafted balance of strait State/user States rights and obligations which form the essence of all the Convention's navigational articles.

In crafting a reasonable international solution, we should look to the system whereby the international community, working through the International Maritime Organization as the "competent international organization," establishes sealanes and traffic separation schemes through international straits.

To designate a sealane or traffic separation scheme under that system, a State would first submit a proposal to the International Maritime Organization with a view toward adoption by that body. To be adopted, the sealane or traffic separation scheme must conform to generally accepted international standards and regulations and, the State must give "due publicity" to its proposal.

Since sealanes and traffic separation schemes affect navigation, it is only reasonable and practical that similar steps be followed in the case of bridges.

This is particularly so since the United States does not believe that customary international law permits a State unilaterally and without prior international approval to construct a fixed bridge over an international strait which in many instances is the sole practical deep water route available. In order, therefore, to unify State practice, the United States suggests that all future construction plans for bridges over international straits be submitted to the International Maritime Organization.

Our suggestion consists of three elements. First, prior to referral of a proposal by a straits State of plans to construct a

fixed bridge over a strait used for international navigation, the straits State should be required to provide actual notice of the proposal well in advance through the International Maritime Organization to all States.

Second, all States which are then notified about the proposal by the International Maritime Organization would be given adequate opportunity to communicate their views to the proposing straits State which would be obliged to seek to accommodate such views.

As part of this process, the International Maritime Organization should first establish internationally recognized guidelines and standards to ensure that construction of bridges does not hamper or impede navigation through international straits. These guidelines and standards would in part be based on and vary with the type of international strait involved and other considerations, such as the nature and density of the traffic through such a strait, the availability of equally practicable alternate routes, and the associated additional costs, if any, of the proposed bridge construction.

Finally, the straits State initiating the bridge construction proposal could only proceed with actual construction upon determination by the International Maritime Organization that the proposal conforms to the established International Maritime Organization guidelines and standards.

By way of reference, the United States notes that Denmark gave notice to all States of its construction plans sixteen years

ago and requested that interested States submit their views to it with a view to their accommodation. The only State to submit such views prior to construction was the former Soviet Union, which requested that the clearance of the main central span over the deep water channel be increased to 65 metres, a request Denmark duly incorporated into the final construction plans. The United States believes that notice through the International Maritime Organization would ensure the international community had effective notice of the opportunity to address so potentially serious a threat to effective international navigation.

The United States looks forward to working with other interested States to help develop these procedures within the International Maritime Organization. We believe that international acceptance of such a procedure which involves the International Maritime Organization and internationally recognized guidelines and standards that would apply to future bridge construction, would be the most equitable and effective means to address the issue. It would also reduce the potential for the establishment of adverse precedents in this field.

Recently we have been informed of suggestions to build bridges across other international straits. I wish to make it clear beyond any doubt that the United States would not acquiesce in the construction of such bridges unless internationally recognized procedures are already in place and complied with. To accept anything less after the international community worked so many years in the Law of the Sea Conference to establish a

universally accepted navigation regime would place us all in unacceptable, uncertain dangers in a field in which the international community requires predictability, stability, and the orderly development of a universally endorsed body of traditional law of the sea norms.