



## Presentation Abstract

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### Protection of the environment and governance of straits used in international navigation under the 1982 United Nations Convention on the Law of the Sea

The 1982 United Nations Convention on the Law of the Sea (“LOSC”)<sup>1</sup> was negotiated over a period of nine-years.<sup>2</sup> The regime of international straits, or straits used in international navigation, proved to be one of the key areas of contention. Negotiation positions were drawn among different groups of States representing different interests.<sup>3</sup> The negotiations centered on military and security issues, safety of shipping and environmental protection. Broadly speaking the division was between the shipping interests and the coastal State interests. The loss of high seas freedom of navigation resulting from the expansion of the breadth of the territorial sea to 12 nautical miles was the red line for the two Super maritime powers - the United States and the former Soviet Union.<sup>4</sup> On the other side, with the advent of super tankers carrying oil the increased threat of costly environmental pollution, and also the risks from the transport of nuclear waste, coastal Strait States demanded competence to regulate passage of foreign flagged ships through straits. Ultimately, compromise was reached, which resulted in the relatively complex regime codified in Part III *Straits used for international navigation*, including the new regime of transit passage.<sup>5</sup>

The 1982 LOSC created multiple categories of straits according different regulatory competence to the coastal States and passage rights to foreign flagged vessels.<sup>6</sup> The most important result of UNCLOS III on the question of straits was without doubt the creation of the entirely new regime of *transit* passage. Article 38 defined the rights of passage accorded to foreign flagged vessels and Article 42 the competence of coastal States to regulate transit passage. The traditional non-suspendable innocent passage rights were maintained for straits that fell within the scope of Article 45. In addition the Convention recognized the regime of passage in straits of regulated in whole or in part by long-standing conventions in Article 35 ©. Importantly, in response to the Strait States Group’s concerns over protection of their coasts and waters from accidental sources of vessel pollution, the 1982 LOSC expressly allowed for the establishment of sea-lanes and separation schemes in straits to be approved by the competent international organization

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<sup>1</sup> Adopted in Montego Bay on 10 December 1982, entered into force on 16 November 1994, 1833 UNTS 3.

<sup>2</sup> *United Nations Convention on the Law of the Sea, Commentaries*, Vol.II, Myron H. Nordquist, Neal R. Grandy, Satya N. Nandan and Shabtai Rosenne, eds., (1993).

<sup>3</sup> *In general see*, B. Bing Jia, *The Regime of Straits in International Law* (Oxford 1998); J. A. de Yturriaga, *Straits Used for International Navigation: A Spanish Perspective* (Boston, 1990); Satya N. Nandan and David H. Anderson, “Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982,” *British Yearbook of International Law* 60(1989): 159–204; Robin R. Churchill and A. Vaughn Lowe, *The law of the sea*, 3<sup>rd</sup> edition (Manchester 1999) 13-22.

<sup>4</sup> John Norton Moore, “The Regime of Straits and the Third United Nations Conference on the Law of the Sea,” 74 *American Journal of International Law* (1980) 77-121; W. L. Schachte, Jr., and J. P. A. Bernhardt, “International Straits and Navigational Freedoms,” 33 *Virginia Journal of International Law* 503 (1993), 544-45.

<sup>5</sup> Jon M. Van Dyke, “Transit Passage Through International Straits,” in Aldo Chircop, Ted L. Dorman & Susan J. Rolston eds., *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston* (2009) 177-232.

<sup>6</sup> Mary George, “The regulation of Maritime Traffic in Straits Used for International Navigation,” in A.G. Oude Elferink and D.R. Rothwell, eds., *Oceans Management in the 21<sup>st</sup> Century: Institutional Frameworks and Responses* (2004).

(i.e. IMO). Furthermore, as part of the compromise brokered in Part III States bordering straits subject to transit passage were granted limited regulatory competence to adopt pollution control laws. This limited regulatory competence over transit passage straits was to some degree supplemented with Article 233, which allowed states bordering transit passage straits to take enforcement measures against foreign flagged vessels in the case of actual or threatened major damage to the environment. One other innovative feature of Part III on straits was Article 43 which exhorted cooperation between the strait States and User States to conclude agreements of co-operation on navigational and safety aids and other measures related to the prevention, reduction and control of pollution.<sup>7</sup> To date article 43 has been implemented only in the Singapore and Malacca Straits.<sup>8</sup>

Since the adoption of the 1982 LOSC thirty years ago, the world has changed in many ways that may not have been foreseeable during the time the Convention was negotiated. In 1990 the political balance of powers that drove the negotiations for Part III and created the transit passage regime changed. One of the maritime super powers that had sought to preserve the open sea corridors in straits, the former Soviet Union, disappeared into history. International environmental law underwent a rapid development following the 1992 United Nations Conference on Environment and Development (“UNCED”), held in Rio de Janeiro that included the adoption of the 1992 Convention on Biological Diversity<sup>9</sup> as well as other important developments. The economic boom during the past decade in the emerging economies placed a greater demand for oil and consequently led to increases in transport of oil through straits adding to the risks of pollution. Furthermore, over the past three decades the International Maritime Organization (“IMO”) evolved into an important actor in developing instruments and measures such as particularly sensitive sea areas (“PSSA”) and Emission Control Areas (“ECA”) that went beyond the sea-lanes and traffic separation schemes expressly mentioned in Part III of the Convention. In addition to environmental concerns, the past decade has witnessed a serious increase in piracy attacks and possible terrorism attacks against international shipping have had a significant impact on key straits used in international navigation raising important questions. In addition, the technological advances of the past three decades on the one hand have provided sophisticated tools for the enhancement of safety of shipping but on the other hand have also resulted in significant increase in costs especially for the coastal States.

Part III on straits used in international navigation attempted to balance the countervailing interests that were broadly divided between the shipping interests advocating for freedom of navigation and the coastal State interest to protect their coastal and marine environment with the transit passage regime. This paper will examine the transit passage regime within the context of the developments over the past thirty years, focusing on protection of the marine and coastal environment of straits.

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<sup>7</sup> B. H. Oxman, “Observations on the Interpretation and Application of Article 43 of the United Nations Convention of the Law of the Sea with Particular Reference to the Straits of Malacca and Singapore,” *Singapore Yearbook of International Law* 3 (1999) 408–26.

<sup>8</sup> Robert Beckman, “Singapore strives to enhance safety, security, and environmental protection in its port and in the straits of Malacca and Singapore,” *14 Oceans & Coastal Law Journal* (2009) 176

<sup>9</sup> Adopted 5 June 1992, entered into force 29 December 1993, 31 ILM 841(1992)