Chapter 6
The New Regime of Transit Passage Through International Straits

Transit passage through international straits is, undoubtedly, a neologism, an example of the new terminology introduced into International Law by the *United Nations Convention on the Law of the Sea* of 1982, and one of the most important achievements of the Grand Sea Powers in the new conventional regime.

Moreover, it is also new as a concept, which is evident if the rules of passage in transit of the UNCLOS – contained in the Second Section of Part III (articles 37–44) – are compared with the rules set out for straits in the 1958 Geneva Convention. The result of this comparison is that this regime is much more liberal than that of innocent passage and has strong connotations of the freedom in force on the high seas.

In synthesis the main differences between both systems of passage can be reduced to three. The first is that passage in transit includes the overflight of aircraft, which is probably the most problematic question, and innocent passage does not. The second is that passage in transit does not include the obligation which innocent passage has as concerns the fact that submarines must pass on the surface and flying their flag. Finally, although the power of the coastal State to adopt laws and regulations regarding passage in transit are specified in detail, it is easier to achieve this power than the similar power which the coastal State has in order to promulgate laws and regulations on innocent passage.

T. Scovazzi did not point out in vain that the new regime of passage in transit is so peculiar that the waters which are affected by this constitute "a *tertium genus*, distinct from both the internal waters and the territorial sea".[380]

According to article 37, this novel regime is applied to 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. As we have seen in Chap. 4, this takes in most of the international straits, and, undoubtedly, the straits which can be considered to be the most important in the world, from an economic-commercial point of view and from a strategic-military point of view,

[380]See Scovazzi (1995, p. 138).

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that is to say, the main international navigation routes such as Gibraltar, Dover, Bab-el Mandeb, Hormuz, Malacca and Singapore.

We do not risk exaggerating when we state that this new regime has become the 'heart' of the regulation of the passage through the straits used for international navigation.

6.1 Conceptual Delimitation

Article 38 provides the meaning of the right of passage in transit and does so in the following terms:

> 2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

This concept was proposed by the United Kingdom at the 1974 Caracas meeting, as a compromise formula between 'freedom of navigation' and 'innocent passage'. The essence of transit passage as distinct from innocent passage is precisely shown in the phrase "freedom of navigation and overflight solely for the purpose of continuous and expeditious transit".

A reading of this precept, classified by S.N. Nandan and D.H. Anderson as a "key provision in the Convention",[381] gives rise to several questions related to the exact determination of transit passage which we will attempt to analyse.

6.1.1 Beneficiaries of the Right to Transit Passage

The first clear conclusion which can be deduced from article 38 is that this is a right which is extensive to *ships* and *aircraft*. This conclusion is reinforced with the provisions in the first paragraph of article 38, which begins by stating that "in the straits referred to in the article 37, *all ships and aircraft enjoy the right of transit passage*, which shall not be impeded". A clear, unequivocal statement, with no exceptions, which confirms that transit passage does not distinguish nationalities or ownership, nor the type of ship or aircraft as it extends to *all*.

In fact, there is doctrinal unanimity as regards understanding that *all vessels* – including warships, nuclear driven vessels and those which transport harmful or hazardous substances – have the right to transit passage. On this point, the doubts

[381] See Nandan and Anderson (1989, p. 179).

we have observed in State practice regarding these types of vessels exercising innocent passage do not appear in the case of transit passage.

This is also a right which *all aircraft* have, an all embracing expression sufficient to include not only the civil aircraft used in air navigation, but also the other civil aircraft, military aircraft and other State aircraft. This last aspect is, undoubtedly, the most novel and certainly the most polemic of the new legal regime, as was shown in the course of the III Conference and as we established in Chap. 2 of this work. However, this was not due to civil air navigation, which had already been regularly overflying straits, but to military flights which had always required previous authorisation. Without doubt, this is the most outstanding difference in relation to the right of innocent passage.

Furthermore, as K.L. Koh points out, the right of transit passage "is not subject to the requirement of authorization or notification as a condition of passage".[382] A requirement which some States have imposed so that warships and, even, nuclear driven vessels or those which transport hazardous substances can exercise the right to innocent passage in their territorial waters, including straits as we have seen in the previous chapter.

However, there is one type of vessel which has given rise to doubts concerning how it must exercise transit passage; this is the *submarine* and other submergible vehicles. Concerning these, the interesting question arises regarding whether they can pass submerged or should pass on the surface.[383] This problem does not arise in innocent passage as the Convention is very clear in this respect; article 20 prohibits submerged navigation, and obliges submarines and any other submergible vehicles to navigate on the surface and fly their flags. However, there is no mention in any of the articles of Part III concerning submarines, thus it can be said that the Convention does not clearly and unequivocally guarantee the right of submerged transit.[384] However, this statement can be qualified, by endeavouring to interpret the whole of Part III which leads us to the conclusion that this right exists.

On the one hand, there is no similar provision to article 20, which expressly excludes submerged transit, and can be interpreted *sensu contrario* as permission since, if the drafters had wanted to make an exception of this, they would have incorporated a norm similar to innocent passage. On the other hand, article 38.2 uses the expression "freedom of navigation and overflight", which is situated within the high seas regime, therefore, it must be classified in association with what happens on the high seas; no provision expressly refers to submarines having this freedom to navigate submerged, however, there is no doubt that submarines have this freedom. Therefore, through similarity of reasoning, it seems to be pertinent that this right also corresponds to them under the transit passage regime as there is "freedom of navigation" although this is for the purposes of fast uninterrupted

[382]See Koh (1982, p. 153).

[383]For a detailed analysis of this problem, see the work of Burke (1976–1977, pp. 193–225).

[384]The contrary position to the recognition of a right of submerged transit passage is held fundamentally by H.G. Knight and W.M. Reisman (cited by Burke 1976–1977, p. 200).

transit. In addition, subsection (c) of article 39.1 refers to the "normal modes of continuous and expeditious transit". What constitutes a normal mode of navigation will depend on the type of vessel in question and, evidently, the normal mode of transit of a submarine is to navigate submerged. We must add to these arguments that there is "no interpretation to the contrary that has been advanced by any nation participating at UNCLOS".[385]

Furthermore, we must point out regarding this point that there is a difference in the drafting of article 38 and the corresponding norm of innocent passage as article 17 refers to "ships of all States", while article 38 omits the reference "of all States". A literal interpretation of this final provision implies that the holder of this right is the vessel and the aircraft, and not the flag or Registration State. Undoubtedly, the formulation is inadequate from the legal technical point of view as the vessel or aircraft cannot assume the obligations and responsibilities which are derived from the right granted.

6.1.2 Objective of This Passage Modality

Transit passage is understood solely as the exercise of the freedom of navigation and overflight for the purposes of expeditious and continuous passage as stated in article 38.2. Two conclusions can be deduced from this expression. The first is that this precision is intended to show that the vessels and aircraft only have the rights inherent to the mere continuous and expeditious passage through the strait, but not to the other rights deriving from the freedom of navigation and overflight, such as the exercise of military activity.[386]

The second involves the intention of the navigator to cross the strait continuously and expeditiously. This means that lingering, stopping or carrying out manoeuvres, which can be carried out on the high seas, are actions which are forbidden when the right of passage in transit is exercised.[387] In this regard, we can state that there is a certain parallelism between this provision and article 18.2, as article 18.2 classifies (innocent) passage as "continuous and expeditious". This language is repeated in article 53, as regards the right of passage through archipelagic sea lanes.[388] Article 18.2 permits stopping and anchoring as normal incidents of navigation, or in cases of force majeure or extreme danger. These last circumstances are

[385]Cf. Moore (1980, p. 121).

[386]See Reisman (1980, p. 72).

[387]Cf. Nandan and Anderson (1989, p. 181).

[388]Article 53 lays down the following:

> 1. An archipelagic State may designate sea lanes and air routes thereabove, suitable for the **continuous** and **expeditious** passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea.
> 2. All ships and aircraft enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes.

also stipulated in transit passage in article 39.1(c), which provides that the vessels and aircraft "will abstain from all activity which is not related to its normal modalities of continuous and expeditious transit unless this is necessary due to force majeure or serious difficulties".

There is also a substantial difference between these two types of passage. Innocent passage is typified in article 19, based on 12 activities which are not innocent, which also permits the coastal State to perfectly identify any passage which is not innocent and impede this. No article defines nor typifies the meaning of "in transit", there is no criteria similar to 'innocence', which permits the coastal State to prevent passage not adapted to this as article 38 is silent on activities which are not adapted to transit.

A final precision must be made as regards the second paragraph of article 38, in the sense that the requirement for continual and expeditious transit will not impede passage through the strait in order to enter a coastal State of the strait, to exit this State or to return to it, subject to the conditions which regulate the entry to this State.

The United Kingdom introduced this point, which was defended before the Second Committee by its representative in the following terms:

> This delegation also had in mind the situation of the long strait which had more than one country bordering one side of the strait. Assuming a strait which had two countries on the western side, States A and B, and one country on the eastern side, State C, the United Kingdom draft proposed first, a right of transit should the ship or aircraft be going all the way northwards or southwards through the strait; secondly, a right of transit if the ship or aircraft was proceeding down the first part of the strait between States A and C with a view to calling at a port or airport of State B.[389]

Undoubtedly, an example of a strait which complies with the circumstances stated by the British delegate is the *Malacca Strait*, with Singapore as the State B in this equation, which has the strait itself as the sole access to and from its ports. Thus, the provision receives the name, "Singapore Clause".

Evidently, this entails an extension of the right of transit passage, as this can be exercised to enter a coastal State or to leave it. Therefore, from the meaning of article 38, it is clear that transit passage involves both *lateral and transversal passage*, that is to say, crossing the strait proceeding from the high seas or an exclusive economic zone, or *vertical passage*, that is to say, passage involving entering, leaving or returning to the interior waters of a coastal State of a strait. In this second case, as pointed out by D. Pharand,[390] the corresponding transit passage and not innocent passage will be applied, although passage will be subordinated to the conditions of entry or exit established by the coastal State. We disagree on this

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3. Archipelagic sea lanes passage means the exercise in accordance with this 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 letters ain bold are ours).

[389] See Second Committee, 3rd meeting (1974), p. 32, *II Off. Rec.*, 125.

[390] See Pharand (1977, p. 82).

point as regards the opinions of such as V. Bou Franch,[391] who believes that transit passage is applied to transversal navigation, and is excluded in the case of perpendicular or vertical navigation.

6.2 Reciprocal Rights and Obligations of the Coastal States and the Users of the Straits Regulated by Transit Passage

The rights and obligations which fall on the coastal States, as well as on the vessels and aircraft which use these international straits regulated by transit passage, are specifically regulated in articles 39–44 of the UNCLOS. Following the structure marked out by the Convention, we will distinguish the obligations of the vessels and aircraft during their transit passage and the rights of the coastal States, and finally, the common obligations of both.

6.2.1 Obligations of Vessels and Aircraft During Transit Passage

This question is regulated in article 39, which establishes obligations which are generic for vessels and aircraft, consequently, these apply to the respective flag or registration states of the aircraft, and others are specific for the transit passage of each of these.

We should point out that the obligations listed in this provision are obligations which arise from the 1982 Convention for the vessels and aircraft which exercise the right of transit passage. These are, as stated by H. Caminos,[392] obligations which arise from the 1982 Convention for the vessels and aircraft which exercise the right of transit passage, and are different from the additional obligations arising as a consequence of the implementation of sea lanes and schemes for the separation of traffic by the coastal State and the regulatory powers attributed to this as regards transit passage. As we have stated above, the correlative of a right is an obligation.

6.2.1.1 Common Obligations for Ships and Aircraft

The obligations which are common to ships and aircraft are determined in the first paragraph of article 39, a provision which is, undoubtedly, clearly associated to the concept of transit passage. These are the following:

> Ships and aircraft, while exercising the right of transit passage, shall:
> (a) proceed without delay through or over the strait;

[391] Cf. Bou Franch (1994, p. 84).

[392] See Caminos (1987, p. 148).

(b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
(c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;
(d) comply with other relevant provisions of this Part.

As stated in the introductory phrase to this first paragraph, the obligations set out are applied when the ships or aircraft are exercising the right of transit in passage. In this regard, we must take into consideration that these ships or aircraft exercise this right when they enter a strait with the intention to pass through it, or to cross it in order to exit or head for a port or airport of a coastal State of the strait.

The first obligation which falls on a ship or aircraft which exercises the right of transit passage through a strait is that of "*proceed without delay*". This expression does not have an identical meaning but is in consonance with the requirement involving continuous and expeditious transit imposed by articles 38.2 and 39.1(c). In this same regard, it is understood that ships must move forward at their normal speed, taking into account all the relevant factors, including the safety requirements, the meteorological conditions or the presence of other vessels or aircraft in the straits.[393]

The second obligation refers to the abstention from *any threat or use of force*, using an identical formulation to that used by article 19.2 concerning innocent passage, although, in this last case, this is completed with a number of activities considered to be harmful to peace, good order and security in the coastal State, which does not take place in transit passage; such as the use of weapons, the obtaining of information propaganda, the take off and landing of aircraft or military schemes. Faced with this divergence, the doubt arises whether these activities are allowed or not. According to D. Pharand,[394] as they are not expressly prohibited, as in innocent passage, they could be considered to be permitted in transit passage. We do not share this opinion. If we take into account that an activity included in article 19.2 which is not mentioned in Part Parte lII is that concerning the disturbance of the communication systems or any other coastal installation or service, and these activities infringe the property rights and the exclusive jurisdiction of the coastal State, does this mean that these are permitted? Evidently not, this would entail a clear infringement of the sovereignty of the coastal State. As regards this point, it should be borne in mind that Part III does not limit the authority of the coastal State of the strait as regards the activities related to transit passage. Article 34 safeguards the exercise of sovereignty and jurisdiction of the coastal State over the waters of the strait, the airspace and soil and subsoil, and, undoubtedly, the competence to carry out these activities is exclusive to the coastal State. This conclusion is also strengthened by what is stipulated in article 38.3, in the sense that any activity

[393]Cf. Nandan and Anderson (1989, p. 183).

