INTERNATIONAL STRAITS: THE RIGHT OF ACCESS*

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I. CONTEMPORARY CLAIMS AND INTERNATIONAL STRAITS: SCOPE OF THE PROBLEM

The quest for utilization of ocean space and resources has assumed such immense proportions that the resolution of conflicting claims of nation states to use and develop that space and those resources may well be one of the most important challenges of our time. States now tend to look seaward and to expand their wealth and power bases as far as they can. Claims have been asserted to nearly every variety of legal competence, from limited special interests to vast territorial sea claims. Clearly, through this process certain rights of the international community are being abused. Unless restraint and order are exercised, and unless rules more representative of community interests are developed, the potential for maximizing ocean use will be lost.

A. Background—Factors Creating Conflict

Among the numerous claims being made by states, two such claims are the subjects of particular conflict. The first is the claim to extend the territorial sea, and thereby subject international straits to a territorial sea regime. The second is the claim to use such straits independently of a territorial sea regime. Since straits are essential corridors to or between the high seas for all maritime nations, the question of how their use shall be regulated is a strategically vital one. Recognition of even a 12-mile territorial sea brings traditional territorial sea rights into conflict with traditional free passage rights in more than 100 straits. Recognition of more ambitious claims, some reaching up to 200 miles, would affect every ocean highway, as virtually every passage between

* The opinions and views herein are those of the author and do not necessarily represent the views of the Judge Advocate General, Department of the Army, or any other agency of the United States Government.


two free seas would then lie within the territorial sea of some nation.\(^2\)

The dimensions of this conflict have confronted all nations suddenly. The past two decades have witnessed unprecedented changes in technology.\(^3\) Supertankers and nuclear powered submarines and naval vessels have become important users of the oceans. Offshore oil and gas production has become an increasingly important source of energy. Sophisticated fishing methods have threatened depletion, even exhaustion of fisheries. Commercial extraction of hard minerals from the ocean floor may soon become a reality. Marine pollution has emerged as a significant problem. Opportunities for use and abuse of the sea and its resources have become of global concern.

These developments have formed the impetus behind the recent shift from permissive use of the oceans by the world community to demands for greater exclusive use by individual coastal states.

Controversy over straits is a recent problem. Under rules achieving widespread acceptance during the last century, nations made territorial sea claims of only three or four miles. In most of the world's major straits, these claims generally left a high seas corridor in which the unrestricted right of passage for all ships was operative, subject only to a reasonable regard for the interests of other nations in the exercise of their high seas freedoms.

In the few territorial seas which overlapped important straits, arrangements were eventually devised to permit transit. The Danish and Turkish straits are examples of such arrangements.\(^4\)

It was not until governments seriously began contemplating a recognition of the expansion of the territorial sea that attention focused on the necessity of continued transit through straits used for international navigation as the key element to agreement on a new territorial sea regime.\(^5\) The Government of Spain noted, "The general legal regime of navigation through international straits never raised any problem to the International Community until 1967, when the Governments of the United States and the Soviet Union started negotiations on the Law of

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\(^3\) See Stevenson, 66 *Dept State Bull.* 672, 673 (1972).

\(^4\) The Sound Dues were abolished by the Treaty of 1857, to which the powers on the Baltic and North Sea were parties. For history, see H. Wheaton, *History of the Law of Nations* 518 (1845). For the Turkish Straits, see *Convention Regarding the Regime of the Straits*, July 20, 1936, 173 L.N.T.S. 213; F. Hudson, *International Legislation* 386 (1941).

the Sea." Of course, wider territorial sea claims affect more straits and more nations. What is surprising is not that so many nations are affected, but that so many nations have been so slow to appreciate that fact.

The Third Law of the Sea Conference is attempting to address most of the major problems emerging from ocean use. Several states have submitted draft proposals which address the straits problem. These proposals fall into two general categories: (1) those advocating an innocent passage regime, and (2) those advocating a free passage regime. Variation of these proposals call for a restriction or liberalization of innocent passage, qualifications on free passage, and exceptions in favor of certain straits. There has been little accommodation. Underlying the inflexibility in these proposals is their focus on a context requiring agreement on a maximum territorial sea width as a condition to resolving the straits issue, rather than treating straits as a functional problem which could be resolved independently of such width.

B. The Conflict

Coastal states advancing claims to extend the territorial sea provide a panoply of legal bases as applicable to straits. The more moderate positions assert what amounts to an exclusive competence to control navigation within the territorial sea, including straits, although they generally recognize that their powers are essentially delegated by the international community. Most extreme are the positions of certain coastal states which see national sovereignty as the touchstone to justify all claims.

The straits problem is essentially one of resolving duties and rights of states inter se. It is unfortunate to frame it in the context of sovereign...
eignty—not the sovereignty historically limited by the sovereignty of other states to use common resources, but an absolute sovereignty which would permit arbitrary exclusion of other states from common resources. This emotionalizes issues which should be resolved on their merits and vitiates attempted accommodation. Claims have proliferated in recent years partially because of the popularity of this appraisal of sovereignty. They germinate conflict by their irretractable all-or-nothing approach.

The principal shortcoming of the contemporary extended territorial sea philosophy is that it assumes that all other rights are subservient to territorial sea rights. Concomitantly, this view fails to recognize that, applied to an expanded context, territorial sea rights may conflict with rights already vested in the international community which have an independent and at least parallel juridical hierarchy. By fiat, these coastal states have declared that all law of the sea which constrains their claims is outmoded and no longer binding in the modern law of nations. The paradox, however, is that they have endorsed those concepts of coastal state sovereignty which were developed by the law of nations for a narrow territorial sea, and proclaimed them as still binding and applicable in however broad a context the coastal state, in its sovereign prerogative, should deem appropriate.

In opposition are claims of maritime nations which have approached the problem in a manner equally inimical to international community interests. Although admitting that the tremendous interaction of ocean activities affecting coastal states may require certain protective measures at extensive distances from shore, these nations have conceptually applied a traditional narrow territorial sea regime to resolve problems which do not respect boundaries, rather than recognizing that that regime, too, without some adaptation, is equally outmoded and inadequate in the modern law of nations.

These respective claims reflect two differing concepts of transit: innocent passage and free passage. Innocent passage, applicable within the territorial sea of a state, only permits transit by vessels which do not threaten the peace, good order, and security of the coastal state. Innocent passage is not extended to overflight of aircraft or submerged submarine traffic, which may transit the territorial sea only upon receiving coastal state consent. Free passage permits navigation by all vessels and aircraft, without distinction.

In attempting to extend the application of innocent passage rights which are precisely intended to regulate the interaction of interests in narrow territorial seas, states are discovering, in a broad territorial sea
context, genuine conflicting interests with international community rights which were previously unaffected. Whatever the advantages to coastal states of extending the territorial sea, it is the extension of the innocent passage regime to the detriment of vessels now enjoying extensive high seas rights of the free passage, which is so potentially disruptive to international navigation. Assuming the eventual recognition of at least a 12-mile territorial sea, the question is whether coastal states shall be permitted to "close off" straits used for international navigation by applying an innocent passage doctrine to supersede the more extensive existing navigation rights presently exercised by the community of nations in the form of high seas freedoms. Herein lies the most acute problem if new territorial sea claims are unqualifiedly recognized and applied in international straits.

