STRAITS USED FOR INTERNATIONAL NAVIGATION AND PROTECTION OF THE MARINE ENVIRONMENT UNDER THE 1982 UN CONVENTION ON THE LAW OF THE SEA

Nilufer Oral
Istanbul Bilgi University
Center for Marine Law Research
British Institute of International and Comparative Law
International Conference
“UNCLOS at 30”
DEVELOPMENT OF STRAITS PASSAGE REGIME BEFORE THE 1982 LOSC

- **1930 Hague Conference**
  - Innocent passage in territorial sea

- **1949 ICJ Corfu Channel Case**
  - Non-suspendable innocent passage territorial sea

- **1958 Geneva Convention on the Territorial Sea and Contiguous Zone**
  - Non-suspendable Innocent passage in territorial sea
  - High seas passage

<table>
<thead>
<tr>
<th>Maritime/naval interests</th>
<th>Strait States</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Extension of territorial sea to 12mn</td>
<td>• Pollution from super tankers</td>
</tr>
<tr>
<td>• Enclosure of areas once high seas and freedom of passage</td>
<td>• Transport of nuclear waste and other hazardous cargoes</td>
</tr>
<tr>
<td>• US and USSR cold-war</td>
<td>• Nuclear powered vessels</td>
</tr>
<tr>
<td>• Military ships rights of unfettered passage</td>
<td></td>
</tr>
</tbody>
</table>
CATEGORIES OF STRAITS UNDER 1982 LOSC

- **Article 38(1):** Traditional non-suspendable passage regime “Messina Strait” clause. Straits located between an island and the mainland of the same State if there is a route of similar convenience, including hydrographical characteristics, exists through the high seas or exclusive economic zone;

- **Article 45(1)(b):** Traditional non-suspendable passage regime also applies in straits that are found in part of the high seas or an exclusive economic zone and the territorial sea of a foreign State;

- **Article 36** Straits which include a route through the high seas or an exclusive economic zone, if this route is of similar convenience with respect to navigational and hydrographical characteristic, are subject to the applicable provisions of the Convention including freedom of navigation and overflight;

- **Article 35 (c):** The regime of Straits under Part III if the 1982 LOSC does not alter the rights and obligations of Parties in Straits that are governed in whole or in part by long-standing international conventions;

- **Article 37 transit passage regime:** Straits used in 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.
TRANSIT PASSAGE VERSUS INNOCENT PASSAGE

Transit passage compromise

- Maritime States obtained greater passage rights than innocent passage but narrower than high seas

- Strait States given limited competence to regulate passage of vessels in transit passage in comparison to innocent passage vessels
Questions:

- Can “transit passage” be reconciled with the needs for protection of the marine environment especially with developments since 1982?
  - 1992 UNCED and new principles and approaches
  - Biodiversity
  - Climate change

- Is there a way to balance the navigational interests in transit passage with protection of the marine environment?
PROTECTION OF THE MARINE ENVIRONMENT AND STRAITS

- Article 192: All States have the duty to protect and preserve the marine environment (customary international law).
- Articles 194: States required to take all measures against all sources of pollution consistent with the Convention.
- 194(5): States required to take all measures for the protection of rare or fragile ecosystems and habitats of depleted, threatened or endangered species and other forms of marine life.
- 194 (4): Measures to prevent pollution cannot unjustifiably interfere with activities carried out by States in the exercise of their rights and in pursuance of their duties.
1982 UN CONVENTION ON THE LAW OF THE SEA

Innocent Passage defined
Articles 19 and 18

- “innocent” means passage that it is not prejudicial to the peace, good order or security of the coastal State.
- Passage shall be continuous and expeditious incidental to ordinary navigation ...

Article 24
- Laws cannot have the practical effect of denying, or impairing innocent passage rights.

Transit Passage defined
Article 38

- 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.