[394]See Pharand (1977, p. 83).

which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

Furthermore, none of the activities mentioned in article 19.2 can be considered to be an activity related to the normal modalities of fast, expeditious transit, as required b subsection (c).

The third obligation involves refraining *from any activities other than those incidents to their normal modes of continuous and expeditious transit*. The text does not define the normal modalities of transit, but it can be deduced that vessels can carry out the common and usual activities involved in navigation, depending on their type and the hydrographical and navigational characteristics of the strait through which they are passing, which will include the submerged passage of submarines, as we pointed out above. In the case of aircraft, we can also consider that this refers to the usual modes of navigation for each type of aircraft, while in the case of hydrofoils and hovercraft, this involves flying or sliding over an air cushion.

However, this obligation is excluded in the case of force majeure, for example, a collision or hurricane or serious difficulty. The meaning of this subsection (c) is similar to the meaning used in article 18.2, but not identical as there is quite a difference. Article 18.2 also recognises the exception involved in providing assistance to persons, vessels or aircraft in danger or in serious difficulties. In its amendment to article 39, Spain[395] proposed that this exception included in innocent passage be incorporated, but it was rejected and is not included as such. One interpretation *sensu contrario* of article 39.1(c), would mean that, if a vessel or aircraft in transit through a strait carries out an action involving humanitarian aid, assistance to persons, vessels or aircraft, it would lose the right of transit passage as it would not be complying with this. This is absurd if we take into account that the tradition to provide assistance at sea is as ancient as navigation itself.

Finally, article 39.1 refers to the *duty to comply with other relevant provisions of this Part*.

Specifically, in the first place, this involves the prohibition involving foreign vessels, included in article 40 in the following terms: "During transit passage, foreign ships, including marine scientific research and hydrographical survey ships, may not carry out any research or survey activities without the prior authorization of the States bordering straits". It is important to remember that, according to article 40, the prohibition is not restricted to 'marine' research, nor to 'hydrographical' surveys, but this involves a general prohibition concerning any kind of research or survey carried out by vessels while they are in transit passage. Thus, the exclusive competence of the coastal State in this matter is recognised, as occurs with innocent passage; and we must also place this regulation in relation to article 245, which grants the coastal State to regulate, authorise and carry out scientific research in its territorial sea.

Furthermore, the express reference to vessels engaged in scientific marine research and hydrographical surveys must not be seen as a redundancy, but as a

[395]Cf. Doc. A/CONF.62/L.109 (1982).

clarification intended to prevent confusion or erroneous interpretations. If article 39.1(c) regarding the normal modalities of transit is taken into account, there is no doubt that the normal modality of these vessels is research and surveys, thus, this clarification which excludes these vessels from this activity without authorisation is necessary. We must also draw attention to the use of the plural "States", which means that the consent of all the coastal States of the strait is required, obviously when there is more than one coastal State, in order to carry out activities involving research or surveys. If only the consent of one of these coastal States is obtained, these activities can only be carried out in the part of the territorial sea which corresponds to this State.

During transit passage, the vessels must respect the sea lanes and the traffic separation schemes designated by the coastal State of the strait and adopted by the IMO, in accordance with the stipulations in article 41.7. These vessels must comply with the laws and regulations dictated by the coastal State as regards transit passage, as stipulated in article 42.4.

However, none of these three provisions affects aircraft as they only refer to ships, which demonstrates a lack of judicial coherence, and shows how those drafting the Convection extended the obligations for ships "ad sideram" simply by inserting the words 'aircraft' and 'overflight' in the articles corresponding to sea navigation, and does not take the trouble to examine the consequences nor carry out the adaptations required.

6.2.1.2 Exclusive Obligations for Vessels

Ships in transit passage shall comply with generally accepted international regulations, procedures and practices for safety at sea, including the *International Regulations for Preventing Collisions at Sea*, known as COLREG. This also involved the generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships (article 39.2).

The expression "generally accepted" used in this article was drafted in intentionally broad terms in order to include the international agreements on this matter and which the States are parties to, such as the customary regulations generally accepted in these matters and the agreements which include these. The 'generally accepted' condition was suggested by the United States in the III Conference in order to prevent the imposition of unilateral criteria by the coastal State.[396]

Undoubtedly, the main international instruments as regards the safety of navigation, as well as the prevention and control of pollution, have been drafted within the framework of the IMO, which is the international organisation competent in this area (with 169 Contracting States). In addition to the aforementioned COLREG of 1972 (which has 153 Party States), mention should be made of the *International Convention for the Prevention of Pollution from Ships*, MARPOL 73/78 (with

[396]Cf. Doc. A/AC.138/SC.II/SR.33-47.

150 party States to Annex I/II, 133 to Annex III, 124 to Annex IV, and 139 to Annex V) and its 1997 Protocol and Annex VI (with 58), and the 1974 *International Convention for the Safety of Life at Sea* (SOLAS) (with 159 Party States) and its two Protocols of 1978 (with 114 party States) and 1988 (with 94), as the main referents.[397]

6.2.1.3 Obligations Applicable Only to Aircraft

Similar to the above, the third paragraph specifies a number of duties which exclusively affect the aircraft which fly over the straits used for international navigation, exercising their right to transit passage; obligations which are intended to ensure the safety of air navigation:

> Aircraft in transit passage shall:
>
> (a) observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation;
>
> (b) at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.

It is evident that the primordial obligation of civil aircraft is to respect the *Rules of the Air* of the International Civil Aviation Organization (ICAO). We should mention that these Rules are contained in an Annex to the Chicago Convention of 1944 and contain international standards and practice recommended as regards safety and air traffic obligatory in the air apace above and adjacent to the high seas. Thus, what article 39.3 does is convert the rules of the high seas, into obligatory for the overflight of straits regulated by transit passage, which we must not forget continue to be territorial sea, and this circumstance again corroborates the idea which we have so often repeated that the new regime of transit passage equates the waters of international straits with the high seas as regards the navigation regime.

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[397]Status at March 1, 2010. The status of the Conventions held within the framework of the IMO can be seen at http://www.imo.org/Conventions/mainframe.asp?topic_id=247. Moreover, we must point out that there are more than 40 agreements which attempt to regulate the safety of navigation and the prevention of pollution; as examples, we can cite the following: the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters* (LCD), 1972; *International Convention on the Control of Harmful Anti-fouling Systems on Ships* (AFS), 2001; *International Convention for the Control and Management of Ships' Ballast Water and Sediments*, 2004; *International Convention on Civil Liability for Oil Pollution Damage* (CLC), 1969; *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (FUND), 1971, *Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material* (NUCLEAR), 1971; *International Convention on Civil Liability for Bunker Oil Pollution Damage*, 2001. These texts can be seen at http://www.imo.org/Conventions/mainfarme.asp?topic_id=260.

Nevertheless, it is not clear to what extent and under what conditions this same obligation binds State aircraft due to the introduction of the adverb "normally" in order to specify this obligation. In fact, the Convention does not clarify what must be understood as 'normally', nor who must determine when the situation is 'normal' or 'abnormal', so, it can be easily concluded that this would be the State where the aircraft is registered, endorsing the effective conduct of the pilot, who would finally be empowered to decide, at his own discretion, whether a determined situation comes under the category of 'abnormal' in order to be 'released' from compliance with the Rules of the Air, included in the requirements for identification.

Undoubtedly, this is a crucial question as the inevitable consequence of this specification, interpreted *sensu contrario*, is that, in abnormal circumstances, the aircraft State is exempt from the obligation to comply with these Rules of the Air. This issue led to the drafting of the absurd article 39.3 which is a contradiction, since, if the finality of this provision is to guarantee the safety of navigation, which is considered of supreme interest, why is this relegated and excluded by the mere classification of a situation as abnormal? The meaning of this norm leads us to doubt the authentic 'supreme' interest of transit passage of State aircraft through international straits as, evidently, this is not the safety of navigation but safeguarding the particular interests of the main sea powers, and we know who these are as we should remember that military aircraft are included in the State aircraft.

As the Spanish representative at the III Conference correctly pointed out, "it is evident that establishing an obligation which will only have to be complied with is the same as not establishing any obligation".[398] The mere classification of a situation as 'abnormal' sets these aircraft aside from all the regulations, which represents a threat to air navigation, to the safety of the coastal States and their populations. This particular situation, which is generated by the new regulations, meant that Spain submitted an amendment to article 39, in the sense that it suppressed the term "normally". However, the amendment was rejected by 55 votes against and 60 abstentions.[399]

Undoubtedly, the key question concerning this obligation is the 'classification' of a situation as normal. The interpretation declarations made by Spain, both on signing and ratifying the UNCLOS, are aimed at clarifying this controversial point, and understand that the word "normally" means "except in the case of force majeure or serious difficulty".[400] The concern behind the formulation of this declaration is none other than the attempt to attenuate the problems which presumably will derive from the wide discretional margin granted to the aircraft of a State when theses are in transit through the straits, when it is precisely the indiscriminate passage of these types of aircraft which might cause the greatest inconvenience to the sovereignty of the coastal States of the straits. Although we must not forget that

[398]See Intervention of the Ambassador J.M. Lacleta Muñoz, in Doc. A/CONF.62/SR.182, of April 30, 1982.

[399]Cf. Doc. A/CONF.62/SR.176.

[400]Cf. http://untreaty.un.org.

this is a mere interpretative declaration which has no judicial effects unless this is expressly accepted by the other States which are parties to the Convention, which is quite improbable.

The second obligation imposed by article 39.3(b) on aircraft refers to the *rules of communication*, specifically, to the duty to keep the radio frequency assigned by the competent internationally designated air traffic control authority, or the corresponding international assistance radio frequency tuned in at all times. We must draw attention to the fact that the use of the disjunctive *"or"*, which establishes an option right for the aircraft which may choose between one system of communication or another with no need to provide a justifying reason. The use of this disjunctive conjunction is a new concession to the aircraft which carry out transit passage, to the detriment of the State being flown over, and this also involves a problem concerning the application of successive treaties regarding this matter as Annex 10 of the Chicago Convention obliges aircraft to carry two frequency systems. In this regard, article 39 should have maintained the cumulative obligation to tune into the two radiofrequencies, in line with the Chicago Convention, and not the option, but this has not been so.

Furthermore, this provision provides an incomplete reproduction of the rule in Annex 2, according to which, an aircraft operated as a controlled flight must stay tuned into the proper radiofrequency of the competent traffic control unit at all times, and establish the necessary communication and dialogue with this unit (rule 3.6.5.1). This last detail is not incorporated into article 39.3(b). The obligation to simply stay tuned into the radiofrequency assigned by the control tower of the State being flown over is of little use if the pilot does not maintain a dialogue with the air traffic controllers and does not follow their instructions.

In any case, as pointed out by the Report drafted by the ICAO in 1984,[401] this is an error which has continued from the time it was initially drafted in 1977, and has not been corrected despite the notification of the ICAO made to the Draft Committee of the Secretariat of the United Nations. It adds that, in practice, this is a matter of minor importance and does not entail a conflict with the rules of the ICAO, as these constitute *lex specialis* which must be applied in the case of the Convention.

However, we disagree with this 'optimistic' view of the ICAO. As we stated above, we are again facing a problem concerning the application of successive treaties relating to the same subject matter, whose rules of application are established in article 30 of the 1969 *Vienna Convention on the Law of Treaties*. None of the criteria involved gives preference to the *lex specialis*, nor is the special norm very clear on this point as the UNCLOS could be considered to be a *lex* specialis as regards the regime of overflight of straits. According to article 30, it would be necessary to examine whether there is a relationship clause in either of the treaties. In this regard, both Conventions have a relationship clause, which are not clauses of subordination or compatibility, which solve this problem, but both are primacy clauses. In fact, both article 82 of the Chicago Convention, and article 311.2 of the

[401]Cf. Doc. ICAO/.C/WP/7777, January 20, 1984, pp. 9–12.

UNCLOS, only allow agreements which are compatible with these, thus, the problem is not resolved. Taking into account the fact that there is no identity of parties as regards both Conventions, the solution to this question is regulated in paragraph 4 of article 30 of the 1969 Vienna Convention, as follows: as concerns the relationships between States parties to both treaties, the latter treaty is applied; in the relationships between States which are parties to the two treaties, the treaty to which both States are parties will be applied, regardless of whether this is the anterior or the posterior treaty. Evidently, as regards the relationships between States which are parties to one treaty, this treaty will be applicable.

The Chicago Convention has 190 Contracting States and the UNCLOS has 160 Contracting States (both at March 1, 2010). There are 36 States which are parties to the Chicago Convention and not to the UNCLOS. Obviously, these States apply the provisions of the 1944 Convention, just as the States which are parties to the Chicago Convention and these 36 States must apply the provisions of the Chicago Convention. Attention must be drawn to four of these 36 States[402] as these are coastal States of straits governed by transit passage. Such is the case of Iran and the United Arab Emirates, coastal States of the *Strait of Hormuz*. The United States of America, coastal State of the Straits of *Bering, Agattu, Tanaga, Unimak, Samaiga, Seguan, Adak, Kaulakhi, Kaiwi, Pailolo, Alalakeiki, Kealaikahiki, Auan* and *Kalohi*. And Venezuela, the coastal State of the *Aruba-Paraguana Passage, Serpent's Mouth* and *Dragon's Mouth*. This means that, in the straits we have referred to the territorial seas belong to these States and overflying aircraft must follow the obligations established by the 1944 Chicago Convention.