II. The Need for a Functional Approach

The solitary concept of a 12-mile territorial sea is not objectionable in the abstract. The concept that does give rise to objection is that of a 12-mile territorial sea at the expense of existing navigation rights. The problem could be avoided if navigation rights were not determined by an arbitrary territorial sea breadth, but were perceived in their functional character. This means essentially the recognition of a regime in which the navigation function (as expressed in freedom of access) is accorded a higher priority than arbitrary territorial sea boundaries. The measurable width of the territorial sea then assumes less importance. States could pursue other legitimate objectives within their territorial sea, leaving navigation rights presently enjoyed by the international community in the conduct of international trade, communication and state business to continue without unnecessary conflict. Unfortunately, proposals have followed a rigid traditional territorial sea and high seas dichotomy which has tended to polarize claims.

As the fundamental community interests in straits navigation do not change, it seems desirable to avoid linking the transit right so completely to the breadth of the territorial sea. Rather, it should be recognized as conceptually separate from territorial sea, resource or other claims of coastal states. So separated, navigation's functional character would remain unimpeded and international navigation would remain operationally secure regardless of the new width of the territorial sea or resource zones agreed upon. Moreover, each new territorial sea claim

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* The term "closed" is commonly used to refer to straits which, due to overlapping territorial sea claims, are subject to a legal regime different from that of the high seas.
would no longer affect navigation rights through international straits, so the validity of such claim for non-navigation purposes could then be evaluated on their own merits.

It is appropriate to ask whether all straits should be subject to the same juridical treatment. Some straits are indispensable if ocean navigation is to be at all feasible. Others are highly useful, and some are merely of considerable convenience. Conceivably, straits could be ranked in order of importance, or grouped as those of a greater or lesser order. Such factors as volume of traffic, special geographical hazards, economic costs of alternate routing, and strategic value, all provide means of distinguishing one strait from another. Yet, while there are adequate bases to distinguish straits for particular purposes, it must be remembered that their function is identical.

The most viable approach to community interests is to avoid a classification of straits which will ultimately prejudice their functional value. This is best accomplished by treating all international straits as functional equivalents, irrespective of their utility at any particular period of time, for purposes of rejecting coastal authority to deny freedom of access. (Of course, straits otherwise governed by international agreements, or historically under the control of the coastal state would not be included.) This functional, rather than territorial, approach to straits is essential.

III. SOVEREIGNTY AND ACCESS RESPECTING THE SEA

The relation of sovereign states to the sea is under continual reexamination as sovereign rights to use ocean resources collide with sovereign rights to exclude other users. Regarding navigation, if the idea of the equality of states is valid in international law, that idea implicitly means the equality of sovereigns. If sovereignty is to be the touchstone for coastal state control over littoral waters, sovereignty ought also to be the touchstone for constraints on that control. The sovereignty of the coastal state is thus constrained by the sovereignty of other states. Excesses by one state constitute impermissible invasions of the domain of the other.

The chief dangers facing current navigation interests are an upset of the delicate balance of sovereign interests and a fear that proposed solutions to ocean problems will be at the expense of one group of states or another. To comprehend the vitality of mutual restraint of sovereigns it is helpful to review the modern development of the sovereignty concept in the territorial sea.
The mutual and reciprocal constraint of sovereignty was noted in the 19th century by Wheaton, who observed:

The territorial sovereignty may be limited by the right of other nations to navigate the seas thus connected. The physical power which the State, bordering on both sides the sound or strait, has of appropriating its waters, and of excluding other nations from their use, is here encountered by the moral obstacle arising from the right of other nations to communicate with each other.\(^9\)

At the 1930 Hague Codification Conference the question of a terminology that most competently described the rights and powers of the coastal state in the territorial sea was extremely controversial. States desired to express rights and duties essential to coastal state control, yet they feared that failure to define them articulately would result in a disruption of rights which nations collectively enjoyed on the high seas. Terms such as “competence”, “jurisdiction” and “sovereignty” were debated at length. “Sovereignty” was the natural choice, but it promoted considerable apprehension.\(^10\)

States advocating the use of “sovereignty” acknowledged that although there must be some restriction upon the term, it was most descriptive in that “wherever the rights of other States do not exist, and where there are no servitudes, the coastal State has exclusive jurisdiction.”\(^11\) Others opined that fear of the idea of sovereignty stemmed from abuses in the past, that “the recent development of solidarity and international co-operation have done much to render the notion of sovereignty very relative,”\(^12\) that “sovereignty is no longer regarded as absolute” and most accurately “represents the sum-total of the powers exercised in accordance with international law.”\(^13\)

Notwithstanding the difficulties in defining sovereignty, states decided to adopt that term with the condition that it would always be understood to be restricted:\(^14\) Mr. Erich, the Finnish delegate, noted:

\(^9\) H. Wheaton, Elements of International Law 303 (Phillipson ed. 1916) [hereinafter cited as H. Wheaton].

\(^10\) Sir Maurice Gwyer of Great Britain commented: “It was surprising that, in an Assembly of the representatives of more than forty sovereign States, the very idea of the use of the word “sovereignty” should have occasioned such terror—I almost said panic; but I have listened carefully to the observations of the Norwegian delegate and I appreciate that there may be certain difficulties in the use of that expression.” 3 Acts of the Conference for the Codification of International Law, Territorial Waters 37, Minutes of the Second Committee, (C. 351(b). M. 145(b). 1930 V.) [hereinafter cited as 1930 Acts]. The final Act, Committee Reports, and Annexes of the Conference can be found at 24 Am. J. Int’l L. 169 (Supp. 1930).

\(^11\) Views of the Chairman of the Second Committee, 1930 Acts, supra note 11, at 37.

\(^12\) Views of the Egyptian delegate, Abd el Hamid Badaui Pasha, id. at 39.

\(^13\) Views of the French delegate, Mr. Gidel, id. at 43.