Article 42
- Laws cannot have the practical effect of denying, hampering or impairing transit passage rights.
COMPARISON: PRESCRIPTIVE RIGHTS OF COASTAL STATES IN TRANSIT PASSAGE AND INNOCENT PASSAGE

Article 21

INNOCENT PASSAGE: CS can adopt laws for:

- Safety of navigation and regulation of maritime traffic
- Protection of navigational aids...
- Protection of cables/pipelines
- Conservation of living resources of the sea
- Prevention of infringement of CS fisheries laws
- Preservation of CS environment and prevention, reduction, control of pollution
- Marine scientific research
- Prevention of infringement of CS customs, fiscal, immigration or sanitary laws and regulation

Article 42

TRANSIT PASSAGE: CS can adopt laws for:

- Safety of navigation and the regulation of maritime traffic
- Pollution prevention ... by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait; (MARPOL Annexes I-III, excludes garbage, sewage and air pollution]
- the prevention of fishing, including the stowage of fishing gear;
- the loading or unloading of any commodity, currency or person ...
# COMPARISON:
## DUTIES OF FOREIGN FLAGGED SHIPS IN TRANSIT PASSAGE AND INNOCENT PASSAGE

<table>
<thead>
<tr>
<th>Article 21(4) Innocent Passage</th>
<th>Article 39 Transit Passage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Comply with all laws and regulations of</strong> CS enumerated in Article 21 and all GAIRS for collision prevention at sea</td>
<td><strong>Comply with GAIRS, procedures/practices for safety at sea and COLREG</strong></td>
</tr>
<tr>
<td><strong>Includes laws for protection of the CS marine environment and the conservation of living resources</strong></td>
<td><strong>Comply with GAIRS procedures/practices for vessel source pollution</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Nothing on environmental protection or conservation</strong></td>
</tr>
</tbody>
</table>
SEA LANES AND TSS IN TRANSIT PASSAGE AND INNOCENT PASSAGE REGIMES

Articles 22 and 23

Innocent Passage
- CS can make use of sea lanes and prescribe mandatory TSS and require that
  - Tankers, nuclear-powered ships/ships carrying inherently dangerous or noxious substances to confine passage to these lanes and
  - require such vessels to carry certain documents and observe special precautionary measures

Transit Passage
- CS can designate sea lanes/prescribe TSS
- Must be submitted to IMO for approval
- NO reference to tankers, nuclear-powered ships/ships carrying inherently dangerous or noxious substances
TRANSIT PASSAGE

Expressly permitted measures
- Designation of sea lanes with approval of CIO
- Designation of Traffic Separation Schemes (COLREG)

Other measures
- PSSA and APMS
- Compulsory pilotage
- Mandatory Ship Reporting Systems
- Mandatory Vessel Traffic Services (VTS or VTMIS)
- Emission control areas (ECAs)
- Ballast exchange restrictions
- Others??
ENFORCEMENT COMPETENCE OF COASTAL STATE

**Innocent Passage**
- Non-IP passage for acts of "wilful and serious pollution"
- Article 220 (2) in TS:
  - Violation of GAIRS for vessel source pollution- w/o prejudice to IP- CS can inspect, institute proceedings and detain.

**Transit Passage**
- Only have exceptional competence under Article 233:
  - Only applies to violation of Article 42 (1)(a) or (b) and actual or threat of major pollution
  - Sea lanes and TSS violations
  - MARPOL Annex I-III
- Excludes transit passage from much of Part XII (sections 5,6,7)
COOPERATION UNDER ARTICLE 43

**Article 43:**

User States and States bordering a strait should by agreement cooperate:
(a) In the establishment and maintenance ... of navigational and safety aids or other improvements in aid of international navigation, and
(b) The prevention, reduction and control of pollution from ships

- Article 43 could provide a mechanism of cooperation to allow the adoption of measures beyond sea lanes and traffic schemes.
CASE STUDIES

1. Malacca and Singapore Straits (Article 43)
2. Torres Strait (PSSA and Mandatory pilotage)
3. Strait of Bonifacio (PSSA and Mandatory pilotage)
4. Strait of Gibraltar
5. Danish Straits (Mandatory pilotage ?)
6. Turkish Straits
Malacca Strait
IMO Adopted Routeing System the Malacca and Singapore Straits