There are five States which are parties to the UNCLOS but are not parties to the Chicago Convention. In this case, the solution is the same but inversely, that is to say, as regards the relationships between them and their relationships with States which are parties to both Conventions, the provisions we have seen in the UNCLOS will be applied. We must draw attention to one of these five States which is a coastal State of two article 37 international straits, this is Dominica, and the straits are the *Dominica Passage* and the *Martinique Passage*. Undoubtedly, the obligations imposed by the 1982 Convention govern the use of these straits.

The other 153 States which are parties to both Conventions must apply the provisions of the UNCLOS as regards their mutual relationships as this is the later treaty. This is apart from the questions of international liability which might arise from non-compliance with the obligations of any of the Conventions,[403] in the sense stated in article 30.5 of the 1969 *Convention on the Law of Treaties*.

[402]The other 32 States which are not parties to the UNCLOS are parties to the Chicago Convention are: Afghanistan, Andorra, Azerbaijan, Bhutan, Burundi, Cambodia, the Central African Republic, Colombia, Congo, the Democratic Republic of Korea, Ecuador, El Salvador, Eritrea, Ethiopia, Israel, Kazakhstan, Kyrgyzstan, Lesotho, Liberia, Libya, Malawi, Niger, Peru, Ruanda, San Marino, Swaziland, Syria, Tajikistan, Thailand, East Timor, Turkey and Turkmenistan.

[403]In fact, article 82 of the Chicago Convention obliges the contracting States not to contract obligations and mutual understandings which might be incompatible with the provisions of the Convention.

This is not a minor question, but it may entail serious consequences in the case of an aircraft which enters the airspace of a State since, as stated in the 1978 Spanish Memorandum, "if this aircraft fails to maintain radio contact with the air traffic control tower and fails to obey its instructions, it will be a real hazard for civil aviation; moreover, it would also be impossible to distinguish an aircraft which wishes to exercise the right of transit passage from a possible aggressor aircraft if there is no previous identification".[404]

Furthermore, given the fact that this obligation to maintain the radiofrequency tuned in, as stated in article 39.3(b) which repeats Annex 2 of the Chicago Convention, is intended for **controlled** flights, it must be interpreted in the sense that **uncontrolled** flights over straits are forbidden.

We must mention that the provisions in articles 39 and 40 related to the obligations of ships and aircraft which exercise the right of transit passage through article 37 straits, is applicable, "mutatis mutandi", for the ships and aircraft which navigate or fly over 'archipelagic straits' designated by the archipelagic State as archipelagic sea lanes in the sense of article 53 (article 54) UNCLOS.[405]

One final note concerning the regulation analysed is that we wish to stress the fact that in the second section and in the third section of article 39, the obligations of the ships and aircraft mentioned arise in reference or in relation to the coastal State or States of the strait, but with regard to an international organisation, such as the IMO and the ICAO. This situation proves to what extent the interests of States other than the coastal States have been taken into account have been taken into account in the new transit passage regime.

6.2.2 Rights of the Coastal State or States of an International Strait

As we have already analysed, unlike the innocent passage regime, the UNCLOS establishes a number of normative powers for the coastal State, such as the consequent jurisdictional and protection competences, as regards transit passage, the Convention seems to completely ignore competences. In fact, articles 42 and 41 of the UNCLOS establish the regulatory powers the coastal States have as concerns transit passage through the straits, but they omit any reference to the corresponding executive competences in this regard, which is another indication that the right of transit passage seems to be above the sovereignty of the coastal States for the 1982 Convention.

This is an evident omission which we must complete by carrying out the due interpretation of the provisions of the Convention.

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[404]See the reference in Yturriaga Barberán (1991b, pp. 414–415).

[405]For a comparative analysis of the rights and obligations which affect the aircraft in transit over straits or archipelagic waters, see Vries Lentsch (1983, pp. 165–225).

6.2.2.1 The Regulatory Competence of the Coastal States Concerning Transit Passage Through Their Straits

The regulatory competences of the coastal States of international straits essentially consist of adopting laws and regulations related to transit passage through their straits (article 42), and designating sea lanes and prescribing schemes for the separation of traffic in these lanes (article 41). We must draw attention to the fact that these rights recognised for the coastal State are quite limited as it can only dictate laws and regulations in four specific material areas, and establishing the sea lanes and the schemes for the separation of the traffic requires the agreement of the IMO. In addition, all these refer to sea navigation and not to air navigation; even the establishment of lanes and schemes for the separation of traffic is limited only to sea navigation, and there are no regulations concerning similar measures related to air traffic.

In fact, article 42 establishes that the coastal States of straits can adopt laws and regulations related to transit passage especially or to some matters which are on a limited list, and which refer to maritime safety, pollution, fishing and customs, tax, health and immigration laws. A list which contains important omissions, such as liability for damages, and which contrasts with the regulation powers recognised in article 21.1 for the coastal States governed by innocent passage. This entails a substantial restriction to the powers granted to the coastal State as regards ordering passage.

A restriction which is intensified if we observe how the regulatory rights included in articles 22 and 23 concerning innocent passage by nuclear driven vessels or those which transport harmful or hazardous substances through the straits governed for the article 45, do not exist for the transit passage of these types of vessels with special characteristics through straits of the article 37. Not even the possibility to charge levies as remuneration for certain services provided for ships which cross the straits in transit, recognised in innocent passage (article 26), is a right granted to the coastal States in the case of transit passage through their straits.

The regulatory powers of the coastal States concerning transit passage are extended to the stipulations in article 42.1, each of whose four sections specifies the subject of the legislative competence of the coastal State and restricts its scope in the following terms:

Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:

- *"(a) the safety of navigation and the regulation of maritime traffic, as provided in article 41"*

Unlike article 21 which we have analysed and which authorised the coastal State to dictate norms only concerning the safety of navigation and the regulation of sea traffic, article 42 qualifies this power and refers to article 41, that is to say, it limits this power to the mere possibility to designate sea lanes and schemes for traffic safety, an important question which will analysed in detail in the following section due to the importance of the matter.

- *"(b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait"*

The rigidity and restrictive nature of the terms of this provision contrast with the parallel provision of article 21.1 concerning innocent passage, where the limitations we observe here do not appear. In fact, the legislative competence of the coastal State regarding the prevention, reduction and control of pollution in the straits where transit passage is in force is not absolute, but has two important limitations. One is that its laws and regulations must have the finality that they provide effect to the international regulations applicable. Another is that it only restricts the unloading of hydrocarbons, waste oil and other harmful substances; an absurd limitation which excludes the regulations on pollution due to other reasons, such as spills or the pollution resulting from maritime accidents.

Spain proposed two amendments in order to overcome these limitations, one tended to replace the word "applicable" by "generally accepted", and the other to eliminate "oil".[406] The second was withdrawn, but the first was maintained and accepted by a margin of 60 votes in favour, 29 against and 51 abstentions. However, despite its acceptance, the rigid Conference Rules prevented its incorporation to the text of the UNCLOS. The difference in meaning is important because the expression "generally accepted" includes customary norms, incorporated or not into an international treaty, accepted by the majority of States; while "international regulations applicable" is limited to international treaties in force which the coastal State of the strait and the flag State of the vessel in transit. Among these treaties we must cite MARPOL 73/78.

As pointed out by T. Scovazzi[407] it is surprising that the coastal State is not also granted the right to know whether the vessels in transit through their straits carry contaminating substances.

Exercising this power and as a partial incorporation of Directive 2005/35/EC of the European parliament and of the Council, of September 7, 2005, Spain adopted Royal Decree 394/2007, of March 31, *on measures applicable to ships in transit which unload pollutants in Spanish marine waters*, which will be applied to the unloading of contaminating substances in Spanish straits used for international navigation subject to transit passage, as expressly set out in paragraph 2 of its article 2. Among other measures, in the event that a vessel which is navigating in the territorial sea has unloaded pollutant which supposes or might suppose considerable damage to the natural resources of these waters or to the coast or property linked to it, article 3 of this Royal Decree legitimises the Spanish Maritime Administration to adopt the necessary policing, including detaining the vessel, as well as the possible commencement of the sanctioning proceedings or the referral of

[406]Cf. Doc. A/CONF.62/L.123, of April 13, 1982.

[407]See Scovazzi (1995, p. 142).

the actions to the Prosecutor.[408] This legislation is in force in the *Strait of Gibraltar* and in the *Menorca Channel*, straits where Spain is a coastal State.

- *(c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear*

Again the regulatory competence of the coastal State regarding this matter is much more limited in the straits where transit passage is in force than in those with innocent passage. In the latter, the coastal State can dictate laws and regulations for the conservation of the living resources of the sea and to the prevention of infringement of the fisheries laws and regulations of the coastal State (article 21.1); as regards transit passage, it can only regulate the prohibition to fish. This is a restrictive and unjustified formulation, which contradicts the stipulations in article 34 which declares that the regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil

What happens when the natural resources are not fish? Can these be regulated in a strait, territorial sea, with transit passage in force?

The illogical nature of the terminology of this subsection goes to an extreme when it restricts the regulation to "fishing vessels". Can the coastal State regulate fishing if the vessels are not fishing vessels? Can it prohibit foreign vessels which fish in its territorial sea or must it restrict itself to fishing vessels?

- *"(d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits"*

Of course, the regulations in this regard are more restricted than in innocent passage. Furthermore, they are more restricted than in the adjacent zone since the coastal State can regulate the infringement of its laws and regulations on taxation, Customs, health and immigration, as well as prevent violations of its regulations under the regime of innocent passage and in the adjacent zone. The coastal State of a strait does not have this power under the regime of transit passage.

There are 35 coastal States of straits where transit passage is in force[409] – status at March 1, 2010 –, none of these have dictated specific laws and regulations concerning this new legal regime of passage, except for the recent Spanish Royal Decree of March 31, 2007, on measures applicable to vessels in transit which unload pollutant in Spanish marine waters, which we have already referred to (A Royal Decree which, however, refers to all the Spanish marine waters and not

[408]The Spanish Ministry of Development must dictate the Implementation Rules for this Royal Decree. See *Boletín Oficial del Estado* No. 81, of April 4, 2007, pp. 14667–14669.

[409]These 35 States are: the United Kingdom, France, Spain, Morocco, Italy, Ukraine, Russia, Greece, Yemen, Djibouti, Somalia, Oman, the United Arab Emirates, Japan, China, Malaysia, Singapore, Indonesia, India, Sri Lanka, Australia, Papua New Guinea, Nueva Zealand, Samoa, the United States, Canada, Denmark, the Bahamas, Cuba, Dominica, St. Lucia, St Vincent, Trinidad and Tobago, Venezuela and Holland.

exclusively to straits). This means that the internal legislation in force continues to be the general legislation on territorial seas, which does not establish a differentiated regime for straits. This legislation was adequate until the corresponding entry into general and particular force of the UNCLOS, but now it is clearly insufficient.

The change became necessary due to the extent of the legal insecurity as regards the users of these international straits. The coastal States must make the necessary changes to their internal legislation in order to adapt it to the new transit passage regime which is in force in their straits.

In fact, only five States, Djibouti, Cuba, Spain, the United States and the United Kingdom have expressly recognised the new navigation regime in their domestic law. However, two of these have restricted this to a referral to the international rules in this matter, without specifying what these are. These are Djibouti, the coastal State of the *Strait of Bab-el-Mandeb*, and Cuba, which is the coastal State of the *Old Bahama Channel*. In fact, article 15 of Law No. 52/AN/78 of Djibouti, *on the territorial sea, adjacent zone, exclusive economic zone, maritime and fishing borders*, provides that "the provisions of this Law shall not modify the international rules of navigation in the Straits of Bab El Mandeb". In the same sense, article 5 of Decree-Law No. 1 of February 24, 1977 concerning the width of the territorial sea of the Republic of Cuba establishes that "The Republic of Cuba, without prejudice to the provisions of the preceding articles and in accordance with the principles of International Law, will respect the freedom of navigation and overflight as regards the straits or channels used for international navigation".[410] Only the United Kingdom, the United States of America, and recently Spain, have expressly recognised the application of transit passage for their straits. The United Kingdom in its *Territorial Sea Act* 1987[411] and in the *Air navigation Order* of November 29, 1989,[412] in relation to the *Straits of Dover* and *The Hole*. The United States declared in its Proclamation of December 27, 1988, that "within the territorial sea of the United States, the ships of all countries enjoy the right of innocent passage and the ships and aircraft of all countries enjoy the right of transit passage through international straits".[413] With regard to Spain, after its initial implacable opposition to transit passage, its position has become more flexible to the extent that article 2 of Royal Decree 394/2007, of March 31, refers expressly to "the straits used for international navigation subject to the *regime of transit passage* where Spain

[410]See http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/regionalist.htm in order to see the texts of these two provisions of internal law.

[411]Cf. *Law of the Sea Bulletin*, No. 10, 1987, p. 11 et seq.

[412]This Order of 1989 recognises the right of transit for foreign aircraft which means, "overflight of the strait from an area of high seas at one end of the strait to an area of high seas at the other end, or flight to or from an area of high seas over some part of the strait for the purpose of entering, leaving or returning from a State bordering the strait and 'an area of high seas' means any area outside the territorial waters of any State" (see *BYBIL*, 1989, p. 668).