\(^14\) Strictly speaking, the State has no “sovereignty” over the waters of the sea around...
"We need have no scruple in dispensing with any explanatory epithet, even if it were explicitly limitative, since it is self-evident that sovereignty is always understood to be restricted." 16

Thus the Committee's vote recognized that states possess not sovereignty, but the attributes of sovereignty over their territorial waters. 17

As the Swedish delegate stated,

We voted for retaining the word 'sovereignty', a term which we have nearly all stated and recognized to be somewhat obscure, and which, on that account, might give rise to misunderstanding . . . merely because we could not find any other term representing the body of rights and duties which a coastal State possesses, and is bound to possess, over its territorial waters. 18

The precise limitations on sovereignty were not clear. "This sovereignty is, of course, limited by the rights of common user," 19 limited by "international rules recognized by the nations, either by convention or by custom," 20 and, as it is not a "rigid and absolute quality," it is "capable of adaptation, consistent with certain restrictions in favour of other states." 21

Some states viewed sovereign powers over the territorial sea as only exercisable pursuant to delegation by the international community. Mr. Sitensky of Czechoslovakia stated that:

It would perhaps have been more correct to take as our starting point, not the principle of the sovereignty of the coastal States, but the opposite principle, that of the freedom of the seas, the freedom of maritime navigation. This freedom of navigation might then be limited by granting to the coastal State . . . within . . . the territorial waters belt, such rights and powers as it requires to safeguard its security. Such . . . body of rights . . . can be called rights of sovereignty. 22

The genesis, then, of coastal state sovereignty in the territorial sea as

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16 "Id. at 44.
17 "Id. at 59.
18 "Views of the Swedish delegate, Mr. Sjoborg, id. at 68.
19 "Views of the German delegate, Mr. Schucking, id. at 12.
20 "Views of the Yugoslavian delegate, Mr. Novakovitch, id. at 44.
21 "Views of the Finnish delegate, Mr. Erich, id.
22 "Id. at 24.

of 1930 was one of restriction and adaptation in favor of existing rights of other states. As one delegate concisely described it, "In respect of territorial waters, the sovereignty of the coastal State is checked by the sovereignty of the flag State."\textsuperscript{23}

An examination of the 1930 Conference makes it apparent that states viewed their existing rights of passage as rather comprehensive. Illustrative of that perspective is the remark of the Spanish delegate:

The question is whether the right of sovereignty is compatible with the right of passage without any qualification. For my own part, I reply in the affirmative. Modern law has formulated the principle that there is no absolute right of sovereignty. That being so, there is no contradiction between the right of sovereignty and the right of passage.\textsuperscript{24}

From the history of these proceedings and subsequent ones in 1958, it is clear that, for purposes of the territorial sea, sovereignty of the coastal state is constrained by sovereignty of the flag state, and the former is not a derogation of the later.

IV. ASSIST TO PORTS

Just as the high seas freedom of navigation is meaningless if states do not have access to the sea, it is also meaningless if vessels cannot cross the territorial sea of a state to enter the port of a third state which desires to trade with them. Similarly, it is meaningless if the third state is "port-locked" and unable to send its vessels at will across such territorial sea to enter the high seas and trade with other states, or send its state vessels to conduct state business. The recognition that the right of access to ports is an independent right is expressed by Jessup as follows:

[Innocent passage is a] traditional right developed as a necessary part of the law of territorial waters because even the three mile limit sometimes cut (sic) across established trade routes. . . . So long as the passage was innocent, ships were permitted to pass through territorial waters along such routes. . . . [T]he right of innocent passage historically had nothing to do with the passage of the ships bound to or from a port of the States and a right of access to ports should be distinguished from the right of innocent passage.\textsuperscript{25}

At the 1958 Conference, the International Law Commission's (ILC's) draft omitted any reference to the right of access to ports or to terri-

\textsuperscript{23} Views of the Norwegian delegate, Mr. Raestad, \textit{id}. at 33.
\textsuperscript{24} \textit{id}. at 65.

(1975)
torial waters through international straits. States perceiving this omission viewed access to both ports and territorial seas as functionally the same problem. The Netherland representative noted that it was "insufficient to declare the high seas open to traffic without also guaranteeing the right of entry into seaports. If the right of access to ports was to be assured to landlocked States, a fortiori, it should be guaranteed to the maritime countries." The British delegate observed that "passage was not impeded in waters which were essential to maritime communications. The main purpose of any maritime voyage was, after all, to arrive at the port of destination."

States exercising the right of access have not generally based their claim as derivative from the status of waters through which passage was required, but on the broader right of access to ports. Israel, for example, said that international waterways are open to navigation in spite of the fact that they lie within the territorial sea of another state. "Regardless of their position as territorial sea, straits in the geographical sense which constitute the only access to a harbour belonging to another State can under no circumstances fall within the regime of territorial sea."

If the foregoing view is accurate, the international interest in upholding the right of access is given predominance over those of the littoral states whose territorial seas have to be traversed in making for a given harbor, and passage through straits is assimilated to high seas navigation rights themselves.

V. Access from High Seas to High Seas

The right of all nations to use the high seas stands as the fundamental principle underlying the legal structure of the law of the seas. Historically, that principle meant that (1) all nations have an equal right to use the high seas, (2) one nation may not unreasonably interfere with the lawful use of the high seas by another, and (3) each nation retains jurisdiction over activities conducted on the high seas under its flag or nationality.

In the context of navigation, if access from one high seas to another is denied any state, it no longer has the means to enjoy the right to use the high seas. Since straits are the key geographical points which make

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* Id. at 79.
* Comments submitted to the ILC by Israel concerning the Draft Regime of the Territorial Sea, 50 AM. J. INT’L L. 988, 1012 (1956) [hereinafter cited as Israeli Comments].
* See id. at 1005 (1956).
transit between high seas areas possible, their *de facto* navigation is the only guarantee that states can enjoy high seas rights.

A. Historical Perspective

The straits problem was not generally significant until the last decade or two when nations began seriously to consider an extended territorial sea. With the exception of straits such as those of Turkey and Denmark where passage conflicts had to be resolved, little attention was given to the straits problem. Among those writers who did address it however, there was considerable agreement. Several influential 19th century writers had perceived the functional importance of straits and their value to the international community. The French jurist, Hautefeuille, noted that even a strait which separates two shores controlled by the same state remains nevertheless in the condition of the ocean itself, free of all shackles, and that "to wish to close such a passage to other nations would be to deprive them, in reality, of the right that they have to use the sea for navigation." He carefully distinguished the question of the status of international straits through which a right of passage is recognized from such rights as fishing and jurisdiction, which he concedes remain in the coastal state without prejudice to the use of a strait as a thoroughfare.30

Another Frenchman, Godey, perhaps the first authority of record to propose that straits be subject to a special regime, fixed the extent of the territorial waters in straits at three nautical miles and demanded that the high seas portion of an international strait be subject to special rules different from the ordinary rules regarding the open sea.31

More modern writers supported this functional view. According to Hyde, "The relation which the channel of communication bears to navigation generally as a means of access to the seas thus connected . . . rather than any other circumstance, is decisive of the equities of foreign maritime states."32

Just after the turn of the century the German jurist, Walter Shucking, maintained that where straits connect two open seas and are of importance to international shipping, they must never be completely closed, even if passage is not possible without touching the territorial waters of one or more states.33

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30 I E. BRUEL, INTERNATIONAL STRAITS 56 (1947) [hereinafter cited as E. BRUEL].
31 Id. at 59.
32 "A strait which serves as a passage from one open sea to another ought not on principle to be closed. This is believed to be true although the waterway is a part of the domain of the States adjacent to it." I C. HYDE, INTERNATIONAL LAW 519 (2d ed. 1954).
33 I E. BRUEL, supra note 30, at 64.
After 1950, Colombos wrote that "the regime of the territorial straits is similar to that of all national waters, but subject to freedom of navigation for the vessels of all nations where such straits form part of the highway of international traffic."\(^{34}\)

These authorities contended pragmatically that freedom of navigation has little meaning unless it permits vessels to travel from port to port, and sea to sea. Their view was that high seas rights of navigation must be exercised as rights, and not on sufferance.\(^{35}\)

**B. Judicial Perspective**

The Corfu Channel case is the landmark international judicial decision upholding passage through straits.\(^{36}\) The decision has been subjected to various interpretations and cited to substantiate numerous, often conflicting, views. It is best understood when viewed in its historical and factual context.

