

## Chapter 2

# The Third Conference of the United Nations on the Law of the Sea or the Metamorphosis of Consensus

The situation enshrined in article 16.4 of the 1958 Convention failed to satisfy the Maritime Powers, suspicious of the implications of innocent passage in the straits which hindered the mobility of their hegemonic strategic deployment,<sup>61</sup> and also failed to satisfy a group of States interested in a number of important straits and, for ideological or conservationist reasons, these States wanted to impose a greater degree of control over the passage through the straits than the control over innocent passage.

Added to this unquestionable circumstance is the convergence of three factors<sup>62</sup> in the decade of the 1960s, which made the latent problems in the 1958 Geneva Convention concerning the right to air and sea navigation of the straits and contributed to the erosion of this right. Firstly, the technological development in ships and aircraft, the closing of the Suez Canal, and the growth of world trade has involved an increase in the size, nature and number of the ships and aircraft which use the straits. Secondly, the coastal States became preoccupied by the hazards of pollution and accidents in the straits.<sup>63</sup> Finally, there was a tendency to extend the territorial waters to 12 miles.

In this regard, inevitably a growing number of coastal States claimed 12 mile territorial waters and sustained that the passage of the straits included in their territorial waters was subject to the regime of innocent passage.<sup>64</sup> In addition, as

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<sup>61</sup>Cf. Pastor Ridruejo (1983, p. 78).

<sup>62</sup>Cf. Grandison and Meyer (1975, p. 403). We must add the emergence of the so called countries of the Third World to these three factors, as these countries claimed a revision of the law in force which they had not participated in forming.

<sup>63</sup>In 1969, the collision and explosion of three super-tankers in the Santa Barbara Channel, the *Maotra*, the *Mapessa* and the *King Haakon VII*, led to the loss of the *Mapessa* and substantial damage to the other two vessels increased the preoccupation regarding the danger of pollution already started with the *Torre Canyon* incident in 1967.

<sup>64</sup>This was done by Iran in 1959, Yemen in 1967, Malaysia in 1969, Morocco in 1969, France in 1971, and Oman in 1972. A table showing the evolution of the claims concerning the different widths of territorial waters can be seen in Burke (1977, pp. 195–196).

a consequence of the fear of accidents and pollution, some of these States demanded the right to regulate the manner of passage and to establish the conditions of passage through the straits. Nevertheless, these claims were rejected by the main Maritime Powers.

Undoubtedly the revision of the Law of the Sea in general, and the Law concerning navigation through the straits in particular, was necessary. In this same respect, in the middle and at the end of the 1970s, there was a strong movement to promote this revision. Thus, in 1967, the USSR requested the opinion of the United States and other countries on the possible holding of a new inter-governmental conference on the Law of the Sea, in which a 12 mile limit for territorial waters would be established together with an exclusive fishing zone. The United States authorities responded that its position would be favourable if the USSR and other States were prepared to support provisions which recognised free passage through and above the international straits. After a number of consultations, in 1968, Soviet and United States experts drafted a project with three articles related to the establishment of 12 mile territorial waters, and the recognition of certain special fishing interests for the coastal States beyond the territorial waters, which was the subject of global distribution one year later.<sup>65</sup>

This growing pressure for the drafting of a new legal text to regulate the use of maritime areas appeared more specifically in the proposal put forward by the Maltese delegate, Mr Pardo,<sup>66</sup> before the United Nations on August 17, 1967, requesting the inclusion of the question concerning the use of sea and ocean beds in the agenda of the General Assembly;<sup>67</sup> a proposal which was extended on November 1, 1967.<sup>68</sup>

Finally, by Resolution 2367 (XXIII) of December 21, 1968, the General Assembly created a Special Committee with 42 members, which was later increased to 86 in 1970, and to 91 in 1971, and was responsible for preparing the conference on the Law of the Sea. Thus, the *Commission for Sea Beds* replaced the ILC as regards the work of codification and progressive development of International Law. The ILC had traditionally been in charge of this work in the area of the Law of the Sea, as we have seen in the previous paragraphs. The excessive workload of this organism and, consequently, the slow drafting of projects and the fact that numerous States considered that certain political matters were involved in the reform of the Law of the Sea, and this was in conflict with the ILC which is a legal organism, and led to the decision to create an *ad hoc* codifying organism for this occasion.

<sup>65</sup>Cf. Yturriaga Barberán (1991b, pp. 367–368).

<sup>66</sup>For a detailed analysis of the so called “Pardo Declaration” and its immediate consequences, see Marffy (1985, pp. 123–142).

<sup>67</sup>Cf. The title of the agenda proposed by Ambassador Pardo, in a *memorandum* explaining the “Declaration and treaty concerning the reservation exclusively for peaceful purposes of the seabed of the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interest of mankind” to the Secretary General (vid. Doc. A/6695).

<sup>68</sup>Doc. A/A1/PV 1515 and 1516.

Subsequently, through section (C) of Resolution 2750 (XXV) of December 11, 1970, the General Assembly decided to convene the III Conference of the United Nations on the Law of the Sea<sup>69</sup> which began in 1973.

The traditional conception was that the III Conference was established basically as a mechanism for the exploitation of the sea beds, as stated by B.P.V. Rao,<sup>70</sup> mistakenly. In fact, in the words of J.I. Charney, “the present Conference has its origin in the efforts of the United States and the Soviet Union in the early 1960s to protect their strategic interests in transiting the oceans, particularly international straits”.<sup>71</sup> Such dissuasive strategic interests are of specific importance for the United States for the passage of its submerged nuclear submarines so that their detection in the straits will be impeded or hindered as their fundamental value lies precisely in their mobility and the difficulty to locate them; while the USSR has a geographical position which, in the majority of cases, forces its fleets to pass through straits in order to reach the high seas, which leaves it at a clear disadvantage with the United States. Therefore, a regime of innocent passage in the straits would have very serious consequences for its nuclear and conventional submarine forces.<sup>72</sup>

In this respect, the two substantial objectives of the main sea powers were undoubtedly focussed on refuting the claims for 12 mile territorial waters, and achieving a new right of passage in transit through the straits affected by 12 mile territorial waters. Therefore, it can be stated that these constitute some of the most crucial issues debated at the Conference.