- TSS (233 miles long)
- VTIS (Advisory)
- Deep draught vessels under keel clearance of at least 3.5 meters (mandatory violation under article 233)
- Deep draught vessels mandatory use of designated deep-water routes
- **Pilotage recommended** for VLCC and deep draught vessels in TSS
- STRAITREP **Mandatory** Ship Reporting System
- Electronic Highway (MEH)
- **Article 43 Cooperation Mechanism** (first and only one established)
  - Contributors: Nippon Foundation, UAE, Saudi Arabia, ROK, PRC, IMO,
MALACCA AND SINGAPORE STRAITS AND ARTICLE 43

- MOU Cooperation mechanism for Malacca and Singapore strait States and user States andIMO signed in 2008
- Three elements
  - Cooperation Forum: consultation among littoral states, user States and other stakeholders
  - Aids to Navigation Fund (Revolving Trust Fund)
  - Projects
TORRES STRAIT AND PSSA
MANDATORY PILOTAGE?
TORRES STRAIT

- 1991 Great Barrier Reef PSSA approved by IMO
- IMO Res. A710(17) adopted in 1991 recommended pilotage in the Torres Strait for all ships over 70 m in length, all oil tankers, chemical tankers, liquefied gas carriers
- VTS
- 2005 IMO approved extension of GBR PSSA to the Torres Strait
- Controversy: Mandatory pilotage or not?
- Does IMO have the competence?
- Australia: Pilotage part of TSS
- Does the 1982 LOSC prevent it?
- “Clear legal basis / a legal basis”?
- Role of the precautionary principle in face of “legal uncertainty” but scientific certainty on importance of pilotage?
STRAIT OF BONIFACIO

MEPC 61 PROPOSAL FOR A PSSA
MANDATORY PILOTAGE OR NOT?
BONIFACIO STRAIT

- MEPC 61 (September 2010) Proposal to establish a PSSA jointly submitted by Italy and France
- Adopted in 2011.
- APM requested:
- Mandatory pilotage? Considered but not included.
STRAIT OF GIBRALTAR

• “Security areas” to protect large cetaceans from the heavy traffic in the Gibraltar Straits the Spanish government established in areas of the Strait.
• Measures consist only of a notice to mariners that simply recommends reduced speed and to navigate with particular caution.
Danish Straits
DANISH [BALTIC] Straits

• 35 (c) Strait
• IMO Resolution 1987, all ships with a draught of 13 meters or more recommended to use the pilotage services
• Proposal for mandatory pilotage made to HELCOM by Denmark in 1992 for laden tankers above 20,000 DWT to take on pilots when navigating the Danish Straits did not receive support.
• 1996 IMO adopted mandatory Ship Reporting System (SRS) SOLAS Reg V/8-I
• SHIPPOS (Ship Position Reporting) - mandatory
• VTS in Great Belt
• 2004 Baltic Sea designated as a PSSA (in effect in 2006) Modifications made to TSS
• Pilotage is, in general, compulsory for masters on vessels with a length of 70 metres or breadth of 14 metres or more.
• 2010 IMO Sub-NAV approved joint Danish-Swedish AIS-based SRS for Sound [SOUNDREP]
Istanbul Strait

1994 M/T Nassia - M/V Ship Broker collision
Turkish Straits

- Would be a 35© Strait
  - 1936 Montreux Convention
  - 1998 Turkish Straits Regulations
  - Resolution A.827(19) (adopted 1995) on Ships' Routeing includes in Annex 2 Rules and Recommendations on Navigation through the Strait of Istanbul, the Strait of Canakkale and the Marmara Sea the recommendation that "Masters of vessels passing through the Straits are strongly recommended to avail themselves of the services of a qualified pilot in order to comply with the requirements of safe navigation"
  - Vessel Traffic Monitoring System (VTMIS)
  - Optional pilotage
TRANSIT PASSAGE WAS A POLITICAL AGREEMENT

Significant political, legal and environmental changes since 1982

The environmental realities should not be subject to the legal borders of transit passage (versus other straits)

Protection of the environment under Articles 192 and 194 are not subservient to transit passage

CS should be able to adopt additional measures that are “justifiable”

Transit passage should not prohibit mandatory pilotage if shown necessary for the protection of rare or fragile ecosystems and habitats under Article 194(5).

Role of Article 43 should be expanded to allow for more measures to be taken in straits

Transit passage should co-exist with current and developing environmental protection measures

THANK YOU