Immediately following World War II certain littoral states attempted to exclude foreign warships from waters traditionally considered international. In October of 1946, two of four British warships were heavily damaged by mines while passing through the North Corfu Strait\(^{37}\) within Albanian territorial waters.\(^{38}\) The United Kingdom asserted that its warships had a right to transit the strait, that Albania had illegally mined or consented to the mining of an international strait, and that Albania was in violation of international law for failure to warn the warships of the danger to their navigation in the area.

Albania denied that it had knowledge of the mines,\(^{39}\) but insisted that British warships were not entitled to transit the straits without her consent, and that the United Kingdom vessels had violated her territorial sovereignty.\(^{40}\) Albania first contended that the North Corfu Strait was


\(^{35}\) The work which most perceptibly addresses straits on a functional basis is R. Baxter, *The Law Of International Waterways* (1964) [hereinafter cited as R. Baxter]. For a good collection of views of other writers supporting this functional approach, see I Bruel, *supra* note 30, at 48-69.


\(^{37}\) The North Corfu Channel separates Albania from the Greek island of Corfu and is little more than a mile wide at its narrowest point and less than six miles wide elsewhere.

\(^{38}\) The British force was observed and reported to Albanian coastal defense authorities who made no attempt to warn the vessels. Almost two hours later, the *Saumarez* struck an underwater mine and was heavily damaged. *Volac* took the stricken vessel in tow, but also struck a mine. British casualties were one officer and 37 ratings killed and two officers and 43 ratings wounded. The Times (London), Oct. 24, 1946, at 6, col. 7.

\(^{39}\) Albania contended that she had neither access to the type of mines used, nor sufficient naval vessels with which to lay them. The British contended that the field had been laid by Yugoslavia, Albania's ally, either at the request of, or with the consent of, Albania.

\(^{40}\) If the minefield was laid without the consent of Albania, that constituted a serious violation
not an international highway, that the Corfu Channel, although heavily transited by both merchant and war vessels, was not an international strait, and that had it been closed entirely to international shipping, an alternate route around the island was reasonably available which would have added scarcely 100 miles to the shipping route. The Court found, however, that the North Corfu Channel belonged "to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace." In categorizing the strait as an international highway, the Court said,

It may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the opinion of the Court the decisive criterion is rather its geographic situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this Strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and the Adriatic Seas.

Thus, the geographical criterion, coupled with the use criterion is controlling, and it is not a requirement that an international strait be "necessary" if it is "a useful route for international maritime traffic." The Albanian Government next maintained a right to exclude warships for protection of its own security interests and alleged that passage of the warships was not of an innocent character. Albania and Greece were in a state of de facto hostility at the time; Britain was an ally of

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41 Statistics indicating the degree to which the Corfu Channel was actually used by international shipping where furnished the Court for the period April 1, 1936 through December 31, 1937. During that period 2,884 vessels put in at the Port of Corfu and transited the Channel. The flags of the ships were Greek, Romanian, Yugoslav, French, Albanian and British. The total did not include vessels in transit which did not call at Corfu. The British Navy regularly used the Channel for more than 80 years, as did the navies of other states. [1949] I.C.J. 4, 29.

42 Id.

43 Id. at 28.

44 Id.

45 The Court was fully cognizant of the state security basis of the Albanian claims: "It is a fact . . . that Greece had declared that she considered herself . . . in a state of war with Albania, and that Albania, invoking the danger of Greek incursion, had considered it necessary to take certain measures of vigilance in this region." Corfu Channel Case, [1949] I.C.J. 4, 29.

If significance is to be attached to the state of Greco-Albanian relationships at the time, the actual holding of the case that a right of free passage existed for the warships of third states during a period of hostilities would apply a fortiori in time of peace. But it cannot be too strongly emphasized that the Court professed to be dealing with the peacetime situation. R. BAXTER, supra note 35, at 164.
Greece; Albania needed to protect herself against intrusions into a politically unstable sector of her state territory;\(^4\) East-West relations in the immediate post-war era were tense at best. Five months earlier, Albanian shore batteries had fired on British cruisers.\(^4\) There were no diplomatic relations between the United Kingdom and Albania.\(^4\) In this politically charged atmosphere, the British Royal Navy Task Group consisting of two cruisers and two destroyers undertook to transit the strait. The United Kingdom admitted that its motive for passage was to test the Albanian attitude, and to affirm by a show of force a right which had been denied by force.\(^4\)

The Court still found no violation of Albania's sovereignty and upheld the innocent character of the passage. If the Court's decision turns on "motive," or a subjective test,\(^5\) the coastal state has the burden of second-guessing the intention of the transiting warships and for practical purposes, is placed in the position of being unable to exclude vessels until it actually suffers some measure of harm.\(^6\) If, on the other hand, the "manner of passage," or an objective test, is the controlling factor in assessing the reasonableness of the coastal claim that passage is non-innocent,\(^7\) then a liberal conception of innocent passage has been adopted by the Court.

It must be emphasized that the Court did not apply the technical concept of "innocent passage" as later defined in the 1958 Territorial Sea Convention. Rather, it applied customary international law which has always required that passage be "innocent," whether in the exercise of a right of passage in the territorial sea or on the high seas, as there is no right of prejudicial passage anywhere in time of peace.

\(^{4}\) The Court acknowledged that Albania, in view of the circumstances, would have been justified in issuing regulations in respect of the passage of warships through the strait, but not in prohibiting such passage or in subjecting it to the requirement of previous authorization. [1949] I.C.J. 4, 29.

\(^{5}\) Id. at 27.

\(^{5}\) Id. at 29.

\(^{5}\) Id. at 30.

\(^{6}\) It is believed that unless this emphasis on lawful purpose is attributed to the Court its decision would make nonsense of all previous and subsequent formulations of innocent passage. . . . It may be emphasized . . . that the purpose of passage . . . was a very specific one, connected with the issue of the right of innocent passage.


\(^{7}\) McDougal and Burke read the case as merely affirming the proposition that the concept of innocent passage is sufficiently broad to sanction acts, otherwise prejudicial to coastal state security, when the purpose of such acts is to affirm a right intimately connected with the territorial sea in the first instance. They place emphasis on the motive, rather than the manner, of passage. Id. at 244, 246.