This reached such a point that Resolution 2750 (XXV) expressly refers to both these substantial problems, and included the questions of the extension of territorial waters and international straits.

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<sup>69</sup>A detailed presentation on the development of the work of the Commission of the Sea Beds and the III Conference of the United Nations on the Law of the Sea is in the Office for Ocean Affairs and the Law of the Sea (1992, in vol. I, pp. 21–152, there are details of the work of the Commission, while vol. II deals extensively with the III Conference). In addition, there is abundant scientific literature on such important work. Among the many works, we can cite some which refer especially to international straits: Burke (1977, pp. 195–220); Caminos (1987, pp. 66–120); Grandison and Myer (1975, pp. 393–450); Koh (1982, pp. 99–148); Maduro (1980, pp. 65–96); Marín López (1979 pp. 80–81, pp. 46–64); Momtaz (1974, pp. 841–859); Nordquist (1993, pp. 279–398); O’Connell (1982, pp. 328–331); Oxman (1985, pp. 143–216); Rao (1984, pp. 398–405); Robertson (1980, pp. 801–860); Stevenson and Oxman (1975, pp. 1–30); Yturriaga Barberán (1991b, pp. 366–396); Yturriaga Barberán (1991a, pp. 41–162). Also of interest is the excellent work of Jiménez Piernas (1982, pp. 815–931), which correctly analyses the question of the straits regarding waters in archipelagos, due to the unquestionable similarity of their legal regimes.

<sup>70</sup>Vid. Rao (1984, p. 403). Likewise Lawyer (1974, p. 1), for whom the matter of international straits “is probably the most important single issue to come before the conference”.

<sup>71</sup>Vid. Charney (1977, p. 598).

<sup>72</sup>Cf. Jiménez Piernas (1982, pp. 807–808). The author adds the substantial strategic interests of France and the United Kingdom to those of the two main powers.

## 2.1 A Brief Summary of the Work Carried Out by the Commission on the Sea Beds as Regards International Straits

The period from 1971 to 1973 was marked by the preparation of the III Conference of the Commission on the Use of the Sea and Ocean Beds beyond the Limits of International Jurisdiction for Peaceful Purposes. Taking the previous resolution of the General Assembly as a mandate, the Commission divided its work among three sub-committees. Sub-committee I was in charge of preparing the project of articles on the international regime of sea beds beyond the limits of national jurisdictions. Sub-committee II was responsible for drafting a list of points for the conference agenda. Finally, Sub-committee III was assigned the issue of sea pollution and scientific research.

Throughout the 1971 session, the work of Sub-committee II was focused on the drafting of a complete list of questions concerning the Law of the Sea, including the regime of territorial waters and international straits, as well as the contiguous zones, the continental shelf, fishing and the high seas.<sup>73</sup> During the following two years, numerous statements and recommendations were put forward, and several projects of articles on each subject were presented. Undoubtedly, the question of navigation through international straits occupied a pre-eminent position in the preparatory work of the Commission from the beginning. The projects of articles presented could be grouped basically by interests in two categories: the developed naval powers and the developing coastal States of straits; the former tended towards freedom of navigation through the straits, while the latter were in favour of a regime of innocent passage.<sup>74</sup>

In short, the contradiction between both groups of States was reduced to two different conceptions as regards navigation through international straits, set out at three distinct levels: the legal nature of these waters, the naval powers did not accept that these were part of territorial waters, the navigation regime, and, as regards the distinction between commercial vessels and aircraft and warships and warplanes, this was irrelevant for the sea powers.

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<sup>73</sup>The list drafted by Sub-committee II can be seen in *ILM*, vol. 11, 1972, p. 1174 et seq.

<sup>74</sup>The States in favour of the single regime of innocent passage were: Albania, Argentina, China, Egypt, Spain, Fiji, Iran, Kuwait, Morocco, Oman, Peru, Tanzania and Yemen. While Algeria, Bulgaria, Canada, Cuba, Czechoslovakia, Denmark, the United States, Finland, Ghana, Hungary, Iceland, India, Iraq, Israel, Italy, Liberia, Mongolia, Nigeria, Poland, the United Kingdom, the Democratic Republic of Germany, Singapore, Sri Lanka, Sweden, the Ukraine, and the USSR were to a greater or lesser extent in favour of the application of in transit passage in certain straits.

### ***2.1.1 The Proposals of the Main Sea Powers and the Freedom of Navigation***

As soon as the substantive work of the Commission began, the United States “opened fire”<sup>75</sup> with the submittal of a project of three articles which essentially reproduced the text agreed to in 1968 with the Soviet Union. While article I referred to the 12 mile territorial waters, and the third referred to fishing, article II claimed the freedom of the high seas for vessels and aircraft which crossed straits used for international navigation, in the following terms:

1. In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of another State, all ships and aircraft in transit shall enjoy the same freedom of navigation and over-flying aircraft, for the purpose of transit through and over such straits, as they have on the high seas. Coastal States may designate corridors suitable for transit by all ships and aircraft through and over such straits. In the case of straits where particular channels of navigation are customarily employed by ships in transit, the corridors, so far as ships are concerned, shall include such channels.
2. The provisions of this article shall not affect conventions or other international agreements already in force specifically relating to particular straits.<sup>76</sup>

The first two articles of the United States project constituted an indivisible package. In the words of Stevenson<sup>77</sup> before the Commission, the United States would only accept 12 miles territorial waters in exchange for the recognition of freedom of navigation through and over international straits.