[413]See *ILM*, vol. 28, 1989, p. 284.

exercises jurisdiction";[414] this is the evident result of having backed down and ratified the 1997 UNCLOS.

The other 30 States have not mentioned the new regime of transit passage in their legislation at all. Moreover, there are States which have even expressly stated their intention to maintain the legislation in force previous to their joining the UNCLOS. This is the case of Morocco which, on ratifying the UNCLOS on May 31, 2007, stated that "the laws and regulations relating to maritime areas in force in Morocco shall remain applicable without prejudice to the provisions of the United Nations Convention on the Law of the Sea".[415] That is to say, despite ratifying the Convention, it maintains its internal legislation regarding marine areas in force which includes the Law of 1973, whose article 3 establishes the regime of innocent passage for the *Strait of Gibraltar*.

Moreover, we must bear in mind that, among these 30 States we have referred to, there are three States which are not parties to the UNCLOS and have also manifested their inconformity with this new regime: the United Arab Emirates, Iran (both coastal States of the *Strait of Hormuz*), and Venezuela, therefore, we cannot state that they are obliged by the new regime of passage.

In addition, we must point out that there are six coastal States of three straits of article 37, which have signed international treaties regarding these straits in which they have recognised the right of transit passage. This is the case of the Treaty made by Australia and Papua New Guinea on *sovereignty and marine borders* between the two countries, including the *Torres Strait*, of December 18, 1978, whose article 7 recognises the freedom of navigation and overflight in the *Torres Strait*. The *Treaty on the Border Delimitation* between Venezuela and Holland of March 31, 1978, whose article 4 recognises the existence of the right of transit passage between the Island of Aruba and the Venezuelan mainland, that is to say, in the *Aruba-Paraguana Passage*, although this applies only for their respective vessels and aircraft as article 4.3 excludes State aircraft and the warships of third party States. Finally, the Agreement of November 2, 1988 made between France and the United Kingdom *on the delimitation of their marine border*, which was accompanied by a Joint Declaration concerning the status of the *Dover Strait*, which stated that "the two Governments recognise rights of unimpeded passage for merchant vessels, state vessels and, in particular, warships following their normal mode of navigation, as well as a right of overflight for aircraft, in the Straits of Dover. It is understood that, in accordance with international law, such passage will be exercised in a continuous and expeditious manner".[416]

Finally, we must point out that this legislative competence of the coastal States of article 37 straits which is regulated by article 42, is applicable, "mutatis mutandi", to the 'archipelagic straits' which are designated as archipelagic sea

[414]See *BOE* No. 81, 4 April 2007, p. 14668.

[415]See http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

[416]See http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/regionalist.htm, in order to see the text of the three treaties cited.

lanes by the archipelagic States, with the exception of the designation of sea lanes and the establishment of schemes for the separation of traffic which will be carried out following the stipulations in article 53 of the UNCLOS.

To date, the only archipelagic State which has developed this legislative competence has been Indonesia. In fact, on June 28, 2002, Indonesia adopted State Regulation No. 37 whereby the rights and obligations of foreign vessels and aircraft which exercise the right of passage through the archipelagic sea lanes are regulated and these sea lanes are designated. As a consequence of this routing, as we pointed out in Chap. 4, the straits of *Karimata, Sunda, Makassar, Lombok, Leti* and *Ombai* have been designated as archipelagic sea lanes, therefore, a right of passage similar to transit passage governs these, while, in the other Indonesian straits, the right of innocent passage with the possibility that it might be suspended is applied.[417]

6.2.2.2 The Executive Power of the Coastal States as Regards Transit Passage Through the Straits

The third Section of Part II of the 1982 Convention recognises the right of the coastal State to adopt all the measures required to prevent any passage which is not innocent, to regulate the cases in which it may exercise criminal and civil jurisdiction as regards the vessels which navigate through its territorial sea in innocent passage, and it grants it the right to expel any warship which does not comply with its laws and regulations related to passage through its territorial sea from the strait. The second Section of Part III does not mention this point at all. The only reference appears in paragraph 5 of article 42, but there is no reference to the adoption of measures concerning the infringement of transit passage or its legislation by the coastal State. However, it does refer to the possibility that the coastal State has to demand the international liability of the flag State in the cases of failure of State ships to comply with its laws and regulations; a law which is similar to article 31 analysed above. A right which is a logical consequence of the immunity these types of vessels have under International Law.[418]

The absence of a competence clause similar to that of innocent passage as compared with transit passage, presupposes inhibiting any State territorial control over the vessels intending to cross the strait, and the guarantees of the interests of this State, especially as regards safety, on the good will of the vessels in transit

[417]In conformity with the provisions in article 53 of the 1982 Convention there are three archipelagic sea lanes designated by Indonesia; the last of these contains four variants. State Regulation No. 37 of 2002 and the archipelagic sea lanes established by Indonesia with its corresponding map can be found in the *Law of the Sea Bulletin*, No. 52, 2003, p. 21–41.

[418]However, as regards innocent passage, article 30 legitimates the coastal State to expel these State vessels if they infringed the laws and regulations concerning innocent passage, a right which is not recognised in transit passage.

Does this mean that the coastal State lacks any executive competence as regards transit passage? Evidently no; but it does show that this is much more limited and that, in order to provide grounds for this, it is necessary to carry out a kind of magic as regards the interpretation of the pertinent provisions of Part III.

What happens when a ship or an aircraft crossing a strait in transit passage carries out an activity which the coastal State judges to be incompatible with the rules of 'transit passage'? What can a coastal State do as regards passage which is not 'in transit'? One example is the case of ship or an aircraft which carries out military manoeuvres, exercises with weapons, which might disrupt the communication systems of the coastal State or it simply decides to stop with no force majeure or serious difficulty. Faced with this situation, the Convention does not authorise the coastal State the express power to adopt the measures required to prevent such passage in transit, as authorised by article 25.1 in innocent passage. Thus, we must refer to article 38.3 which sets out the following:

> Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

Transit passage, which is not adjusted to the parameters set out in article 38, or the conduct patterns of article 39, will be submitted to the pertinent provisions concerning the territorial sea, insofar as this continues to be the legal nature of the waters which include an international strait. In accord with article 25.1, this means that the coastal State is competent as regards the sanctioning of such conduct.

In conclusion, article 38.3 may be invoked as a residual rule to justify an executive intervention of the coastal State as the sovereign State of the territorial, sea. However, T. Treves points out that the coastal State must be prudent on applying article 38.3, as regards the exercise of its sovereign powers in the strait, which must ensure certain proportionality between infringement and its countermeasure.[419]

It is in no doubt that Part III only expressly recognises legislative and not executive authority for the coastal States of straits; however, it is also certain that there is a particular provision – although not within Part III – which recognises the executive competence of the coastal States of international straits although this refers to a very specific material area, which is the "protection and preservation of the marine environment", regulated in Parte XII of the CNDUM. We refer to article 233, which expressly provides that:

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

[419]Cf. Treves (1985, p. 800).

The objective of this article is to grant powers of application to the coastal States, in the cases involving the infringement of internal laws and regulations dictated by the coastal State concerning the safety of navigation and the regulation of marine traffic, as well as the prevention, reduction and control of pollution by complying with the international regulations applicable regarding the unloading of hydrocarbons, waste petroleum and other harmful substances in the straits. However, this executive power has two important limitations which must be borne in mind. On the one hand, the vessels referred to in Section 10, that is to say, ships which have immunity, such as warships, auxiliary vessels and other ships or aircraft belonging to or used by a State for non-commercial activities are excluded from this competence. On the other hand, this possibility is only restricted to cases in which these infringements have effectively occurred or might cause serious damage to the marine environment of the straits.[420]

Nevertheless, if the conditions required for this provision are complied with, the coastal states could choose to inspect the vessel (article 226) or impose financial penalties for infringing domestic laws and regulations or international rules and norms from among the execution measures stated in the Seventh Section of Part XII, except in the case of an intentional and serious pollution of the territorial sea, in which case, the coastal State can impose sanctions of a criminal nature (article 230).

However, the ambiguous meaning of this article 233 gives rise to many doubts, for example, the appropriate execution measures in specific cases. Besides detaining and inspecting, is it also possible to capture a vessel in transit and adopt criminal jurisdiction measures against the crew?

On this point, there are two possible interpretations. One is to understand that only the execution measures of the Seventh Section can be applied and the other is that the Fifth and Sixth Sections are considered to be equally applicable.

In this regard, in the opinion of V. Carreño Gualde,[421] in order to protect the marine environment, the execution measures stipulated in article 220.2 of the UNCLOS can also be applied, taking into account that these measures may include the physical inspection and immobilisation of the infringing vessel, thus affecting the unhampered exercise of its transit passage. Likewise, R. Riquelme Cortado[422] states that she understands that, besides the execution measures of the Seventh Section, the coastal State could adopt the measures of the Fifth and Sixth Sections, as stipulated in articles 216, 220 and 222, including the retaining and immobilisation of the vessel during its passage through the strait.

In our opinion, if we attend to the literal meaning of the Convention, the execution measures of the Fifth and Sixth Sections are applicable, but only to the extent that they do not hinder, impair or suspend the right to transit passage.

[420]The restrictive terms of this article 233 led to a declaration by Spain (the 7th) at the time the Convention was signed, in the sense that this should be interpreted in accordance with the provisions of article 34. However, this declaration is one of those which were not maintained when the UNCLOS was ratified.

[421]See Carreño Gualde (1999, p. 194).

[422]See Riquelme Cortado (1990, pp. 162–166).

However, we believe that the *damage* which these vessels may cause in the waters of the coastal State of the strait must be borne in mind as article 233 permits the adoption of execution measures when non-compliance causes or threatens to cause **serious damage** to the marine environment of a strait. An execution measure which impedes, hinders or hampers the right of transit passage even though it infringes a navigation rule, if it occurs in order to prevent greater damage to the coastal State, it seems to be reasonable and not cost incurring. Clearly, the difficulty involves evaluating the damage to the coastal State and to the user in order to determine which the greater damage is.[423]

In any case, the evaluations of J.A. Yturriaga Barberán are not surprising as, in his opinion, "the special provision on safeguards contained in article 233 is one of the least fortunate of the Convention and implies a denial of the sovereignty of the coastal State over a part of its territorial sea, in contradiction to customary and conventional rules of International Law".[424] Undoubtedly, this provision is another triumph of the strategic considerations as opposed to ecological interests.

In order to escape from the clear rigidity of article 233, the coastal States of the Straits of *Malacca* and *Singapore* reached an understanding with the main users of these straits. The most relevant aspects are included in the Memorandum of April 28, 1982[425] and are the following:

(1) The provisions dictated by the coastal States in accordance with article 42 may include the requirement that vessels in transit through the strait carry a probe under the keel measuring up to 3.5 m. Indonesia, Malaysia and Singapore had already achieved that the IMO recommend this measure five years previously in its Resolution A.375 (X) of 1977.[426]
(2) If this requirement is not complied with, the coastal States can take the appropriate execution measures stipulated in article 233, including the measure to prevent the progress of the vessel, and this cannot be considered to be a refusal, a hindrance, an impairment or a suspension of transit passage.

[423]The coastal State can even justify the infringement of the right of transit passage and exclude the illicit aspect of its conduct by alleging the excluding circumstance of the 'state of necessity' stipulated in article 25 of the Project of the ILC concerning the international responsibility of States 2001. Specifically, 'ecological state of necessity' in the sense included in the *Gabcíkovo-Nagymaros Project Case* (cf. ICJ *Reports*, 1997, pp. 51–53), again taking up the opinion of the ILC, for which, a grave danger to the ecological preservation of all or some of the territory of a State included among the situations what could occasion a 'state of necessity', and adds that, "the ecological balance has come to be considered an 'essential interest' of all States" (See *Yearbook of the ILC*, 1980, vol. II, 2nd part, pp. 34, 3, 38 and 14).

[424]See Yturriaga Barberán (1991a, p. 185).

[425]The content of the Memorandum was officially confirmed by Australia, the United States, France, Indonesia, Japan, the United Kingdom and the Federal Republic of Germany. Cf. Doc. A/CONF.62/L.145, of 29 April 1982.

[426]Among other measures, this Resolution recommends that the vessels carry a 3.5 m probe under the keel in order to cross the Malacca and Singapore Straits.

(3) Articles 42 and 233 will not affect the rights nor the obligations of the coastal States as concerns the suitable execution measures regarding vessels which are not in transit passage through these straits.

Italy and France, the coastal States of the *Strait of Bonifacio* created an International Marine Park in the area and wanted to forbid the transit of certain vessels through the Strait in order to prevent and avoid the risk of pollution, a measure which could not be adopted as it was incompatible with the regime of transit passage. What they did do was to adopt internal norms forbidding the traffic of its domestic vessels which transport hydrocarbons, chemical products or other hazardous substances through the straits. This is included in the French Prefecture Resolution No. 1/3, of February 15, 1993, and the Decree of the Italian Merchant Navy Ministry of February 26, 1993[427]

What they did achieve was that the IMO adopted Resolution A.766 (18), of November 4, 1993 on navigation through the *Strait of Bonifacio*, which recommended the governments "to prohibit or at least strongly discourage the transit of the Strait of Bonifacio by laden oil tankers and ships carrying dangerous chemicals or substances in bulk liable to pollute, in the event of a casualty, the sea or the coast, as listed in the annex to MEPC.49 (31) resolution adopted on July 4, 1991, and which are flying the flag of their respective State",[428] although its Preamble reaffirms that freedom of navigation in international straits is an absolute priority.