With this background, the language in the decision as to the scope of the transit right upheld is considerably more meaningful:

It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of the coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage . . . in time of peace.\[^{53}\]

If the foregoing language is interpreted in light of contemporary understanding of what constitutes "innocent passage" as it applies in the territorial sea regime generally, the decision makes little sense. The previous firing on British vessels by Albania, the de facto state of hostilities between Greece and Albania, the motive of the British in transiting the strait—all strain an interpretation of innocent passage under the 1958 definition. If, however, the case is understood as applying only to international straits, albeit lying within territorial waters, it reflects a rational sustaining of the policy to uphold their special legal status in favor of a right of access for international navigation. In this context, the right of access upheld is something more than innocent passage as now defined in the 1958 Convention and more akin to a recognition of a high seas navigation right. If a satisfactory explanation is to be found, it lies in the Court's application of the special rules applying to international straits, as opposed to those governing the territorial sea generally.

Since Albania presented a strong case for excluding British warships (as opposed to failure to warn them of the mines), and since the Court considered all the factors presented in her behalf and still rejected her position, it is clear that, in the Court's view, vessels of war, like merchant ships, are entitled to a right of access through an international strait in time of peace.

VI. INTERNATIONAL CONFERENCES AND TREATIES

For over a century, international conferences and treaties governing straits have demonstrated a clearly discernible trend toward greater and greater freedom of access. These incidents are important because they represent successful international efforts to free navigation from the control of coastal states. Moreover, they demonstrate that straits have in fact been treated differently from territorial waters generally. Conferences on the law of the sea, however, have never dealt with the issue of

international straits in the context of extensive territorial sea claims. Straits themselves were never a significant issue because attention was focused on problems arising from only a very narrow territorial sea.

The 1930 Hague Codification Conference was the first major international conference on the law of the sea. Although it did not produce a treaty, it does provide insights into basic concepts which affect both straits and navigation in general. The Second Committee, which dealt with the territorial sea, addressed "the application to narrow straits of the rules of law concerning territorial waters," as wider straits were not affected. The only breadths of territorial seas which were seriously considered were those of three, four and six miles. This is consistent with the committee's observation that "we are only called upon to consider straits the entrance to which is not more than 12 marine miles in width."

As the Committee did not consider a wider territorial sea to be viable, its discussion on straits centered on the relatively obscure question of whether small enclaves lying within straits, the entrances to which were overlapped by the territorial sea, should be assimilated to the territorial sea. The Committee did affirm that in those waters of straits which constitute territorial sea, "it is essential to ensure in time of peace in all circumstances, the passage of merchant vessels and warships through straits between two parts of the high sea forming ordinary routes of international navigation." A liberal policy toward passage through the territorial sea in general was manifested and few significant problems in international cooperation resumed. At the Second Law of the Sea Conference, more attention was given to straits than in 1930 because of the decision of the ICJ in the Corfu Channel Case and the dispute over transit of the Gulf of Aqaba. However, straits were an issue only in those narrow fact contexts as efforts concentrated on agreement on a narrow territorial sea breadth, not significantly affecting straits.

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54 Documents from the League of Nations Committee of Experts for the Progressive Codification of International Law, 20 AM. J. INT'L L. 1, 88 (Special Supp. 1926). Indicative of this focus on a narrow territorial sea is the comment by Mr. Miller, the U.S. representative, that:

The value of that right [innocent passage] has been considerably exaggerated in the books. There are very large parts of the coast throughout the world where the right of innocent passage is never employed. ... While I do not wish to bring up the question of the limit of the territorial sea, I would point out that, in most cases, the deviation in the course of a ship is very slight if it is required to go outside that limit; or, let me say, outside the limit of the territorial waters of the United States, which is three miles.

53 1930 Acrs., supra note 11, at 148.

54 Id. at 58.

57 See discussion of the enclave problem in id. at 208.

55 Id.

59 The Soviet proposal that each state would determine the breadth of its territorial waters within
Only Article 16(4) of the 1958 Convention on the Territorial Sea and Contiguous Zone purports to deal directly with straits. The remaining articles in the same section govern the right of innocent passage and rules applicable to all ships in the territorial sea. The failure of the Conference to provide for separate rules in dealing with straits in a broader context was calculated to result in "some distortion of the law." This proved to be a gross understatement when efforts to resolve the permissible width of the territorial sea proved unsuccessful. It is hardly surprising that, by making the solution to straits a derivative of a solution to the territorial sea problem, little stability has been achieved.

As in 1930, increasing dissatisfaction with a three mile territorial sea was apparent. Agreement on a greater width was not obtained. If failure to resolve the territorial sea breadth was the primary shortcoming of the 1958 Conference, the failure to address adequately the straits problem most assuredly ranked a close second. Furthermore, rules formulated as a result of consideration of straits problems in the context of a narrow territorial sea should not be expected to reflect the realities of a legal regime which prevails in a substantially different fact context.

In March 1960 the Second United Nations Law of the Sea Conference met to resolve the two major issues which had frustrated its efforts in 1958—the breadth of the territorial sea and coastal state fishing rights. It failed to reach satisfactory results on either issue.

The Conference did consider a variety of proposals which essentially provided a choice between a six-mile and a territorial sea. None of the proposals however, mentioned rights of passage through newly enclosed limits of three to twelve miles was rejected (3 U.N. Conf. 233, U.N. Doc. A/CONF. 13/C.1/L.80 (1958)), as was a joint proposal by India and Mexico which would have entitled a state to a territorial sea up to a limit of twelve nautical miles (id. U.N. Doc. A/CONF. 13/C.1/L.79 (1958)). A vote on a Canadian proposal for a territorial sea up to a limit of six nautical miles also resulted in defeat (id. at 232, U.N. Doc. A/CONF. 13/C.1/L.77/Rev. 3 (1958)), along with a U.S. proposal which combines a six mile territorial sea with a twelve mile fisheries zone (id. at 253, U.N. Doc. A/CONF. 13/C.1/L.159/Rev. 2 (1958)). Actual vote on a wider territorial sea rejected breadths of up to six and twelve miles, respectively. The Soviet proposal was defeated 29-44-9; the India and Mexico proposal, 35-35-12; the Canadian proposal, 11-48-23; the United States proposal, 36-38-9.

See the views of the State of Israel as expressed in Israeli Comments, supra note 28 at 998.

Article 24 of the Territorial Sea Convention sets forth criteria on the Contiguous Zone. This is sometimes erroneously cited as authority for a 12-mile territorial sea. The proceedings and history of the Conference are clear that it does not authorize a universal 12-mile territorial sea. At most, it permits accommodation of those few states which historically have claimed more than 3 miles, but not more than 12 miles. It would, of course, accommodate any new claims up to 12 miles which were legitimate on an independent basis, but does not, of itself, authorize new claims.
territorial waters, whether in international straits or otherwise. Limited attention was given to this subject in the debates.