This proposal received the total support of the Soviet Union and the United Kingdom; other countries, such as Australia, the Netherlands and Norway were also in favour. However, several States considered that the regime of innocent passage was adequate and did not see the need for the proposal of the United States; this was the case of Denmark, Greece and Italy. Other States such as Spain were more preoccupied by the need to establish control over pollution considering the hazards of super-tankers. In the light of these observations, the representative of the United States made another declaration during the 1972 session of the Commission, and repeated the promise that, in accordance with the 1971 project, the rights of vessels and aircraft in transit were not equivalent to the freedom of navigation on the high seas. In order to ensure that vessels and aircraft would not contaminate or navigate, Stevenson proposed that the coastal States adopt regulatory systems compatible with the norms established by the international organisms – the then International Maritime Consultative Organization (IMCO) and the International Civil Aviation Organization (ICAO).<sup>78</sup>

<sup>75</sup>Cf. Yturriaga Barberán (1991b, p. 369).

<sup>76</sup>Vid. The text of the project of the United States in Office for Ocean Affairs and the Law of the Sea I (1992, p. 27). For a detailed analysis of this project, which supposes a repetition of the Declaration of President Nixon on May 23, 1970 on sea policy, see Knight (1972, pp. 759–788).

<sup>77</sup>Cf. Robertson (1980, p. 808).

<sup>78</sup>Cf. UN Doc. A/AC.138/SC.II/SR.33-47 (1972).

During the 1972 session, the USSR submitted a project similar to the one submitted by the United States although it applied exclusively to the straits which join two parts of the high seas. However, this proposal contained a number of provisions on the obligations affecting vessels and aircraft in transit and included a clause on compensation for damages caused to coastal States as a consequence of over-flying aircraft;<sup>79</sup> although it made no mention of the obligation to comply with neither the rules of the coastal State nor the power of this State to issue norms on pollution. Subsequently, in the 1973 session, the Soviet representative, Mr Malik, pointed out that the USSR was prepared to extend the regime stipulated in its proposals to the straits which join the territorial waters of a State with the high seas.<sup>80</sup> Numerous delegations were concerned by this coincidence of opinions of the two main naval powers.

It was clear that a interesting change had occurred in the position of the Soviet Union as concerns the passage of warships; while article 23 of the 1958 Geneva Convention was the subject of a Soviet reservation, in the sense that warships could not cross the territorial waters of another State, including the waters of straits, without the previous authorisation of the coastal State,<sup>81</sup> in its 1972 proposal the USSR made no distinction between warships and merchant ships.

Despite the efforts of the United States and the Soviet Union to present their projects as balanced positions on the question of straits, many of the coastal States presented an unshakeable position involving only the recognition of innocent passage through the straits.

### ***2.1.2 The Propositions of the Coastal States and the Right of Innocent Passage***

Throughout the last two sessions of the Sea-Bed Commission held in 1973, the United States and the USSR were challenged by numerous proposals from coastal States in straits,<sup>82</sup> which trusted that these might serve as a draft text for the III Conference in December 1973.

Spain was the first country to react against the United States and Soviet proposals, and pointed out that, due to a generally accepted traditional rule, vessels have the right of innocent passage which cannot be suspended and, according to the stipulations of the 1944 Chicago Convention, civil aircraft have freedom of transit and stopover in the territory of other States for non-commercial purposes, while the transit

<sup>79</sup>Cf. UN Doc. A/AC.138/SC.II/L.7 (1972).

<sup>80</sup>Cf. UN Doc. A/AC.138/SC.II/SR.69 (1973).

<sup>81</sup>Cf. <http://untreaty.un.org>.

<sup>82</sup>The total number of proposals submitted to the II Sub-Committee in 1973 amounted to approximately 50, a figure which clashed with the two proposals in the 1971 and 1972 sessions (cf. Caminos 1987, p. 73).

of non-civil aircraft requires the previous authorisation of the State being over flown. The Spanish representative, Mr Sr. Ruiz Morales, concluded by saying that:

if these intended liberties concerning navigation and over flying aircraft in international straits are enshrined in law, the final result will be to establish a right of indiscriminate transit through straits for the benefit of a few . . . and this will be directly in favour not of civil navigation but of military aircraft, which are at present not allowed passage, and warships, especially submarines.<sup>83</sup>

Similar declarations were made by Denmark, Indonesia, Malaysia, Ethiopia and Italy. The Spanish delegation also handed out a “Memorandum on the Question of International Straits”, in which it expressed its opposition.<sup>84</sup> In addition, it encouraged the constitution of a *Group of Coastal States of Straits* in favour of the regime of innocent passage. This group, made up of Cyprus, Spain, the Philippines, Greece, Indonesia, Malaysia, Morocco and Yemen, submitted a project of articles on “Navigation in territorial waters, including the straits used for international navigation”,<sup>85</sup> at the session of the Sea-Bed Commission held from March 3 to April 6, 1973. The proposal included 23 articles, and its preamble listed five basic objectives which had to be taken into account in the draft version:

1. Navigation through the territorial sea and through straits used for international navigation should be dealt with as an entity since the straits in question are or form part of territorial seas;
2. Regulation of navigation should establish a satisfactory balance between the particular interests of coastal States and the general interest of international maritime navigation. This is best achieved through the principle of innocent passage which is the basis of the traditional regime for navigation through the territorial sea.
3. The regulation should contribute both to the security of coastal States and to the safety of international maritime navigation. This can be achieved by the reasonable and adequate exercise by the coastal State of its right to regulate navigation through its territorial sea, since the purpose of the regulation is not to prevent or hamper passage but to facilitate it without causing any adverse effects to the coastal State.
4. The regulation should take due account of the economic realities and scientific and technological developments which have occurred in recent years; this requires the adoption of appropriate rules to regulate navigation of certain ships with ‘special characteristics’.
5. The regulation should, finally, meet the deficiencies of the 1958 Geneva Convention, especially those concerning the passage of warships through the territorial sea, including straits.

This project adopts a monistic approach to the regime of straits, following the directives of the 1958 Geneva Convention on the suspension of innocent passage although it did include important innovations as regards other aspects. For example,

<sup>83</sup>Vid. The first intervention of the Spanish representative in Office for Ocean Affairs and the Law of the Sea I (1992, pp. 30–32).

<sup>84</sup>The four arguments on which Spain grounded its position were as follows: strategic reasons, the satisfactory functioning of the regime of innocent passage, easements of the coastal States of straits and the false accommodation of interests.