6.2.3 *Obligations of the Coastal States of Straits Concerning Transit Passage*

Following the logic of the rights attributed to the coastal State of a strait, the second section of Part III ends with a rule which specifies the obligations of the coastal State with regard to the right of transit passage; obligations which are also compulsory for the archipelagic States as regards 'archipelagic straits' which they might have designated as archipelagic sea lanes. On this point, article 44 stipulates the following:

> States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.

Following the meaning of this rule, we can state that the coastal State has both abstention and information obligations.

[427]Cf. http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/regionalist.htm.

[428]See the reference in Scovazzi (1995, pp. 150–151).

6.2.3.1 Abstention Obligations

From the provisions in article 44 it is possible to deduce a number of *abstention obligations*, that is to say, things not to do.

The first of these is *not to hinder transit passage*. An obligation which we must place in relation to the construction of fixed links between the two sides of a strait. These constructions which are not very frequent due to their high cost are occasionally constructed in straits used for international navigation,[429] which may entail a 'material' obstacle to the right of transit passage as they may hamper and even prevent navigation. Thus, when they are being built, it is necessary to take this obligation not to hamper transit imposed by the Convention into account, and this involves questions such as their height, leaving sufficiently wide passage for navigation and the possible alterations these types of constructions might cause to the sea and wind currents, which might hinder passage through the strait.

There are fixed links already constructed, such as the one in the *Little Belt*, (one built in 1935 which is 33 m high, and another in 1970 which is 43 m high), in the *Bosphorus* (one built in 1973 and another in 1988, both of which are 64 m high), in the *Great Belt*[430] (inaugurated in August 1997), and in the *Öresund* (opened in July 2000, it combines a tunnel measuring 4,050 m long and a bridge which is 7,845 m long).

The projects for the *Strait of Gibraltar* (where preference has been given to a tunnel and which is now stopped), and the *Dover Strait* (temporally abandoned due to its high cost).

At the present time, planning is being made on the construction of a fixed connection in the *Malacca Strait* (between Indonesia and Malaysia, near Singapore), in the *Johor Strait*, and in the *Corinth Channel*, which was financed by the European Investment Bank.

Undoubtedly, the construction of fixed links in international straits comes within the scope of the sovereignty of the coastal State or States as these are territorial waters, however, this is restricted by the obligation these States have not to hinder the right of passage in transit through these straits, and therefore these constructions must strictly respect this obligation.

In this same context, we must situate the "land reclamation" work carried out by Singapore in the *Johor Strait* and the adjacent zones since 2003. This activity was the subject of an action before the *International Tribunal for the Law of the Sea*

[429]For a detailed study of this problem, see the work of Piaskowski-Rafowicz (2004, pp. 319–345).

[430]The construction of the bridge in the *Great Belt* by Denmark was the subject of a claim by Finland submitted to the ICJ on May 17, 1991. On May 23, 1991, Finland requested the adoption of provisional measures by the ICJ, specifically, the stoppage of work. However, this request for provisional measures was rejected by the Court in its Order of July 29, 1991, as it was understood that the work on the construction of a fixed link in the Great Belt did not infringe any right of Finland (cf. *Passage through the Great Belt Case*, ICJ *Reports*, 1991, p. 35). Finland and Denmark finally reached an amicable arrangement which included the payment of 16 million dollars by Denmark to Finland, which meant that Finland ceased its claim before the Court.

brought by Malaysia on July 4, 2003,[431] as it understood that the activity infringed its rights in the zone. On April 26, 2005, Malaysia and Singapore signed a Conciliation Agreement which put an end to the case and constituted the integral and definitive solution to the controversy. Among other questions, Singapore guarantees that, "even after the Palau Tekong land reclamation, the unhampered passage of vessels through Kuala Johor and the port of Calder will not be affected by this land reclamation".[432]

This obligation does not impede transit passage is also stated in paragraph 2 of article 42, when it states that the application of the laws and regulations of the coastal State will not result in denying, hampering or impairing the right of transit passage.

In this regard, as we have mentioned before, it should be remembered that the coastal States of straits where transit passage is in force have not yet made the required changes in their internal legislation in order to adapt it to the new regime, thus, only the general legislation on territorial seas applies. This means that some of these States have provisions in their internal law which, *a priori*, could be included within the material scope of article 42.1(b), that is to say, "prevention, reduction and control of pollution", and these suppose a violation of this obligation "not to deny, hinder or impair the right to transit passage". This is the case of article 5 of Federal Law No. 19 of 1993 of the United Arab Emirates,[433] which establishes the obligation of vessels which transport hazardous or harmful substances to previously notify of their passage. Article 8 of Law No. 45 of 1977 of Yemen[434] imposes this same requisite concerning the passage of these types of vessels. Article 14.2 of Law No. 18 of 1999 of Samoa[435] imposes the requirement that authorisation be granted previously so that nuclear driven vessels and those which transport hazardous substances might cross its territorial waters. This requisite is also demanded by article 9 of the 1993 *Law on Marine Areas* of Iran.[436]

It is evident that the adaptation of domestic legislation in these cases is not only necessary but imperative. Although we must remember that the United Arab Emirates and Iran are not parties to the UNCLOS although Yemen and Samoa are.

In addition, as we pointed out on examining the right of innocent passage, some coastal States of straits in which transit passage is in force also condition the passage of warships through their territorial waters, either by making previous notification obligatory – such as Denmark, Indonesia and India –, or demanding authorisation – such as China, the United Arab Emirates, Iran, St. Vincent and the

[431]Malaysia also requested the adoption of provisional measures by the Court on September 5, 2003, which was decided by the Order of October 8, 2003 (cf. http://www.itlos.org, Case No. 12).

[432]Point 8 of the Conciliation Agreement of April 26, 2005. The text can be seen in the *Law of the Sea Bulletin*, No. 59, 2005, pp. 30–32.

[433]Cf. *Law of the Sea Bulletin*, No. 25, 1994, p. 94.

[434]Cf. http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/regionalist.htm.

[435]Cf. *Ibidem*.

[436]Cf. *Law of the Sea Bulletin*, No. 24, 1993, p. 11.

Grenadines, Sri Lanka and Yemen.[437] The corresponding change in their legislation in order to adapt it to the regime of transit passage through their straits, which prevents these types of measures, is inexcusable.

In this regard, and similar to the right of innocent passage, the coastal State *cannot suspend transit passage* through the strait. Despite this obligation, in September 1988, Indonesia announced the temporary closure of the passage of any vessel through the *Straits of Sunda* and *Lombok* due to the carrying out of air and naval tactical operations. This suspension was protested by the 12 members of the European Community, as well as by Australia, the United States of America and Japan,[438] as it meant a clear infringement of this obligation.

Even more controversial was the adoption of Turkey in 1994 of the "Maritime Traffic Regulations for the Turkish Straits and the Marmara Region", which entered into force in July 1994.[439] This regulation stipulates the possibility to temporarily impede marine traffic in the Turkish straits and in the region of Marmara in certain cases (perforations, salvage operations, accidents, pollution, etc.), and renders the passage of nuclear driven vessels and those which transport hazardous substances subject to the previous authorisation of the Turkish authorities. This polemic situation does not arise due to the infringement of article 44 which does not occur as the straits are beyond the scope of Part III as they are regulated by a long standing convention (article 35 c), but because some of the provisions adopted contradict the terms of the 1936 Montreaux Convention, which has led to several States, such as Greece and the Russian Federation, protesting.

The *prohibition to make distinctions* between foreign vessels in the laws and regulations adopted by the coastal State in relation to the subjects stated in article 42.1 also involves an abstention obligation. This obligation is included in paragraph 2 of article 42, not in article 44, and constitutes an important innovation to the Convention.

6.2.3.2 Obligations Regarding Information and Publicity

In addition, the coastal State must comply with other obligations which entail a *duty of information and publicity*, very similar to what we have analysed as regards innocent passage.

This includes the obligation pointed out in article 44, in the sense that any danger which might threaten navigation or overflight in the strait must be notified of as it becomes known. The determination of the "appropriate way" will depend on the circumstances in each case.

However, due publicity must be given to all its laws and regulations concerning transit passage (article 42.3), and the charts showing the sea lanes and the schemes for the separation of traffic established by the State (article 41.6). The choice of the

[437] See above heading 1.1 (C).

[438] Cf. *AJIL*, vol. 83, 1989, p. 559.

[439] Cf. *Law of the Sea Bulletin* No. 27, 1995, pp. 56–72.

publicity method is the exclusive competence of the coastal State, and a suitable means must be used so that the information might reach all the parties involved, that is to say, users of the straits, flag and registration States of the ships and aircraft which cross the strait and the international organisms competent in this regard.

6.2.4 *Cooperation Between Coastal States of a Strait and the States Using the Strait*

Finally, we must refer to a provision which stipulates international cooperation between coastal States and States using the straits, which has no equivalent in innocent passage. This involves article 43, which sets out the following:

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

The idea contained in this provision is that the compensation for services provided by the coastal State of a strait should be a question to be resolved between the State which uses the strait and the coastal State, since, as we stated above, the regime of Part III does not recognise any right for the coastal State to impose levies for determined services rendered, as occurs in innocent passage.

This provision is based on a proposal of the United Kingdom,[440] which recognises that international interest in navigation through international straits imposes certain restrictions on the rights of the coastal states to these straits, and proposes cooperation between coastal States and the flag States of the vessels and the registration States of the aircraft which use the strait as the most advisable in relation to the navigation aids and the prevention of pollution from the vessels. This article was particularly intended for the *Malacca Strait*.[441]

Although article 43 does not specify how this cooperation must be carried out, it may be direct or through the proper international organisation, which, in this case, would be the IMO, although there are no international instruments which regulate this cooperation.

In this regard, the Foreign Secretaries of Indonesia, Malaysia and Singapore made a Joint Ministerial Declaration on August 2, 2005,[442] whereby they urged the user States of the Straits of Malacca and Singapore to provide assistance to the coastal States in the areas of development of capacity, instruction and the transfer of technology, as well as greater collaboration. Along these same lines, on September 8, 2005, these three States signed the Declaration of Jakarta[443] which, among other

[440]Cf. Doc. A/CONF.62/C.2/L.3, article 3.

[441]Cf. Nandan and Anderson (1989, p. 193).

[442]Cf. *Law of the Sea Bulletin*, no. 59, 2005, pp. 40–41.

[443]Cf. *Ibidem*, pp. 41–45.

questions, agreed to encourage the tasks focused on the application of article 43 of the Convention, to periodically meet with the user States, the shipping sector and other parties concerned in order to examine questions related to safety and protection of the environment in the straits and to facilitate cooperation, as well as to create mechanisms for exchanging information between these. Moreover, the Governments of Indonesia, Malaysia and Singapore requested the IMO to study the possibility to convene complementary meetings so that the coastal States might determine their necessities and the user States in order to study the possibility of convening complementary meetings so that the coastal States might determine their needs and the user States might determine the assistance to attend to these necessities, for example, in the form of information, instruction, training and technical support. The International Maritime Organization, as part of its Protection of Vital Shipping Lanes Initiative, decided to convene a high-level conference to address the security of ships plying the Straits of Malacca and Singapore in collaboration with the three littoral states of Indonesia, Malaysia, and Singapore. Three meetings were held over the period 2005–2007. The outcome was the creation of a framework for cooperation between the users of the straits and the littoral States known as the *Cooperative Mechanism*, a historic breakthrough as Article 43 of the Law of the Sea Convention was implemented for the first time.[444]

In addition, we must point out that this regulation is intentionally drafted in conditional and not in imperative terms as is demonstrated by the use of the expression "they should", instead of "they must", which does impose obligation and is used for this purpose in many other precepts of the Convention. Therefore, we can conclude that the cooperation between user States and coastal States of straits intended by article 43 is a declaration of principles rather than an authentic legal obligation for third party States.

6.3 Regulation of the Safety of Navigation and Sea Traffic: Sea Lanes, Schemes for the Separation Sea Traffic and Other Safety Measures Adopted in the Straits Where Passage in Transit Is in Force

According to the provisions in article 41, the coastal States of straits can designate lanes and establish schemes for navigation in transit through the straits, but not with freedom as in innocent passage but when the following conditions arise:

1. That it is necessary for the safe passage of the vessels.
2. That the sea lanes and schemes are adjusted to generally accepted international regulations. We must understand these to be Regulation V/8 of SOLAS, Rules 1

[444]The decisions made at the three meetings, the analysis of the responses of the various stakeholders during the meetings, and the explications of the reasons for the success of the Cooperative Mechanism with interesting conclusions by proposing ways in which, can be consulted in the works of Ho (2009, pp. 233–247), and Beckman (2009, pp. 233–259).

(d) and 10 of COLREG 1972,[445] and the General Provisions on Ships' Routeing of the IMO contained in Resolution A.572 (14), as amended by Resolution MSC.71 (69). In addition, we must take Resolution A.858 (20) *regarding the Procedure for the adoption and amendment of traffic separation schemes* into consideration. Also of interest are Resolution A.857 (20) which establishes the *Guidelines for Vessel Traffic Services*, Resolution A.851 (20) which includes the General Principles for Ship Reporting Systems and Ship Reporting Requirements, including *Guidelines for Reporting incidents involving Dangerous Goods, Harmful Substances and/or Marine Pollutants*.