A willingness of some of the major powers in 1958 and 1960 to support the six-mile proposals, in particular, may suggest that such a limit would, without special provision for straits, be compatible with their vital interests. It must be remembered, however, that the focus in 1958, and particularly in 1960, was on reaching agreement on a territorial sea breadth, not on navigation through straits. Then too, proposals by the major powers were not unqualified. The British, for example, would permit each state to claim up to six miles of territorial sea. However, "rights of passage for aircraft and vessels outside a three-mile limit were to remain free and unrestricted as before, and were not to be subject to the control or jurisdiction of the coastal State."62

Thus, not only would the United Kingdom have preserved existing navigation rights in international straits, but it would have preserved all navigation rights within areas affected by the extended territorial sea. Most significantly, the practice of major maritime states since 1960 remains unchanged and continues to indicate that they do not intend to relinquish rights which they presently enjoy. Finally, a six mile territorial sea is no longer the popularly proposed width. The present twelve mile proposal patently affects practically all major international straits, thereby escalating the potential conflict for all nations engaged in maritime transit.

VII. SPECIAL INTERNATIONAL AGREEMENTS

The movement over the past few centuries in favor of greater freedom of passage is well-illustrated by various bilateral and multilateral agreements giving effect to that objective. The foremost example of freeing an international strait formerly under total coastal state domination is the Turkish Straits, which control access to the Black Sea.63 Since the capture of Constantinople in 1453, Turkey has held a position at the Bosphorus and the Dardanelles somewhat similar to that of Denmark in the Western Baltic.64 Turkey was forced by Russia through the Treaty

62 Convention Regarding the Regime of the Straits, supra note 4.
63 So long as the shores of the Black Sea were exclusively possessed by Turkey, that sea might with propriety be considered a mare clausum; and there seems no reason to question the right of the Ottoman Porte to exclude other nations from navigating the passage which connects it with the Mediterranean, both shores of this passage being at the same time portions of the Turkish territory; but since the territorial acquisitions made by Russia, and the commercial establishments formed by her on the shores of the Euxine, both that empire and the other maritime powers have become entitled to participate in the commerce of the Black Sea, and consequently to the free navigation of the Dardanelles and the Bosphorus. H. WHEATON, supra note 10, at 292.
of Kuchuk-Kainardji (1774) and later through several treaties with Great Britain, to open the straits first for merchant ships and later for a limited number of warships. The Turkish Straits are presently governed by the Montreux Convention of July 20, 1936. Article I provides for "freedom of transit and navigation in the Straits" and that the exercise of that freedom shall henceforth be regulated by the provisions of the Convention. The Convention emphasizes that special rights were granted to the coastal state not in its own interest alone but also in that of the international community. It qualifies the powers conferred upon the coastal state bordering an international strait, while at the same time proclaiming the principle of freedom of navigation as a principle of international law independent of the will of the parties.

Approaches to the Baltic Sea are controlled by the Danish Straits, which connect it with the North Sea and completely lie within the territorial sea of Denmark and Sweden. Like the Turkish Straits, the Sound and the two Belts which comprise the straits had been under coastal state control sanctioned by a succession of treaties and arrangements with other powers. Until the 17th century, Denmark collected tolls on ships using the straits. States asserted progressively more strident protests against these tolls and demanded abolition of the "Sound-dues," referring to their "right of using the ocean as the highway of commerce." They further pointed out that according to the Law of Nations, "the navigation of the two seas connected by this strait is free to all nations; and therefore the navigation of the channel by which they are connected ought to be free."

These demands culminated in an 1857 agreement which permanently abolished the tolls and permitted passage of warships, subject to special arrangements which were within the prerogative of Denmark to regulate. The agreement represented a purely negative abolition of a power exercised by the coastal state against the interests of the international community. Although the term "free" initially referred to "toll free"
in the Danish Straits, it has also come to mean "freedom of navigation." The Danish delegate at the 1958 Law of the Sea Conference noted this practice in advocating freedom of passage through straits:

Part of the Danish coast bordered an international strait joining two parts of the high seas, and for more than one hundred years his country had maintained freedom of navigation through that strait in the interests of international trade. Such an obligation as that which his country had assumed should be counterbalanced by corresponding rights in other parts of the world, and Denmark accordingly expected that there would be free passage for its ships through straits in the territorial seas of other states.\(^{71}\)

Consistent with the trend to liberate certain international straits historically under coastal state domination by virtue of the fact that they were totally enclosed by narrow territorial seas, some nations also made provisions against coastal state claims which might extend to straits not yet considered to be under the control of littoral states. A number of international agreements ensued which recognized the freedom of passage through straits whose width far exceeded the sum of the belts of territorial sea running through them. Best known among this category of straits is Gibraltar. Unlike the Danish or Turkish Straits, the Straits of Gibraltar, since the days of Roman dominion, have not been subject to exclusive coastal state control and have long been viewed as open to all nations. In the 19th century Wheaton wrote that:

If the straits of Gibraltar, for example, were bounded on both sides by the possessions of the same nation, and if they were sufficiently narrow to be commanded by cannon-shot from both shores, this passage would not be the less freely open to all nations; since the navigation, both of the Atlantic Ocean and the Mediterranean Sea, is free to all.\(^{72}\)

The challenge was not, then, to free the Straits of Gibraltar, but to prevent encroachments. In response to this challenge several decades later Great Britain and France entered into the Declaration of 1904. Article VII of that Declaration provides that "In order to secure the free passage of the Straits of Gibraltar, the two Governments agree not to permit the erection of any fortification or strategic works on that portion of the coast . . . ."\(^{73}\) This was designed to guarantee that nations


\(^{72}\) H. Wheaton, supra note 10, at 292.

\(^{73}\) Declaration between Great Britain and France respecting Egypt and Morocco, together with the Secret Articles, signed at London, April 8, 1904, art. VII, 101 BRITISH AND FOREIGN STATES PAPERS 1053 (1912). Also, see Declaration between France and Spain concerning the adherence by Spain to the above agreement signed at Paris, October 3, 1904, 93 Martens, N.R.G. 2d Series 57.
might continue their usage, even where the channel used for navigation might require shipping to pass through the territorial waters of the coastal state.

Another instance of this process of securing an extensive international waterway to free use by all nations was the guarantee in the retrocession to Japan of the Strait of Formosa that as a "great sea highway of the nations," it would remain open to use by all and remain beyond the exclusive control or appropriation of that country.

In the latter part of the 19th century, the concept of free access made progress in the Western Hemisphere. Following the independence of the Spanish colonies, the control of the Straits of Magellan became an issue between Chile and Argentina. Maritime nations accustomed to using the straits protested against any attempt to place them under coastal state control. Widespread concern induced Chile and Argentina to conclude a treaty in 1881 which provided for free navigation by all nations. This principle has been observed since and has been interpreted to permit the passage of warships not only in time of peace, but also in time of war.

A parallel development to greater freedom in straits was the opening of three major interoceanic canals (Kiel, Suez and Panama) by agreements which are virtually identical in their terms. To some observers this characterizes the emergence of a "common law of international canals," although such law is based more on historical coincidence than on any theoretical consideration like freedom of the seas as applied to straits. Nevertheless there is considerable similarity between straits and canals.