<sup>85</sup>Cf. UN Doc. A/AC.138/SC.II/L.18 (1973).

it tried to objectively specify the concept of innocent passage as it indicated the activities which the vessels were prohibited from carrying out during passage through the straits, such as espionage, propaganda and interference with the communications systems, illicit trading, exploration or exploitation of resources, the embarking or disembarking of persons or things. It introduced a non-discrimination clause as regards the flag of the vessel, the nationality of the passengers, the place of departure and the destination. Furthermore, it reinforced the competence of the coastal States to control navigation with regard to security and maritime traffic, the placement and use of installations to assist navigation and the exploitation or exploration of marine resources, maritime transport, research into the marine environment, and the passage of vessels with special characteristics.

However, the project contained no provisions concerning over flying aircraft as it considered that the rules of the Chicago Convention continued to apply.

Similar to this proposal by the eight "Strait" States was the one submitted by Fiji.<sup>86</sup> We should point out that although the position of Fiji on commencement of the preparatory work seemed to be aligned with those States opposed to an autonomous regime concerning international straits, its position changed dramatically throughout the first two sessions of the III Conference, when, together with the United Kingdom, it led a private negotiation group regarding the straits, which drafted what would later become the articles finally included in the UNCLOS.

The original and premonitory proposals submitted by Malta had little effect on the work of the Sea Bed Commission as regards its global and integrated conception of the maritime areas. In 1971 it presented an ambitious treaty project on marine areas<sup>87</sup> which, to a certain extent, followed the regime of innocent passage, with the only difference that it recognised free passage in straits over 12 miles wide and granted the right of innocent passage to aircraft. It also proposed that the right of the coastal State to prevent the passage of foreign vessels only went as far as the first 6 miles from the coast. In 1973, it submitted a corrected, extended version of its proposal,<sup>88</sup> in which certain special competences were recognised for the coastal States within a 12 mile band adjacent to the coast. These competences, in the case of the straits whose width was less than 24 miles, were restricted to the possibility of demanding the following: that the vessels comply with the obligatory systems for the separation of traffic, their passage be uninterrupted and fast, that they use pilots, that warships notify passage three days in advance and that unidentified submarines navigate on the surface. It recognised the right of aircraft to fly over the straits, and this could only be suspended by the coastal State in the event of grounded fear of serious and imminent threat to its security.

However, the project which had most effect was the very brief one submitted by Italy, which stipulated a dual regime for straits:<sup>89</sup> 'innocent passage' for those straits

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<sup>86</sup>Cf. UN Doc. A/AC.138/SC.II/L.42 (1973).

<sup>87</sup>Cf. UN Doc. A/AC.138/53 (1971).

<sup>88</sup>Cf. UN Doc. A/AC.138/SC.II/L.28 (1973).

<sup>89</sup>Cf. UN Doc. A/AC.138/SC.II/L.30 (1973).



with a width less than 6 miles, whose coasts belonged to one State and which had other alternative nearby navigation routes; and ‘free transit’ for the other straits, where vessels and aircraft would have the same freedom to navigate and fly over as on the high seas, as regards transit through or over straits which communicate two parts of the high seas or apart of the high seas with the territorial waters of a foreign State.

In the words of J.A. Yturriaga Barberán, “this proposal involved a high level of cynicism and opportunism as it was drawn up tailored to the Strait of *Messina*, which remained safeguarded by the often abused regime of innocent passage, while the other straits came under the regime of free transit”.<sup>90</sup> This project was fiercely criticised by the Spanish representative.

It is evident that the projects and proposals submitted to the Commission throughout these three years are a result of two approaches to the regime regulating navigation through international straits which are diametrically opposed. On the one hand, there is the standpoint of the naval powers based on an autonomous regime of freedom of air and sea navigation. On the other hand, there is the position of the coastal States of straits as regards maintaining a unitary regime grounded on the right of innocent passage.

The variety and disparity of the proposals made it impossible to compile all of them in a single document, while this also made it unfeasible for the Sea Bed Commission to draw up a draft of articles to be considered at the III Conference of the United Nations on the Law of the Sea. In fact, the final report adopted on August 23, 1973 is only a list of nine possible variants of how the articles concerning item 4 (straits used for international navigation) could be drafted.<sup>91</sup>

This peculiar circumstance undoubtedly supposed a change of the methodology used at other codification conferences held under the auspices of the United Nations.

## **2.2 The Most Relevant Aspects of the Development of the Question of the International Straits at the III United Nations Conference on the Law of the Sea**

On December 3, 1973, the III United Nations Conference on the Law of the Sea began its long, complex passage in *New York* although this first period of sessions was dedicated exclusively to organisational questions. The first substantial discussions took place during the *second period of sessions* held in *Caracas* from June 20 to August 29, 1974. Although the first session of authentic negotiation was the third one, held in Geneva in 1975, where a *Single Informal Negotiation Text* was achieved and this would give fundamental shape to the new Convention. The dilemma involving innocent passage and freedom of navigation – or, in other words, Straits

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<sup>90</sup>Vid. Yturriaga Barberán (1993, p. 376).

<sup>91</sup>The explanation of the variants adopted in the Report of August 23, 1973 can be consulted in the Office for Ocean Affairs and the Law of the Sea I (1992, p. 138 et seq).

States and Maritime Powers – focused the debates on the regime of straits. However, the initial resistance of the coastal States was gradually weakened during the successive periods of sessions faced with the strong pressure of the Superpowers and the great powers, as well as the neutrality or passivity of the immense majority of the Group of 77, and lost force and consistency. In fact, only Spain showed its disagreement concerning some of the provisions of the new regime up to the last moment and undoubtedly was one of the more active States against the great powers.