3. That the proposals have been submitted for adoption to the competent international organisation, which is the IMO. Of course, the IMO cannot adopt a decision in this regard without the agreement of the coastal States of the strait, but these States cannot establish more sea lanes or schemes than those adopted by the Organisation. In the case of straits with two or more coastal States, these will cooperate in order to formulate proposals in consultation with the IMO.

Therefore, following article 41, the process for the establishment and for the replacement of sea lanes and schemes for traffic safety is as follows: the proposal of the coastal State, the adoption of the Organisation in accord with this, and the establishment or substitution by an internal state act. In the case of two or more coastal States, these will cooperate in order to present a joint proposal to the IMO.

There is also the paradoxical case put forward by S.C. Truver[446] that the coastal States might propose a determined scheme and that the IMO refuses to adopt this, and this cannot be adopted unilaterally. This would generate an *impasse* difficult to solve, a dead end, which would mean not adopting any measures to guarantee the safety of navigation in the strait, nor to order traffic, with the consequent harm to the interests of international navigation in safe routes. This is aggravated by the fact that submarines can navigate submerged in these straits, which increases the risk.

Only **three international straits** where transit passage is in force have schemes for the separation of traffic or other navigation safety systems, adopted by the IMO. However, among these are the five most important straits for international navigation, namely, *Dover*, *Gibraltar*, *Bab-el Mandeb*, *Hormuz* and *Malacca-Singapore*.

– Little Minch.

As we have pointed out in the previous chapter, the IMO has jointly adopted the prohibition of passage by oil tankers weighing more than 10,000 tons through the two *Minches*, as a safety measure, unless there is force majeure (SN/Circ.159).[447]

– North Channel.

As a safety measure, the IMO has prohibited the passage of tankers through the *Rathlin Sound passage* (SN/Circ.159).

[445]See the text in Chap. 5.

[446]See Truver (1980, pp. 203–204).

[447]The measure affects the two *Minches* – *North* and *Little* – although the first comes under the regime of innocent passage (article 38.1) and the second is ruled by transit passage (article 37).

– The Hole.

In the region of the Shetland Islands, the IMO has established two precaution areas, one to the north and another to the west and south. This second area is the one which affects this strait. In order to avoid the risk of oil pollution and severe damage to the environment, vessels of more than 5,000 GT carrying oil or other hazardous cargoes in bulk should avoid the area bounded by lines connecting the following geographical positions (SN/Circ.159 and SN/Circ.167):

(10) 60°02′.50 N, 1°10′.20 W; Heli Ness
(11) 59°59′.87 N, 1°09′.37 N; Perie Bard Lt
(12) 59°41′.0 N, 1°12′.0 W
(13) 59°42′.7 N, 1°26′.0 W
(14) 60°02′.0 N, 2°48′.0 W
(15) 60°15′.0 N, 2°48′.0 W
(16) 60°42′.5 N, 2°09′.0 W
(17) 60°42′.5 N, 1°22′.0 W
(18) 60°40′.0 N, 1°17′.0 W
(19) 60°37′.3 N, 1°17′.9 W

Thence along the West coastline to position (10).

– Dover Strait.

On January 1, 1967 the first traffic separation scheme adopted by the IMO came into force (SN/Circ.35) and this has undergone several modifications, the last of which were in 2006 in relation to post F3 located at northeast edge of the Strait (COLREG.2/Circ.57), and in 2007 (COLREG.2/Circ.59).The first, 2006, introduces the following amendments:

- The existing separation line passing through the F3 station is deleted.
- The geographical positions of the boundary for the new "Precautory Area" around the F3 Station Buoy are as follows (co-ordinates are based on WGS 84 Datum):

  (1) 51°26′.01 N, 002°02′.67 E
  (2) 51°25′.31 N, 002°03′.81 E
  (3) 51°23′.23 N, 001°58′.69 E
  (4) 51°22′.76 N, 001°59′.59 E

- The position of the F3 Station Buoy and the area surrounding it in *IMO Ships' Routeing 7th Edition 1999, Part D, I/4* remain unchanged.
- Recommended direction of traffic flow arrows is inserted in accordance with convention for ships crossing the Precautory Area around the F3 Station, passing the buoy and leaving it on their own port side as follows:

  1. To the northeast of the F3 Station Buoy indicating a north-westerly traffic flow
  2. To the southwest of the F3 Station Buoy indicating a south-easterly traffic flow

The Governments of Belgium, France and United Kingdom have proposed to the 53rd session of the Sub-Committee on Safety of Navigation of IMO a new change in the existing traffic separation scheme (NAV. 53/3/15, 53/3/17/ and 53/3/18). The Maritime Safety Committee adopted on October 31, 2007 this new amendment for the traffic separation scheme in the Strait of Dover and Adjacent Waters (COLREG.2/Circ.59), with the following provisions:

(a) A separation zone is bounded by lines connecting the following geographical positions:

(1) 51°25′.31 N, 002°04′.03 E
(2) 51°26′.77 N, 002°01′.48 E
(3) 51°31′.07 N, 002°07′.90 E
(4) 51°29′.84 N, 002°10′.62 E

(b) A separation line connects the following geographical positions:

(5) 51°26′.97 N, 002°16′.95 E
(6) 51°22′.83 N, 002°12′.29 E

(c) A separation zone is bounded by lines connecting the following geographical positions:

(7) 51°22′.03 N, 001°58′.39 E
(8) 51°22′.49 N, 001°57′.61 E
(9) 51°16′.53 N, 001°52′.29 E

(d) A precautionary area with recommended directions of traffic flow is established connecting the geographical positions (1), (2), (8) and (7) above.

(e) A separation line connects the following geographical positions:

(10) 51°16′.53 N 001°52′.29 E
(11) 51°06′.13 N 001°38′.10 E

(f) A separation zone is bounded by lines connecting the following geographical positions:

(12) 51°05′.77 N 001°38′.65 E
(13) 51°06′.49 N 001°37′.55 E
(14) 50°57′.59 N 001°23′.00 E
(15) 50°51′.14 N 001°17′.20 E
(16) 50°33′.37 N 000°36′.50 E
(17) 50°26′.91 N 000°01′.09 W
(18) 50°22′.12 N 000°00′.91 E
(19) 50°32′.71 N 000°57′.73 E
(20) 50°42′.87 N 001°18′.30 E
(21) 50°56′.87 N 001°24′.03 E

(g) A traffic lane for south-westbound traffic is established between the separation zones/lines described in paragraphs (a), (c), (e) and (f) above and the following separation line/zone:

a separation line connection the following geographical positions:

(22) 51°33′.66 N 002°02′.17 E
(23) 51°27′.35 N 001°52′.76 E
(24) 51°14′.13 N 001°43′.99 E
(25) 51°06′.93 N 001°30′.90 E
(26) 50°52′.29 N 001°02′.65 E

a separation zone bounded by lines connecting the following geographical positions:

(27) 50°52′.47 N 001°02′.45 E
(28) 50°39′.37 N 000°32′.50 E
(29) 50°34′.64 N 000°04′.29 W
(30) 50°32′.71 N 000°03′.49 W
(31) 50°38′.91 N 000°32′.70 E
(32) 50°52′.09 N 001°02′.85 E

(h) A traffic lane for north-eastbound traffic is established between the separation zones/lines described in paragraphs (a), (c), (e) and (f) above and the following separation line/zone:
a separation zone is bounded by lines connecting the following geographical positions:

(33) 50°16′.34 N 000°03′.31 E
(34) 50°14′.49 N 000°04′.11 E
(35) 50°26′.37 N 001°00′.20 E
(36) 50°39′.29 N 001°22′.63 E
(37) 50°39′.69 N 001°22′.20 E
(38) 50°26′.94 N 000°59′.90 E

a separation line connects the following geographical positions:

(39) 50°39′.49 N 001°22′.40 E
(40) 50°44′.54 N 001°26′.90 E
(41) 50°53′.64 N 001°30′.70 E
(42) 51°04′.34 N 001°45′.89 E

a separation zone is bounded by lines connecting the following geographical positions:

(43) 51°04′.34 N 001°45′.89 E
(44) 51°06′.44 N 001°48′.89 E
(45) 51°11′.23 N 002°04′.09 E
(46) 51°09′.84 N 002°03′.12 E

an uncharted line representing the junction of the scheme with the adjacent scheme at West Hinder and joining the following geographical positions:

(47) 51°11′.23 N 002°04′.09 E

(6) 51°22′.83 N 002°12′.29 E

A separation zone is established within this lane as described in (i) below.

(i) A separation zone is bounded by the lines connecting the following geographical positions:

(48) 51°18′.43 N 002°04′.69 E
(49) 51°16′.03 N 002°04′.19 E
(50) 51°13′.71 N 002°00′.99 E
(51) 51°09′.35 N 001°47′.10 E
(52) 51°09′.75 N 001°45′.61 E
(53) 51°12′.35 N 001°51′.03 E
(54) 51°15′.05 N 001°54′.40 E

(j) A deep-water route forming part of the north-eastbound traffic lane between the separation zone described in (i) above and the separation zone/line described in paragraphs (c) and (e) above has been established between a line connecting the following geographical positions:

(i) 51°09′.75 N – 001°45′.61 E
(ii) 51°10′.26 N – 001°43′.74 E;

and

(iii) 51°22′.03 N – 002°58′.39 E
(iv) 51°18′.43 N – 002°04′.69 E

Inshore traffic zones

The area between the outer boundary of the traffic separation scheme and the English coast which

lies between a line:

(v) 51°08′.42 N 001°22′.24 E
(vi) 51°02′.53 N 001°22′.24 E

and a line between:

(vii) 50°34′.64 N 000°04′.29 W
(viii) 50°49′.60 N 000°16′.86 W

is designated as an inshore traffic zone.

The area between the outer boundary of the traffic separation scheme and the French coast which lies between:

(ix) 50°53′.64 N 001°30′.70 E
(x) 50°52′.10 N 001°34′.96 E

and a line between:

(xi) 50°30′.09 N 001°06′.66 E
(xii) 50°30′.09 N 001°34′.59 E

is designated as an inshore traffic zone.

Warnings

1. A deep-water route forming part of the north-eastbound traffic lane is established to the north-west of the Sandettie Bank, and masters considering the use of this route should take into account the proximity of traffic using the south-westbound lane.
2. The main traffic lane for north-eastbound traffic lies to the south-east of the Sandettie Bank and shall be followed by all such ships as can safely navigate therein having regard to their draught.
3. In the area of the deep-water route east of the separation line, ships are recommended to avoid overtaking.

It is important that ships passing through the Dover Strait listen to the appropriate VHF broadcasts y the Channel Navigation Information Service which provide information concerning traffic, navigation and visibility conditions in the Strait.

On the other hand, the Maritime Security Committee of the IMO has adopted on January 8, 1999 a "Mandatory Ship Reporting System" for the ships of 300 gross tonnage (SN/Circ.205), and has adopted on October 8, 2007 some amendments to the existing mandatory reporting system in Dover Strait/Pas de Calais, into force at 00.00 hours on May 1, 2008 (MSC.251 (83)). Likewise as the Dover Strait is a part of the *English Channel* also is applicable the Resolution A.486 (XII), November 19, 1981, regarding "Recommendation on the use of adequately qualified deep-sea pilots in the North Sea, English Channel and Skagerrak" (SN/Circ.167, June 7, 1994).

– Strait of Gibraltar.

The last amendment to the existing the separation scheme in the Strait of Gibraltar was adopted by the IMO on December 11, 2006 (COLREG.2/Circ.58) with the following description:

Traffic Separation Scheme

(a) A separation zone, half a mile wide, is centred upon the following geographical positions:

(1) 35°59′.01 N, 005°25′.68 W
(2) 35°58′.36 N, 005°28′.19 W

(b) A separation zone, half a mile wide, is centred upon the following geographical positions:

(3) 35°57′.08 N, 005°33′.08 W
(4) 35°56′.21 N, 005°36′.48 W
(5) 35°56′.21 N, 005°44′.98 W

(c) A traffic lane for westbounded traffic is established between the separation zone described in paragraph (a) and a line connecting the following geographical positions:

(7) 36°01′.21 N, 005°25′.68 W
(8) 36°00′.35 N, 005°28′.98 W

(d) A traffic lane for westbounded traffic is established between the separation zone described in paragraph (b) and a line connecting the following geographical positions:

(9) 35°59′.07 N, 005°33′.87 W
(10) 35°58′.41 N, 005°36′.48 W
(11) 35°58′.41 N, 005°44′.98 W

(e) A traffic lane for eastbounded traffic is established between the separation zone described in paragraph (b) and a line connecting the following geographical positions:

(12) 35°52′.51 N, 005°44′.98 W
(13) 35°53′.81 N, 005°36′.48 W
(14) 35°54′.97 N, 005°32′.25 W

(f) A traffic lane for eastbounded traffic is established between the separation zone described in paragraph (a) and a line connecting the following geographical positions:

(15) 35°56′.35 N, 005°27′.40 W
(16) 35°56′.84 N, 005°25′.68 W

(g) A precautionary area is established on the eastern side of the Gibraltar TSS by the lines connecting the following geographical positions:

(6) 36°02′.80 N, 005°19′.68 W
(7) 36°01′.21 N, 005°25′.68 W
(16) 35°56′.84 N, 005°25′.68 W
(17) 35°58′.78 N, 005°18′.55 W

(h) A precautionary area with recommended directions of traffic flow is established off the Moroccan port of Tanger-Med in the Gibraltar TSS formed by the lines connecting the following geographical positions:

(8) 36°00′.35 N, 005°28′.98 W
(9) 35°59′.07 N, 005°33′.87 W
(14) 35°54′.97 N, 005°32′.25 W
(15) 35°56′.35 N, 005°27′.40 W

Inshore traffic zones

North Zone: The area between the northern boundary of the scheme formed by the continuing line that links points 7, 8, 9, 10 and 11 and the Spanish coast, and lying between the following limits is designated as an inshore traffic zone:

(a) Eastern limit: that part of the meridian 005°25′.68 W (23) between the northern boundary of the westbound traffic lane (latitude 36°01′.21 N, corresponding to point (7) on the attached chartlet) and the Spanish coast.