As the law stands today, canals and straits bear a close affinity as regards freedom of transit in time of peace. A series of grants in the one case and freedom of the seas in the other have worked to bring about the same result. The establishment of a right of free passage common to both categories of waterways has been aided by the functional analogy resulting from the fact that both offer access from one stretch of the high seas to another. The characterization of a canal as

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74 2 E. Bruel, supra note 30, at 152.
75 R. Baxter, supra note 35, at 8.
76 Treaty between the Argentine Republic and Chile, defining the boundaries between the two countries, Buenos Aires, July 23, 1881, reproduced from 71 British and Foreign State Papers 1103.
77 The provision has also been interpreted in this way in practice, warships of belligerent powers have always passed through the Strait, as e.g., during the Spanish-American War 1898. For further discussion see 2 E. Bruel, supra note 30, at 200-51.
78 See R. Baxter, supra note 35, at 185.
an 'artificial strait' is a highly accurate one, provided it is understood that a canal may achieve that status but it is not necessarily born to it. It is a consequence of this similarity of function that in time of peace the right of transit through both types of waterway remains untrammeled.  

Although artificial canals do not inherently enjoy the same legal status as natural straits, what is important is the movement to assimilate them to the same free passage legal regime governing natural straits.  

In analyzing these treaties, several conclusions are inescapable:

1. To the extent that treaties recognized coastal state powers over navigation, they were only recognized where they had been historically exercised. There has been no general recognition of a right of a state to extend its territorial sea and thereby control transit in a newly enclosed strait.  

2. No exclusive claim to deny all access to any international strait has been successful. Even states disposed to use force to back up their exclusive claims have eventually had to yield to wider community interests. Although the international community has acquiesced in certain coastal state practices that vary somewhat procedurally in each treaty-governed regime, in all straits where the international community has had an interest and a need for passage, whether by merchant or war vessels, accommodation has been reached.  

3. In those straits lying within the territorial sea of one or more states, each agreement, or renegotiation of a previous agreement, resulted in greater freedom of access.  

4. These agreements signify an objective body of conventions which states may no longer be free to repudiate because, in the broadest sense, they reflect an international norm of conduct favoring free access or free passage. For a principle such as free access to constitute an effective basis of international law, it must stand above the revocable consent of individual states. The temptation regarding treaties which have been formulated to promote free navigation in international straits is to construe them as binding only the parties. It cannot be ignored, however, that in each case a treaty resulted because of demands on the part of

\[78 \text{ Id. at 185-86.}\]

\[80 \text{ "[W]hen an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie." Case of the S.S. "Wimbledon", [1923] P.C.I.J., ser. A. No. 1, at 28.}\]

\[81 \text{ See R. Baxter, supra note 35, at 177.}\]
states which did not control both shores of the strait and of demands that community expectations upholding free access be observed.

**VIII. Policy Against Encroachments on Access**

A contemporary example which gives considerable insight into the policy against encroachments on access is the policy which governs rights in the territorial sea which is affected by straight baselines. In delimiting the territorial sea, the question is whether in waters which become internal when the straight baseline system is applied the right of passage should be retained in the same way as in the territorial sea.

Traditionally, baselines involved closing off minor indentations of the coastline, then delimiting the width of the territorial sea. Such indentations were significant only in that they affected the outer limit of the territorial sea, as the line across the indentation was not conceived as separating an area of internal waters on the landward side from an expanse of territorial sea measured seaward of the line. Rather, all waters on both sides of the line were regarded as part of the regime of the territorial sea, the inward boundary line normally being the low watermark. Later, however, states generally came to claim that as the closing line marks the baseline from which the territorial sea is measured, it therefore begins at such baseline. Waters on the landward side, therefore, became regarded as internal waters.

A juridical endorsement of the latter view resulted from the judgment of the ICJ rendered on December 10, 1951, in the Fisheries Case between the United Kingdom and Norway. Norway was permitted to use straight baselines along parts of its coast which was deeply indented to measure the breadth of its territorial sea. Until that judgment, internal waters extended only to rivers, lakes, estuaries and certain deep bays—waters almost exclusively behind the coastline. The effect of that judgment (which was primarily concerned with the outer boundary of the territorial sea) was that waters behind the straight baselines and the coast acquired a new legal status: instead of remaining part of the territorial sea, they became new internal waters.

The proliferation of claims following the Fisheries Case called for a reexamination of the consequences of straight baselines and their impact on international rights previously enjoyed. In 1958, the problem was addressed. Attention focused, however, on preserving existing navigation rights in territorial seas which would become internal waters but were still, geographically, part of the sea and necessary to navigation. Sir Gerald Fitzmaurice of the United Kingdom emphasized that the use of baselines would have to be reconciled with "existing rights of pas-
sage," and that "in case of a conflict, the right of passage, as a prior right and the right of the international community, must prevail over any alleged claim of individual coastal States to extend the areas subject to their exclusive jurisdiction."\(^2\)

The original International Law Commission’s draft Article 5 of the Territorial Sea Convention addressed the baseline problem, but made no provision for the preservation of existing international rights which would otherwise be extinguished by rigidly applying an internal waters regime to newly enclosed portions of the territorial sea. The United Kingdom noted this omission and urged that the Commission propose "a general principle that where territorial waters were thus abruptly transformed into internal waters, following the drawing of straight baselines, the right of innocent passage in such waters should persist, to allow international shipping to continue to use them without let or hindrance."\(^3\)

Defenders of the draft Article 5 argued that "The Commission could not, after giving the coastal State the right to draw straight base lines, take away the main corollary of that right by making provisions for the right of passage."\(^4\)

The United Kingdom, however, pointed out that since waters which were seaward of the coastline might juridically become internal waters, while remaining more akin to territorial waters, "it was therefore just as rational and necessary to have recognized access to them as previously."\(^5\) The British position prevailed and was adopted by the Convention as Article 5. Significantly, the Convention’s approach was functional and did not attempt to distinguish differing navigation rights which would otherwise have resulted from an artificial interior waters-territorial sea median line.

Arguments are presently being advanced that nations should apply the Article 5 rationale to high seas which would become territorial seas under newly recognized claims. The Commission to study the Organization of Peace, under the chairmanship of Louis B. Sohn, undertook a study of the issues to be considered by the Law of the Sea Conference. The Commission published a report in 1973 and stressed that as a matter of community interest, long established freedoms of navigating


\(^3\) *Id.* at 9.