### 2.2.1 *Formulation of the Principal Tendencies*

At the beginning of the second period of sessions in Caracas in 1974, the functioning of the Conference was organised, by being structured in accordance with the model of the Sea-Bed Commission: a First Committee in charge of the international regime and the mechanism for the regulation of the use of the sea beds beyond the limits of national jurisdiction; a Second Committee dealt with all the traditional matters concerning the Law of the Sea, including territorial waters, the economic zone, the continental shelf, the high seas, the straits, the archipelagos and fishing; and Third Committee attended to the problems of sea pollution, conservation, scientific research and technological transfer. This session turned into a forum for presenting the various political declarations together rather than a negotiation session; in fact, the Second Committee only achieved the preparation of a document entitled “Working Paper of the Second Committee: Main Trends”,<sup>92</sup> a collection of alternative formulations amounting to 127 pages. This was difficult to deal with and constituted a compendium of the various positions rather than a negotiation text, which was in accord with the general content of the session.

As regards international straits, a total of nine proposals concerning or referring to these were submitted; the basic positions presented by the States to the Sea-Bed Commission were again explained, proposals were repeated and some new ones were submitted.

Thus, the United States insisted with its already known position that the 12 mile extension of the territorial sea should suppose the recognition of a non-discriminatory right to free transit through international straits as regards air, surface and submarine navigation.<sup>93</sup> The USSR cosponsored a project similar to the one submitted in 1972 together with another five socialist countries.<sup>94</sup>

Spain continued to oppose the proposals for free transit, and presided and coordinated the work of the Group of Coastal States which drafted a version of

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<sup>92</sup>Cf. Doc. A/CONF.62/C.2/WP.1.

<sup>93</sup>Vid. The Declaration of Ambassador Stevenson in this respect in *Documentos Oficiales de la Tercera Conferencia de Naciones Unidas sobre Derecho del Mar*, New York, 1975, vol. I, p. 179.

<sup>94</sup>The project was cosponsored by Bulgaria, Czechoslovakia, Poland, the GDR, the Ukraine and the USSR (cf. Doc. A/CONF.62/C.2/L.11, 1974).

the 1973 text in which, although some minor concessions were made concerning maritime navigation, silence ensued as regards flights over straits. For tactical reasons, the new text was submitted by Oman although it was subsequently cosponsored by Malaysia, Morocco and Yemen.<sup>95</sup> In addition, Fiji presented a revised version to its proposal of 1973.<sup>96</sup>

Another two propositions referred exclusively to the definition of straits used for international navigation; one was presented by Canada,<sup>97</sup> the other was cosponsored by ten Arab States (Algeria, Bahrain, Iraq, Kuwait, Libya, Qatar, Saudi Arabia, Syria, Tunisia and the United Arab Emirates).<sup>98</sup> The Dominican Republic also made a proposal, establishing that the principle of previous notification should be adopted by the States which had bays and straits in common, before any of them carried out work or placed installations which might generate pollution of any kind for the other State.<sup>99</sup>

However, undoubtedly, the most important proposal of all those presented at this second session in Caracas was the one put forward by the United Kingdom, which assumed a supposedly mediating function as it was both a maritime power and a coastal State of one of the most important navigable straits in the world, the Dover Strait, and had to seek the reconciliation of all the interests involved. The project was submitted as an attempt to find a balance between the proposals for freedom of navigation and the traditional support for innocent passage.

As the regime of 'free transit' had received severe criticism, the United Kingdom very skilfully presented a proposal which introduced the concept of 'passage in transit' through the straits used for international navigation which communicate two parts of the high seas; this passage consisted of the exercise of freedom of navigation and over-flying planes exclusively for the purposes of continuous and rapid transit through the strait. The introduction of the new term 'passage in transit' had the advantage that it avoided the excesses of the previous proposals. The seven key factors of this project are as follows:<sup>100</sup>

1. The 'passage in transit' is only applied to straits used for international navigation which communicate two parts of the high seas; other straits are governed by the right of innocent passage which cannot be suspended. The straits formed by an island and the mainland are excluded from passage in transit if there is a similar

<sup>95</sup>Cf. Doc. A/CONF.62/C.2/L.16 (1974).

<sup>96</sup>Cf. Doc. A/CONF.62/C.2/L.19 (1974). Algeria also submitted a proposal concerning navigation through straits which communicated two parts of the high seas and served as access to semi-enclosed sea; in such straits, the merchant ships and the ships of a State exploited for commercial purposes had freedom of transit, while the warships and ships of a State which were engaged in non-trading activities had innocent passage. No mention was made of over-flying aircraft (cf. Doc. A/CONF.62/C.2/L.20, 1974).

<sup>97</sup>Cf. Doc. A/CONF.62/C.2/L.83 (1974).

<sup>98</sup>Cf. Doc. A/CONF.62/C.2/L.44 (1974).

<sup>99</sup>Cf. Doc. A/CONF.62/C.2/L.59 (1974).

<sup>100</sup>Cf. Doc. A/CONF.62/C.2/L.3 (1974).

navigation route on the other side of the island. The straits which have a high seas route are also exempt.

2. While in passage in transit, the ships and aircraft must navigate without delay and must not carry out other activities than those which are normal in transit. The vessels must comply with the generally accepted international norms on safety at sea and the prevention of pollution. The aircraft must observe the rules of the ICAO. The aircraft of a State are normally bound by these rules and must act with due diligence as regards safety.
3. The coastal States of straits have the power to adopt schemes for the separation of traffic and sea routes and have these complied with once they are approved by the proper international authority.
4. The coastal States of straits have the power to adopt norms which put the international regulations on the prevention of pollution into effect and have these complied with.
5. The coastal States of straits cannot hinder passage and must notify the hazards to sea navigation and overflying aircraft.
6. In the case of straits governed by the right of innocent passage which cannot be suspended, the norms must specify which acts are considered to be innocent.
7. The State of the flag of public ships and aircraft must be liable for the damage caused as a consequence of failure to comply with the laws of the Coastal State of straits.

The three proposals which were the subjects of most of the discussion during the second period of sessions of the Second Committee were those of the Socialist States, the proposal of Oman and the proposal of the United Kingdom, although it was this last proposal that dominated the debates fundamentally due to two reasons. On the one hand, because it was considered to be a compromise formula and received the support of the majority of the delegations; on the other hand, because even the delegations which did not fully support the proposal acknowledged the tendency to support it.