(b) Western limit: that part of the meridian 005°44′.98 W (22) between the northern boundary of the westbound traffic lane (latitude 35°58′.41 N, corresponding to point (11) on the attached chartlet) and the Spanish coast.

South Zone: The existing southern inshore traffic zone is divided into two inshore traffic zones to east and west, with a free navigational area between them, located between the southern limit of the TSS and the coast of Morocco; these are bounded by eight geographical positions.

South-eastern zone:

(18) 35°45′.45 N, 005°25′.68 W
(16) 35°56′.84 N, 005°25′.68 W
(15) 35°56′.35 N, 005°27′.40 W
(19) 35°54′.88 N, 005°27′.40 W

South-western zone:

(20) 35°51′.33 N, 005°32′.25 W
(14) 35°54′.97 N, 005°32′.25 W
(12) 35°52′.51 N, 005°44′.98 W
(21) 35°49′.09 N, 005°44′.98 W

The IMO has also established a "Notification System for Vessels" in the area of the traffic separation scheme, which arose from a proposal made by Spain in cooperation with Morocco, on August 12, 1996 (NAV.42/23, p. 5.4). This system affects all the vessels with a length of more than 50 m, all the vessels which transport hazardous substances as per the definition given by resolution MSC.43 (64), the vessels are over 50 m long are hooked to or pushed by another vessel, any category of vessel shorter than 50 m but which uses the traffic lane or the separation zone in order to work, and any type of vessel shorter than 50 m which is using the traffic lane or the separation zone in an emergency in order to avoid an imminent danger (SN/Circ.186).

– Strait of Bonifacio.

As regards this strait, the IMO has adopted several navigation measures different of the traffic separation schemes. Specifically IMO has established two routes for navigation of vessels which are over 20 m long:

Northern limit: a line joining the geographical positions:

A. 41°22′.55 N, 009°22′.38 E
F. 41°18′.00 N, 009°15′.25 E
E. 41°19′.18 N, 009°06′.51 E

Southern limit: a line joining the geographical positions:

B. 41°21′.58 N, 009°23′.30 E
C. 41°16′.75 N, 009°15′.75 E
D. 41°16′.75 N, 009°06′.18 E

and the establishment of a number of precaution areas in these two routes which affect all ships (SN/Circ.198).

Eastern precautionary area: A circular sector pointed on geographical position M: 41°22′.05 N 009°22′.85 E with a radius of 5 (five) nautical miles limited by lines joining geographical positions A (see above) and G: 41°26′.90 N 009°24′.50 E and joining geographical positions B (see above) and H: 41°19′.31 N 009°28′.40 E.

Western precautionary area: A circular sector pointed on geographical position N: 41°17′.96 N 009°06′.33 E with a radius of 5 (five) nautical miles limited by lines joining geographical positions E (see above) and L: 41°21′.37 N 009°01′.47 E and joining geographical positions D (see above) and I: 41°13′.57 N 009°03′.15 E.

It has also established a notification system for ships of 300 gross tonnage and over (SN/Circ.201, 26 May 1998).

– Strait of Bab-el-Mandeb.

The latest amendment of the traffic scheme in force for this strait was adopted by the IMO in 2003 (COLREG.2/Circ.52). It is composed of two traffic sea lanes and a zone for the separation of traffic between them. The direction of navigation will be:

- A southbound traffic lane, 155° (T) as far as the turning line off Mayyun Island, thence 120° (T) to the eastern limit of the existing scheme.
- A northbound traffic lane, 300° (T) as far as the turning line off Mayyun Island, thence 335° (T) to the northern limit of the existing scheme.

Traffic Separation Scheme

(a) A separation zone bounded by a line connecting the following geographical positions:

(1) 13°13′.07 N, 043°02′.87 E
(2) 12°36′.82 N, 043°20′.22 E
(3) 12°32′.53 N, 043°27′.79 E
(4) 12°33′.37 N, 043°28′.30 E
(5) 12°37′.50 N, 043°21′.00 E
(6) 13°13′.83 N, 043°03′.60 E

(b) A traffic lane for southbound traffic between the separation zone and a line connecting the following geographical positions:

(7) 13°11′.94 N, 043°01′.72 E
(8) 12°35′.78 N, 043°18′.98 E
(9) 12°31′.25 N, 043°27′.04 E

(c) A traffic lane for northbound traffic between the separation zone and a line connecting the following geographical positions:

(10) 13°15′.00 N, 043°04′.70 E
(11) 12°38′.50 N, 043°22′.21 E
(12) 12°34′.69 N, 043°29′.03 E

– Strait of Hormuz.

This strait has a traffic separation scheme 6 miles wide, composed of two traffic lanes which are 2 miles wide each one – one to way in and other to way out –, an

intermediate traffic separation zone 2 miles wide and an associated inshore zone (COLREG.2/Circ.11).

– *Straits of Malacca* and *Singapore*.

The IMO has adopted several measures to guarantee the security of the navigation in the Straits of Malacca and Singapore.

There is in force a traffic separation scheme in which has established a Precautionary area in the Strait of Singapore south of Tanjong Stapa bounded by a line connecting the following geographical positions (COLREG.2/Circ.13):

(i) 01°14′03″N, 104°03′35″E
(ii) 01°16′36″N, 104°03′19″E
(iii) 01°18′38″N, 104°15′00″E
(iv) 01°15′24″N, 104°15′00″E

The deep water routes in the Singapore Strait are amended as follows:

(i) 01°03′36″N, 103°38′57″E
(ii) 01°05′54″N, 103°43′23″E
(iii) 01°08′36″N, 103°45′26″E
(iv) 01°10′15″N, 103°47′54″E
(v) 01°09′57″N, 103°48′17″E
(vi) 01°08′54″N, 103°46′49″E
(vii) 01°04′57″N, 103°42′52″E
(viii) 01°02′58″N, 103°39′06″E
(ix) 01°10′15″N, 103°47′54″E
(x) 01°11′18″N, 103°50′30″E
(xi) 01°12′07″N, 103°52′12″E
(xii) 01°11′48″N, 103°52′38″E
(xiii) 01°09′57″N, 103°48′17″E

The Maritime Safety Committee, as its 78h session, adopted, in accordance with the provisions of resolution A.858 (20), an amendment to the traffic separation scheme in the Singapore Strait for the establishment of an anchorage area in the existing separation zone for emergency anchoring of vessels including damaged vessels for repairs prior to entry into a shipyard or similar matters. On June 28, 2004, the IMO received a copy of the text of a Decree of the Directorate General of the Sea Communications No. PP 72/8/1-03 dated November 20, 2003 on "Standard operating procedures for management and operation of the Nipah transit anchorage area on the waters of Nipah" from the Government of the Republic of Indonesia (SN/Circ.238, COLREG.2/Circ.54), which is settled on the following geographical positions:

(a) To exit:

(85) 01°10′.35 N, 103°34′.90 E
(86) 01°10′.35 N, 103°39′.85 E
(87) 01°07′.50 N, 103°43′.72 E
(88) 01°08′.60 N, 103°45′.43 E

(89) 01°05′.90 N, 103°43′.38 E
(90) 01°03′.60 N, 103°38′.98 E
(91) 01°07′.06 N, 103°32′.96 E

(b) To entry:

(85a) 01°09′.40 N, 103°36′.60 E
(86a) 01°09′.10 N, 103°38′.60 E
(89a) 01°05′.50 N, 103°40′.80 E
(90a) 01°04′.50 N, 103°38′.90 E
(91a) 01°06′.80 N, 103°35′.00 E

On the other hand, it has established a naval traffic information service for the Strait of Singapore (SN/Circ.143), a group of 11 Rules to regulate navigation in both straits through the traffic separation scheme (SN/Circ.198), and a notification system for vessels. This last measure affects vessels over 300 gross tonnage, those which are 50 m or more in length, those which exceed 300 gross tonnage or 50 m when combined with other vessels or are pushed by others, the vessels which transport hazardous substances, the passengers of such vessels, and any category of vessel weighing less than 300 gross tonnage or measuring less than 50 m which might use the sea lane or the separation zone in the event of an emergency in order to avoid immediate danger (SN/CIRC.201).

– East Lamma Channel.

To date, Hong Kong Marine Department and MSA China have proposed a traffic separation scheme in the Zhujiang area in 2003. This proposal includes the recommendation to establish also another scheme for the Dangan Channel and the Lantau Channel, to the south west of the Soko Islands (PLVAC Paper No.6/2003). The IMO has not yet answered.

– Torres Strait.

The IMO has adopted routeing measures other than traffic separation schemes. It has established a double direction route in the Great Northeast Channel of the Torres Strait in the following geographical positions (SN/Circ.234):

(a) Northern limit:

1. 10°29′.70 S, 142°22′.63 E
2. 10°29′.14 S, 142°25′.76 E
3. 10°27′.80 S, 142°28′.45 E
4. 10°26′.40 S, 142°31′.30 E
5. 10°21′.90 S, 142°41′.50 E
6. 10°19′.37 S, 142°47′.97 E
7. 10°18′.14 S, 142°50′.82 E
8. 10°13′.38 S, 142°54′.96 E
9. 10°00′.50 S, 143°03′.42 E
10. 09°47′.73 S, 143°10′.40 E
11. 09°25′.80 S, 143°31′.07 E
12. 09°12′.47 S, 143°51′.34 E

(b) Southern limit:

13. 10°30′.45 S, 142°24′.02 E
14. 10°28′.38 S, 142°28′.66 E
15. 10°27′.38 S, 142°31′.85 E
16. 10°22′.85 S, 142°41′.95 E
17. 10°19′.80 S, 142°48′.23 E
18. 10°17′.63 S, 142°53′.29 E
19. 10°09′.78 S, 143°05′.55 E
20. 09°53′.97 S, 143°15′.61 E
21. 09°46′.02 S, 143°18′.48 E
22. 09°37′.96 S, 143°21′.97 E
23. 09°27′.60 S, 143°32′.15 E
24. 09°13′.95 S, 143°52′.62 E

(c) Centre polygon:

25. 10°16′.10 S, 142°53′.82 E
26. 10°13′.79 S, 142°55′.85 E
27. 10°01′.05 S, 143°04′.20 E
28. 09°48′.10 S, 143°11′.30 E
29. 09°41′.04 S, 143°18′.87 E
30. 09°45′.72 S, 143°17′.51 E
31. 09°53′.84 S, 143°14′.50 E
32. 10°09′.15 S, 143°04′.70 E

Therefore, IMO has established a mandatory ship reporting system (SN/Circ.235 and MSC/78/26/Add. 2, May 17, 2004), which includes information on sea traffic, navigation aid, and information on marine safety. The Maritime Safety Committee has established the mandatory pilotage in the inner route of the Great Barrier Reef (MSC.79).

– ***Bass Strait***.

The IMO has also established a traffic separation scheme which has been modified on several occasions. In the COLREG.2/Circ.24 (June 24, 1985) it has been established the following scheme:

(a) A separation zone, half a mile wide, is centred upon the following geographical positions:

(1) 38°41′.05 S, 148°20′.02 E
(2) 38°44′.05 S, 148°14′.09 E
(3) 38°46′.03 S, 148°09′.00 E

(b) A traffic lane for westbound traffic between the separation zone and a line connecting the following geographical positions:

(4) 38°38′.05 S, 148°17′.05 E
(5) 38°41′.00 S, 148°13′.02 E
(6) 38°46′.03 S, 148°07′.03 E

(c) A traffic lane for eastbound traffic between the separation zone and a line connecting the following geographical positions:

(7) 38°49′.08 S, 148°10′.08 E
(8) 38°48′.00 S, 148°16′.07 E
(9) 38°44′.06 S, 148°23′.00 E

The Government of Australia informed the IMO that it will make a temporary change to one of the TSS "In the Bass Strait" on the south east coast of Australia at 00:00 hours UTC on March 1, 2002. The adjustment is to allow for the drilling of petroleum exploration wells (COLREG.2/Circ.50). Revised geographical coordinates of the salient points of the TSS are as follows:

(a) A separation zone, 6.0 miles wide centred upon the following geographical positions:

1. 38°43′.40 S, 148°21′.66 E
2. 38°46′.33 S, 148°16′.37 E
3. 38°48′.32 S, 148°10′.17 E

(b) A traffic lane for westbound vessels between the separation zone and a line connecting the following geographical positions:

4. 38°38′.50 S, 148°17′.50 E
5. 38°41′.00 S, 148°13′.20 E
6. 38°42′.80 S, 148°07′.30 E

(c) A traffic lane for eastbound vessels between the separation zone and a line connecting the following geographical positions:

7. 38°53′.92 S, 148°13′.03 E
8. 38°51′.72 S, 148°20′.09 E
9. 38°48′.40 S, 148°26′.17 E

– Old Bahama Channel.

This strait has a traffic separation scheme on the north coast of the Island of Cuba proposed by the Cuban Ministry of Transport, and a reporting system for ships (SN/Circ.141/Rev.1, February 15, 1993).