As we have mentioned, this second period of sessions concluded with no agreement on the projected articles. However, the proposals submitted were collected in a document on the formulation of the main tendencies drafted in a way which was not very objective as was shown by the fact that, in the section concerning 'innocent passage', there were five variants of the defence of free transit, and the regime of innocent passage was maintained as rather insignificant for certain unimportant straits; or also, that the position of the defenders of innocent passage as a general regime only appears in a footnote.

### ***2.2.2 Preparation and Drafting of the Negotiation Texts***

After the second period of sessions, the work of the Second Committee was carried out mainly at informal meetings, informal consultative groups, and work groups.

Neither was progress in the negotiations recorded in the summary reports of the formal meetings of the Committee, which made little progress.

In this regard, during the *third period of sessions*, held in Geneva from March 26 to May 10, 1975, a special group was constituted to deal with straits within the Second Committee, where – in a dialogue of the deaf<sup>101</sup> – the theses of the supporters of innocent passage again confronted those supporters of free transit. However, once the Conference entrusted the Presidents of the Committees with the drafting of extra-official texts, the negotiation was transferred to other forums, specifically, those of the main interest groups which were acting parallel to each other with no attempt at negotiations with each other. On the one hand, there was the “Group of Coastal States of Straits”, and on the other, the “Private Group on Straits”, an informal group co-presided by Great Britain and Fiji, and made up of Argentina, Australia, Bahrain, Bulgaria, Denmark, the United Arab Emirates, India, Iraq, Iceland, Italy, Kenya, Liberia, Singapore and Venezuela.<sup>102</sup>

In the session held on May 1, 1975, Oman submitted a document adopted by consensus in a private group, and this insisted on three points:<sup>103</sup>

1. The presumption of innocent passage in the straits used for international navigation was sufficient.
2. The basic point was to avoid collisions.
3. Overflying aircraft must be regulated by the Chicago Convention, not by a treaty on the Law of the Sea.

The Private Group on Straits drew up revised version of the British proposal of 1974, which the Group called a consensus text, as it specified that its objective was an adaptation of the proposals of Fiji and of the United Kingdom in order to achieve a balance between the interests of the coastal States of straits and the maritime powers. The main innovations of this project were as follows:<sup>104</sup>

1. The assertion that the activities which did not entail the exercise of the right of passage in transit would be regulated by the relevant norms of the Convention.
2. The addition of two new requirements for the passage of ships and aircraft.
3. Precisions on the establishment of maritime routes.
4. The extension of the regulatory competence of the coastal State: security of navigation and the regulation of maritime traffic, the prohibition to fish and the prohibition to embark or disembark products, currency or persons.
5. The assertion that the regime on transit would not affect the legal condition of the waters of the straits.

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<sup>101</sup>Cf. *Ibidem*, p. 383.

<sup>102</sup>With the exception of Fiji, all the States which composed this Group had submitted proposals in favour of free transit or had supported these. Fiji was won over to the ‘cause’ by the United Kingdom.

<sup>103</sup>Cf. Caminos (1987, p. 97).

<sup>104</sup>Cf. Yturriaga Barberán (1993, pp. 235–236).

This project was the subject of harsh criticism by Canada, Chile and Norway, which considered that its definition of straits included a number of straits which they considered to be internal waters. They also submitted an official memorandum with their viewpoints to the President of the Second Committee.<sup>105</sup>

On the final day of the Geneva session, President Amerasinghe announced the distribution of the *Informal Single Negotiating Text*, accompanied by a note from the President which stated that this text “would serve as a procedural device and only provide a basis for negotiation”.<sup>106</sup>

The tactic of waiting until the last minute to make the *Informal Single Negotiating Text* public was a success to the extent that it prevented the delegates from checking the new text and reopening the debate. Part II of the *Informal Single Negotiating Text* contained the articles project submitted by the Second Committee, which included a section on navigation through international straits,<sup>107</sup> which accepted the thesis of dual regimes in territorial waters and straits and this entailed the triumph of the naval powers and the defeat of the coastal States of straits.<sup>108</sup>

In fact, the provisions which made up this section were a reproduction of the proposal prepared by the Private Group of States cosponsored by the United Kingdom and Fiji, with some modifications to the definition of straits introduced in order to satisfy the claims submitted by Canada, Chile and Norway, together with certain additions, such as the inclusion of a clause which stipulated that all activities which do not entail the exercise of the right of passage in transit would be subject to the other applicable provisions of the Convention, and the insertion of two new obligations for ships and aircraft in transit: to abstain from all activities not related to the normal modalities of transit and to comply with the relevant provisions of the Convention.

This strategy involving the inclusion of proposals with a wider acceptance sought to ensure that the text prepared was accepted by the majority of the segments of the Conference. At the time, what it did achieve was to discourage the Group of Coastal States of Straits, and even led to a crisis within this Group which stopped meeting and ended up being dissolved. From this time, each of its members recuperated their freedom of action which allowed them to act separately in defence of their own interests.

Thus, the *Informal Single Negotiating Text* confirmed the diversity of regimes within straits, as well as the acknowledgement of an autonomous legal regime for straits, which meant a break with the position codified in the 1958 Geneva Convention.

The successive versions of the Negotiation Text did not involve important revisions of the articles, which mean that the efforts made until this date had

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<sup>105</sup>The text of this memorandum can be seen in Platzöder (1983, pp. 223–224).

<sup>106</sup>Vid. Doc. A/CONF.62/SR.54, p. 3.

<sup>107</sup>Cf. Doc. A/CONF.62/WP.8 (1975).

<sup>108</sup>This defeat also involved the archipelago States, as it ignored their proposals on the navigation regime in the waters of archipelagos, which explains the coincidence of the navigation regimes.

given their fruits. Specifically, as regards the provisions related to passage through the straits used for international navigation, these appear in the successive negotiation texts with no substantial changes. In fact, despite the efforts of a small minority, which basically included Spain, Greece, Malaysia and Morocco, to modify the articles related to passage in transit in 1976, 1977 and 1978, none of the amendments submitted received substantial support.

Along these same lines, the provisions of Part II of the *Informal Single Negotiating Text* were again included in the *Revised Single Negotiating Text*, given out on the last day of the eighth week of negotiation in *the fourth period of sessions*, held in New York in May 1976, as “a basis for continued negotiation”.<sup>109</sup> Due to the informal nature of the *Informal Single Negotiating Text*, which could not have any official amendments, some former members of the Group of Coastal States of straits submitted extra official amendments. Thus, Greece submitted a number of amendments related to ‘overflying aircraft’.<sup>110</sup> Spain was open to the regime of passage in transit for maritime navigation but continued to oppose the application of this regime to overflying aircraft; in this regard, it proposed the suppression of any reference in the text to aircraft or overflying, it tried to equate the regime on straits with territorial waters as far as this was possible as regards the rights and obligations of the coastal State and the vessels in transit, it maintained the obligation for submarines to navigate on the surface, and included a clause on the responsibility of vessels not covered by immunity.<sup>111</sup>

However, after numerous discussions held by the groups present, the modifications to the *Un-official Single Text for the Purposes of Negotiation* included in the *Revised Single Negotiating Text* were more formal than in substance. The minor changes made included: the replacement of the expression “Straits States” by “Coastal States of Straits”, which entailed the omission of the definition of “Straits State” contained in paragraph 3 of article 34; the term “legal status of the straits” in article 35(c) was replaced by “legal regime of the straits”; the terms “with similar hydrographical and navigation characteristics” were added to articles 36 and 38.1; on the suggestion of the Guyana delegation, the word “sovereignty” was added to paragraph (b) of article 39; moreover, the articles on the lateral passage to enter a coastal State of a strait and innocent passage were redrafted.

Three months later, the *fifth period of sessions* of the Conference took place, and there were no modifications made to the Single Revised Negotiation Text, although the subject of the straits used for international navigation continued to appear in the list drawn up by the President of basic subjects pending solution and which the Committees should focus their attention on.<sup>112</sup>

In 1977, again in New York, the *sixth period of sessions* was held and focused mainly on the question of the exploitation of the sea beds. The provisions on this

<sup>109</sup>Cf. Doc. A/CONF.62/WP.8/Rev.1 (1976).

<sup>110</sup>Cf. Platzöder (1983, p. 282).

<sup>111</sup>Cf. *Ibidem*, pp. 274–275.

<sup>112</sup>Cf. Doc. A/CONF.62/L.12/rev.1 (1976).

question were the only ones which were modified in the turn. The new text presented by president Amerasinghe is known as the *Informal Composite Negotiating Text*,<sup>113</sup> which combines the work of the three Principal Committees in a single negotiation text, and is the result of the two preceding texts. Its nature is defined by the President of the Conference in the following terms:

Il ne s'agira absolument pas d'une texte de projet fondamental, comparable à celui que la Commission du Droit International avait établi à l'intention de la Conférence de Genève de 1958, et dont toute disposition qui n'aurait pas été rejetée à la majorité requise serait conservée.<sup>114</sup>

This is a text which will serve simply as an instrument of work and the basis of negotiation.

The document is structured into 16 parts, with seven annexes, and a total of 303 articles numbered consecutively. Despite the multiple extra official amendments presented,<sup>115</sup> the section on the passage through the straits remained basically unaltered, except for the inclusion of a new article prohibiting the ships from carrying out research activities during their passage through the straits (article 40), and a modification which was inserted into article 234, recognising limited powers of execution to the coastal State when ships infringed its provisions concerning the security of navigation or the prevention of pollution. This modification was the result of the negotiations made by a group of States directly interested in the consequences of the provisions on safeguards in the straits.<sup>116</sup>

The constant presentation of amendments by some and their being ignored by others is also a reflection of the attitude of a few States that negotiation on straits had not been finalised, and of the position of the President of the Committee who considered that the provisions concerning straits were justly established and were a reflection of the tendency of the Conference.

During the first part of the *seventh period of sessions* held in Geneva in 1978, Spain handed out a "Memorandum on the question of aircraft flying over the straits used for international navigation" among the participating delegations, and this criticised the provisions of the *Informal Composite Negotiating Text* as regards aircraft flying over straits and submitted extra official suggestions which were never discussed or negotiated. It also presented a number of amendments in which, although concessions were made as regards maritime navigation, it continued to

<sup>113</sup>Cf. Doc. A/CONF.62/WP.10 (1977).

<sup>114</sup>Vid. Doc. A/CONF.62/L.20 (1977).

<sup>115</sup>Throughout this sixth session, Malaysia, Spain and Morocco presented several informal amendments which tended to specify the acts vessels in transit were forbidden to carry out, to extend the regulatory powers of the coastal State and to include a provision on objective liability for damages (cf. Platzöder 1983, p. 397, pp. 394–395, and pp. 399–400, respectively for the amendments submitted by each State).

<sup>116</sup>This was explained in this way by President Amerasinghe (cf. Doc. A/CONF.62/WP.10/Add.1, 1977). In fact, the inclusion of the new article 40 and the amendment to article 234 were the result of bilateral negotiations held by Malaysia, Indonesia and Singapore, on the one hand, and by the United States, the USSR, the United Kingdom and Japan, on the other.



oppose any reference to flying over straits. Greece repeated its amendments of 1976, while Morocco and Yugoslavia repeated their amendments of 1977. None of these were accepted. In fact, throughout the subsequent, successive revisions which the *Informal Composite Negotiating Text* made at the Conference – in 1980 and 1981 – until the Convention Project was achieved, none of the amendments presented on the regime of transit through straits used for international navigation were included, except for the introduction of a general clause on liability for damages (article 304), as had been repeatedly claimed by Spain and Morocco.