6.4 The Right of Transit Passage: A Conventional Norm Generally Accepted as Law?

The impact the 1982 Convention with regard to the norms of the Law of the Sea has been impressive due, among other things, to the substantial progressive development it has provided about the matter. It is obvious that the right of transit passage through the straits used for international navigation is part of this.

In this regard, one of the most relevant questions which has been of concern to international law experts since the adoption of the UNCLOS on December 10, 1982

arose. This was the determination whether the right of transit passage has become a customary norm of General International Law.[448] J.N. Moore made an ominous prediction when he stated that, "with or without a new convention. . . the UNCLOS strait regime seems destined to serve as a powerful model for the development of a new customary law of straits transit".[449]

This is a question which was of decisive importance throughout the 14 years in which the Convention was not yet in force, and, after the entry of the Convention into force, on November 16, 1994, it continued to be important, taking into account the fact that a large number of coastal States of article 37 straits were clearly reticent to becoming a party to the Convention. However, ratifications such as that of Spain in 1997, Malaysia in 1996, and Greece in 1995, the only three 'survivors' of the "Group of Strait States" and the strongest opponents to transit passage while defending innocent passage through all international straits at all costs, together with the ratifications of other States which were not excessively enthusiastic about the new regime in the course of the III Conference, and are also coastal States of straits where transit passage must be in force, such as Morocco (2007), Denmark (2004), Canada (2003) and Ukraine (1999), have considerably reduced the importance of this question.

The problem of the customary nature of the right of transit passage is clearly of interest as regards the States which are not parties to the UNCLOS. We must take into account that there are five coastal States used for international navigation which have not ratified nor have adhered to the 1982 Convention: the United Arab Emirates, Iran, the U.S.A., East Timor, and Venezuela. Neither is Turkey a party, but the straits where this is a coastal State (the *Bosphorus* and the *Dardanelles*) are separated from Part III, as these are regulated by a long standing convention (*1936 Montreux Convention*). We should point out four of these States: the United Arab Emirates, Iran, the U.S.A. and Venezuela, as these are coastal States which comply with the parameters of article 37 and, consequently, transit passage must be applied in these if it is concluded that the customary norm exists in these and these States are bound by this. Although the figure is reduced to three on excluding the United States, which undoubtedly recognises the existence and validity of the right to transit passage through international straits.[450] This position remained evident in the course of the III Conference (as we saw in the second chapter), as was subsequently seen when it was expressly included in its domestic

[448]Among the abundant bibliography on this point, we can cite, Bernhardt (1987, pp. 249–331); Caminos (1987, pp. 178–235); Jia (1998, pp. 168–208); Treves (1986, pp. 247–259); Treves (1985, pp. 805–808); or Treves (1990, pp. 9–302).

[449]See Moore (1980, p. 121).

[450]In addition, it seems that the U.S.A. will ratify the UNCLOS and will become a party to it. This can be deduced by the Declaration made by President G.W. Bush, on May 15, 2007, in which he stated that "I urge the Senate to act favourably on U.S. accession to the United Nations Convention on the Law of the Sea during this session of Congress" (see http://www.whitehouse.gov/news/releases/2007/05/print/20070515-2.html).

law (Proclamation of 1988[451]). In any case, the reasons for this hooligan claim for transit passage made by the United States are well known to be grounded on its own interest rather than on the interest of the international community.

In the event that the response is negative, that is to say, it is not possible to definitively state that there is a norm which is generally accepted as law and which recognises the right to transit passage in international straits which join an area of the high seas or an Exclusive Economic Zone, or the conclusion is reached that these States are in no case bound by it as they have manifested an attitude which is clearly contrary to the norm from the beginning, the result would be that, in the part of the territorial sea of the straits where these three States are coastal States, the regime of navigation would be the right of innocent passage, a customary norm generally accepted as law. The straits in question are those of *Hormuz*, the *Aruba-Paraguana P*assage, the Serpent's *Mouth* and the *Dragon's Mouth*, all of which are vitally important for international navigation, and the *Strait of Hormuz* is a fundamental strategic route.

As regards this point, H. Caminos and M.R. Molitor pointed out that the legal effect of the 'package deal' is that "it cannot affect those provisions of the Convention which are carried over directly from the 1958 Conventions and which reflected customary law prior to UNCLOS III. Such provisions, irrespective of their place within the 1982 package, continue to be exercisable by, and binding upon, third States. However, where established customary rules appearing in the 1982 Convention have been changed, it must not be presumed that such modifications have acquired similar status".[452] In our opinion, in the case of transit passage this does not involve any of the matters where the Convention is a reflection of international customary law, and the States which are not parties to the Convention cannot object.

As the ICJ stated in the *North Sea Continental Shelf Case*,[453] it is not sufficient that there is a broad participation in a Convention for it to be automatically transformed into a customary law. Therefore the legal relations which arise from instruments concluded during bilateral negotiations are not of a customary nature *per se*, but are simply contractual. The true test for the existence of a customary norm of International Law is that of State practice, understood in its most general acceptance as the group of actions carried out individually or collectively by the States, and which constitute the most important indication in the determination of the *opinio iuris* and, therefore, of the existence of the norm itself.

In this regard, therefore, the practice of the coastal States of international straits which are not parties to the UNCLOS is the only way to identify whether the right of transit passage is a norm of General International Law. In order to generate this

[451]Cf. *ILM*, vol. 8, 1989, p. 284. For an examination of the position of the U.S.A. in this regard, see Wainwright (1986, pp. 361–414).

[452]See Caminos and Molitor (1985, p. 887).

[453]Cf. ICJ *Reports* 1969, p. 42.

effect, this practice must be uniform, constant and generalised, moreover, it must be carried out in such a way that the legal conviction that this practice is obligatory is demonstrated, that is to say, that there is an *opinio iuris*.

In this regard, the pertinent practice fundamentally refers to the domestic legislation of the States concerning navigation through the international straits, especially as regards coastal States of the straits of article 37, the unilateral declarations which have been made in this regard, and the international treaties concerning this. All of these points have been dealt with in this work.

Related to this summit, we can see that only three States have incorporated the reference to transit passage in their straits to their internal legislation,[454] the United States, the United Kingdom and Spain. The reasons of the first two are more than evident, therefore, they are not a decisive factor in this case. As regards Spain, we must understand that the incorporation of an express reference to the regime of transit passage must be understood as the logical consequence of its ratification of the Convention no less than 10 years later, thus it can only be deduced that this regime was accepted and not conventionally so. Another two States, Cuba and Djibouti, have included the reference to the freedom of navigation and overflight in straits in their legislation, but not expressly referring to transit passage but to the principles of International Law, thus their position is not clear. This is even less clear if we take into account that Djibouti demands previous notification from nuclear driven vessels and those which transport hazardous substances in order to pass through their territorial sea, including *Bab-el-Mandeb*, and submarines must pass on the surface which is incompatible with the transit passage regime which must be in force in this strait.

No other State has incorporated the transit passage regime into its internal legislation, not even mentioning his. This did not occur before nor after they became parties to the UNCLOS, therefore, do their laws which recognise innocent passage in their straits continue to be in force. Some of these even have provisions, as we have seen, which infringe the obligation not to hinder transit passage. This is the case, among others, of the *Federal Law* of 1993 of the United Arab Emirates, and the *Law on Marine Zones* of 1993 of Iran, States which are not parties to the UNCLOS, which include the right of innocent passage as the only regime applicable in its territorial sea. A position which is also taken up in the 1956 *Territorial Law of the Sea* of Venezuela.

As regards the declarations in the *Passage through the Great Belt Case*, Denmark declared that the transit passage regime regulated in Part III of the 1982 Convention cannot be applied to the case as customary law, substituting the regime of the 1958 Convention.[455] Such a declaration clearly contrasts with the declaration of Finland regarding the same matter, which affirms that there is a strong tendency

[454]We must remember that the internal legislation concerning marine areas can be consulted at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/regionalist.htm.

[455]Cf. Counter Report of Denmark, p. 744 (http://www.icj-cij.org).

in international practice towards the establishment of customary law in transit passage.[456]

As we have pointed out, when Spain signed and ratified the Convention, it made an interpretative declaration of the adverb "normally", tending to restrict the overflight of State aircraft above straits.[457]

However, on signing the UNCLOS on December 10, 1982, Iran expressly stated the following:

> Notwithstanding the intended character of the Convention being one of general application and of law making nature, certain of its provisions are merely product of quid pro quo which do not necessarily support to codify the existing customs or established usage (practice) regarded as having an obligatory character. Therefore, it seems natural and in harmony with article 34 of the 1969 Vienna Convention on the Law of Treaties, that only states parties to the Law of the Sea Convention shall be entitled to benefit from the contractual rights created therein.
>
> The above considerations pertain specifically (but no exclusively) to the following:
>
> – The right of transit passage through straits used for international navigation (Part III, Section 2, article 38).[458]

More recently, Morocco ratified the UNCLOS, on May 31, 2007, and declared, as we stated above, that "the laws and regulations relating to maritime areas in force in Morocco shall remain applicable without prejudice to the provisions of the United *Nations Convention on the Law of the Sea*".[459] This entails that its Law of 1973 remains in force, whose article 3 establishes the regime of innocent passage through the *Strait of Gibraltar*.

Finally, we have previously mentioned some treaties concerning maritime limitation between the coastal States of international straits. Thus, the Treaty made by Australia and Papua New Guinea concerning the sovereignty and maritime frontiers of the two countries, including the *Torres Strait*, made on December 18, 1978, recognises the freedom of navigation and overflight in the Torres Strait in its article 7, which is the equivalent of a recognition of the regime of transit passage. As regards this same point, the Joint Declaration of the status of the *Dover Strait* made by France and the United Kingdom, attached to their Agreement of November 2, 1988 *on the limitation of their maritime border*, states that both governments recognise the right of transit passage through this strait[460]

However, Venezuela has made two sea frontier delimitation agreements with its neighbouring States and these clarify its non-recognition of transit passage. Thus,

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[456]Cf. Report of Finland, p. 394 (http://www.icj-cij.org).

[457]Cf. http://untreaty.un.org.

[458]See http://untreaty.un.org.

[459]See http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

[460]The texts of the Treaties made by Australia and Papua New Guinea, and the United Kingdom and France can be seen at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/regionalist.htm.

article 4 of the Treaty signed by Venezuela and the Netherlands on March 31, 1978, recognises the right of transit passage between the Island of Aruba and mainland Venezuela, that is to say, in the *Aruba-Paraguana Passage,* but only for the respective ships and aircraft, as article 4.3 excludes State aircraft and warships of third party States from such passage.[461] Article VI of the Treaty of April 18, 1990, made by Venezuela and Trinidad and Tobago, provides that innocent passage be applied in the Gulf of Paria;[462] a provision which affects the *Serpent's Mouth* and the *Dragon's Mouth*.

Two important *conclusions* can be drawn from preceding practice:

• **One**, practice concerning the application of the right of transit passage, as well as its recognition as a customary norm of a general nature, is neither constant nor uniform. On the one hand, there are only five States which have shown a clear and evident attitude to accepting transit passage as a generally accepted right: the United States, the United Kingdom, France, Australia and Papua New Guinea.

On the other hand, if we understand that the axiom "practice generally accepted as law" implies that, if the right of transit passage is a custom, "it should also be granted by such States as if they were fulfilling a duty of customary law",[463] we find that this meaning of duty is not complied with in many States. Specifically it is not complied with by Canada, Chile, Colombia, Cuba, Denmark, Djibouti, Egypt, Greece, Indonesia, Iran, Japan, Republic of Korea, Malaysia, Morocco, Oman, Panama, the Philippines, Spain, Trinidad and Tobago, Venezuela and Yemen.[464]

In fact, it cannot be stated that the tendency towards customary implementation of navigation within the regime of transit passage has been as uniform as it should have, not even in the case of the Great Sea Powers, as is shown in the attitude of the ex-Soviet Union, which is clearly ambivalent as it claims transit passage for all the straits except for those under its jurisdiction.

Therefore, we can conclude that the customary statute of the right to transit passage is still uncertain, and it cannot be stated that it has achieved the nature of customary norm in General International Law.

Thus, as pointed out by D.L. Larson, "the conventional rights and privileges of transit and archipelagic sea lanes passage can only be legally obtained through state accession or ratification".[465]

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[461]Cf. http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/regionalist.htm.

[462]Cf. *Law of the Sea Bulletin*, No. 19, 1991, p. 25.

[463]Cf. Jia (1998, p. 202).

[464]Cf. *Ibidem.*

[465]The author adds that, "If the United States remains outside of the legal regime established by the 1982 Convention, it cannot claim or obtain the rights and privileges thereof without assuming the 'correlative duties' of the deep seabed mining". See Larson (1987, p. 428).

• **Two**: Moreover, if we focus on practice followed by the three coastal straits of the article 37 straits which are not parties to the UNCLOS, we can see that Iran and Venezuela have again stated their evident positions as 'persistent objectors',[466] thus, there is no doubt regarding the disregard doctrine of a 'hypothetical right of customary transit passage'. The same conclusion could also be applied as regards the United Arab Emirates since, although these have not declared their opposition to the regime of transit passage when signing the UNCLOS in 1982, their internal legislation of 1993 concerning passage through their territorial seas imposes requirements which are a clear attack on passage transit.

This means that the Strait of *Hormuz*, the *Aruba-Paraguana Passage, the Dragon's Mouth and the Serpent's Mouth* are regulated by innocent passage as a generally accepted customary law which obliges their coastal States.

[466]Venezuela did not even sign the 1982 Convection.