Throughout the first part of the *11th period of sessions*, which took place in New York in 1981, it was evident that it would not be possible to adopt the text of the Convention Project by consensus, therefore, the President of the Conference opened the period for the presentation of amendments. Greece and Spain seized the opportunity to try to restrict planes flying over straits by several amendments, which were withdrawn a year later due to the pressure put on the amending delegations by President Koh. Only two Spanish amendments were maintained.<sup>117</sup> One regarding article 39 which proposed the suppression of the term “normally”, was submitted to a vote and rejected by 55 votes against, 21 in favour and 60 abstentions. Another amendment to article 42 relative to the substitution of the word “applicable” by “generally accepted”; with 62 votes in favour, 29 against and 51 abstentions. This amendment was not approved as it did not receive the favourable votes of the majority of the States participating in the Conference, as stipulated in article 39.1 of the Regulations.<sup>118</sup>

The Voting on the Convention Project as a whole took place on April 30, 1982, during the second part of the 11th period of sessions. The text was adopted by 130 votes in favour, 4 against (the United States, Israel, Turkey and Venezuela), and 17 abstentions (including Spain). The formal signing of the Final Minutes of the Conference and the *United Nations Convention on the Law of the Sea* took place in Montego Bay (Jamaica), during the third part of the 11th session, on December 10, 1982. It came into force on November 16, 1994, once 12 months had elapsed since the deposit of the 60th instrument of ratification by Guyana. It currently has 155 parties.

Despite initial reticence, Spain signed the Final Minutes of the Conference on December 10, 1982 and signed the United Nations Convention on the Law of the Sea on December 4, 1984 (five days before the period established by article 305.2 of the Convention), ratified it on January 15, 1997.<sup>119</sup> Both the Spanish signing and the ratification instrument were accompanied by a number of interpretative declarations, using a power permitted by article 310 of the UNCLOS, most of which concerned the issue of international straits.<sup>120</sup> However we should point out that, at

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<sup>117</sup>Cf. Doc. A/CONF.62/L.109 (1982).

<sup>118</sup>Vid. The text of the Regulation in Doc. A/CONF.62/30/Rev.2, New York, 1976.

<sup>119</sup>Vid. *Official State Gazette (BOE)*, No. 38, of February 14, 1997.

<sup>120</sup>Specifically Spain made five declarations on straits at the time of signing, and specifically qualified articles 39, 42, 221 and 233 of the UNCLOS.

the time of the ratification, Spain carried out a reordering and reformulation of the declarations related to the regime on navigation through straits.

Thus, the two declarations related to the protection of the marine environment, specifically, number 4 concerning article 42.1(b) and 7 on the interpretation of article 233 in accordance with article 34 were suppressed. The second declaration was maintained although it was redrafted in order to eliminate the references to the regulation of air space and given a wider meaning to include the content of the two suppressed declarations.<sup>121</sup> Finally, the other two declarations on the regime of international straits remained intact, and this was advisable, in the opinion of C. Jiménez Piernas, “in order to avoid interpretations by the user States of these straits which are clearly contrary to the legitimate interests of the coastal States in order to avoid the misuse of the passage in transit of aircraft and to safeguard their right to intervene in the event of accidents”.<sup>122</sup> The remaining interpretative declarations made on signing were maintained substantially, at the time of ratification, these were those concerning the contentious issue of Gibraltar (2nd), which was correctly described by the same author as “playing to the gallery”,<sup>123</sup> the fishing regime in the European Economic Area (4th), and the regime on the exploitation of the area (5th). Another two, whose justification was self evident were added to these, the 1st concerning the condition of a Member State of the EU, and the 6th in accordance with article 287, whereby Spain chose the ICJ in order to solve controversies related to the interpretation or application of the UNCLOS.

As pointed out by R. Riquelme Cortado, the basis of the Spanish declarations on the new regime of passage in transit through the straits used for international navigation lies “in the fact that the sovereignty of the State over the waters of the straits, its sea bed, its subsoil and the air space above must be reflected in the powers and competencies recognised to the coastal State as regards the regulation of air traffic and the prevention and control of pollution in this international route”.<sup>124</sup>

Finally, it can be concluded that, except for a few insubstantial changes made by the Preparatory Committee, the text of the articles related to the straits included in

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<sup>121</sup>The final drafting of the declaration establishes:

3. a) The regime established in Part III of the Convention is compatible with the right of the coastal State to dictate and apply its own regulations in the straits used for international navigation on condition that it does not hamper the right of passage in transit.

<sup>122</sup>Vid. Jiménez Piernas (2001, p. 113).

The meaning of these two declarations is as follows:

b) In article 39, paragraph 3 a), the word ‘normally’ means ‘except in cases of force majeure or serious difficulties’.

c) The stipulations in article 221 does not deprive the coastal State of straits used for international navigation of the competences recognised by International Law regarding intervention in the case of accidents referred to in the article cited.

<sup>123</sup>Vid. Jiménez Piernas (2001, p. 113).

<sup>124</sup>Vid. Riquelme Cortado (1990, p. 185).

the *Informal Composite Negotiating Text* is identical to the one appearing in Part III of the final text of the *United Nations Convention on the Law of the Sea*, which finally leads us to the proposal of a the Private Group of States cosponsored by the United Kingdom and Fiji.

Considering this state of affairs, there is no doubt that, with regard to the legal regulation of navigation through international straits, this give and take concerning the ‘package deal’ at the III Conference lead to what could call the “desubstantiation of the agreed rule” and others call the “exhaustion of consensus”.<sup>125</sup> At last, the success of the Great Powers.

As was stressed by B.D. Smith:

the maritime States at the Conference sought and achieved a straits regime of diminished coastal authority far more protective of military and economic navigational interests than the rules of innocent passage. The capacity of the coastal State to interfere with navigation in exercise of jurisdiction over environmental matters was specifically targeted for and subjected to reduction. In short, **the coastal State’s jurisdiction over the condition and character of vessels in straits’ transit is non-existent; jurisdiction over affirmative conduct affecting the environment is much diminished.**<sup>126</sup>

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<sup>125</sup>Cf. Wengler (1974, p. 337).

<sup>126</sup>Vid. Smith (1988, pp. 208–209) (the bold lettering is ours).