\(^4\) *Id.*

in the high seas should apply as much as possible in extended territorial seas:

To compensate the international community for the horizontal extension of national jurisdiction, coastal States should agree to define innocent passage through the territorial sea in such a way corresponding closely to the existing freedom of navigation. The relevant provision might be analogous to Article 5 of the Convention on the Territorial Sea which retained the right of innocent passage in areas which became internal waters of a State as a result of drawing straight baselines along a coast.\(^8^6\)

Applying the Article 5 philosophy to the territorial sea, the Commission recommends: “Similarly, freedom of navigation might continue to apply in those areas which would become a part of the territorial sea as a result of extending that sea to twelve miles from the coast, but which have long served as normal traffic lanes for international shipping.”\(^8^7\)

Finally, as regards international straits, the Commission concluded that

In particular, this principle should apply where international traffic has customarily used shipping lanes passing through an international strait connecting two areas of the high seas or leading to the territorial sea of a third State or to a port open to international navigation. In such cases, the State or States bordering on the strait should not have the right to curtail the existing freedom of navigation or overflight.\(^8^8\)

IX. CONCLUSION

The rights of access to the sea and to sea ports, passage from one high seas to another and from high seas to territorial seas, and freedom on navigation of the high seas have not been easily or injudiciously conferred upon the community of nations. They are the result of centuries of conflicting claims, of delicate balancing of sovereign against sovereign, of individual nation against community interest. They are the result, not of a theoretical pretext, but of a pattern of practice solidified by the practicalities of necessity and accommodation. They reflect a community interest adaptable to change, and demonstrate that such interest with regard to international straits remains "far more vital than simply the right of innocent passage in the territorial sea."\(^8^9\)

\(^8^7\) Id.
\(^8^8\) Id.
These rights have suffered temporary setbacks, excesses, abuses, but the trend toward greater freedom of access is undeniable. For straits in particular, it is evident that there has been a consistently strong tendency over the past century to restrict the competence of coastal states over straits. In his study of international straits, Eric Bruel expressed the opinion that "the fact that a legal status *sui juri* has been created for international straits in general and that regimes more or less logical have been established for particularly important straits has shown that strong normative forces are at work in this sphere."

Some states have recently challenged those traditional forces. Basing their claims on a broad territorial sea concept only, a few states have advocated the establishment of new, unprecedented controls over movement of vessels and aircraft through some of the most important maritime arteries of international communication. Much attention has focused on the claims of individual states with little recognition of community interests already vested and new claims which must find accommodation.

Debates in the United States Seabeds Committee have sharpened thinking on this problem. Clearly, those states which condition recognition of extended territorial sea claims on preservation of free navigation are seeking not the creation of any new rights or privileges but simply the maintenance of the existing freedoms of navigation and of overflight.

The former Legal Advisor, Department of State, and now Head of the United States Delegation to the Law of the Sea Conference, Ambassador John Stevenson, succinctly noted:

Neither history nor logic compels any state to concede that an extension of territorial seas has the same effects upon the rights of the international community in straits as it has in other coastal areas. The balance of international and coastal interests is quite different in these two situations. . . . [T]he right to transit straits should be regarded in law for what it is in fact: an inherent and inseparable adjunct of the freedoms of navigation and overflight on the high seas themselves.

The existence of the navigation rights presently enjoyed by the international community has also been recognized by some countries claiming a twelve-mile territorial sea, including France and the Soviet Union.

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60 M. McDougal & W. Burke, *supra* note 50, at 211.
63 65 Dep't State Bull. 261, 263 (1971).
The Soviet Union pointed out that "the international regime should preserve the generally recognized freedom of navigation and overflight in straits which linked areas of the high seas and which had traditionally been used for that purpose on the same basis as the high seas themselves."94 Furthermore, the Russians felt that proposals which sought to extend to straits used for international navigation the principle of innocent passage which applied in the territorial sea were unacceptable, because they "disregarded the special position of straits which linked two areas of the high seas and were widely used for international navigation."95 Norway, Australia, Poland, Italy and other states have also stressed that straits require special treatment and that the rules should not be the same as those for passage through the territorial sea.96

Among the most articulate expressions of the distinct legal regime to which straits navigation rights appertain is that of Professor Richard Baxter:

It may at this point be objected that if a strait consists entirely of belts of territorial sea or of territorial waters separated by a strip of high seas, the law applicable to such waterways should be the usual law applying to the jurisdiction of states on the high seas or in the territorial sea, as the case may be. This conclusion would suggest that there is no reason for the establishment of any special body of law applicable to straits alone. The existence, however, of a variety of conventional arrangements having application to individual waterways and of a body of customary law dedicated to this particular type of waterway makes it impossible to start from this easy assumption.97

Professor Baxter warns that

the logical consequence of the assimilation of the waters of straits and of the territorial sea would be the elimination of any separate body of doctrine relating to straits, for the law respecting passage through territorial waters within a strait would differ in no respect from the principles having application to passage through the territorial sea of a state which does not form part of a strait.98

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95 Sohn recommends that enlarging the width of the territorial sea to twelve miles would not affect the special status of international shipping lanes passing through international straits. L. Sohn, supra note 86, at 38.
98 Id. at 166.
Moreover, to recognize the powers in the riparian state which would necessarily flow from the abolishment of that distinction "would impose needless and undesirable limitations on any 'right' of free passage."°

The conclusion is most compelling that through the practice of states international straits have acquired a *sui juris* legal character which is equal to and independent from, the legal regime of the territorial sea.

Recognition of the *sui juris* legal character of international straits does not, in itself, resolve those problems which marine traffic poses. It does, however, offer a legal framework within which an acceptable solution can be devised. Certain coastal state powers, such as the right to control passage, are inconsistent with that status and have not, in practice, provided viable solutions. States can realistically be expected to resist all manifestations of coastal state control since navigation and overflight affect their fundamental security interests. The lessons of Gibraltar, Magellan, the Bosporus and Dardanelles, and others point out that if coastal states claim the right to control passage, they will inevitably be exposed to varied pressures, to grant or to deny passage to foreign vessels. If states were to select those nations whose vessels might freely navigate straits within their territorial seas, they risk needless controversy, consequently placing themselves in a far more perilous position than if they permitted free use of the straits by all states. The most advantageous position for such states is that of guardian of the interests of the international community. In this capacity they can ultimately expect greater security to result as they appropriately execute their communal functions. Rather than seeking security by methods in disregard of the legal status of international straits, their security is enhanced by their awareness of that legal status.

Coastal state powers other than arbitrary competence to suspend or deny passage are available to deal with new risks and hazards in a manner completely consistent with the legal status of straits. For example, if passage of a particular vessel poses a grave and imminent threat to important coastal interests, the coastal state is universally regarded as having competence to take protective action, to include temporarily suspending passage for cause, or even intervening on the high seas to abate a particular threat.°° Thus, in catastrophic situations it need not assert itself without remedy, and a broader authority such as that to deny or suspend all passage is unnecessary.°°° In each situation, it is the

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° Id.


°°° Littoral states may act in certain ways for the preservation of their safety and the
particular threat which gives rise to the competence to abate it.

As to persistent problems which are less grave in isolated instances, but pose a cumulative, harmful effect, states advocating the continued exercise of free passage have a responsibility to develop a viable solution with coastal states. This is particularly true in areas such as marine pollution and traffic control. Freedom has never meant freedom from responsibility, or ultimately, control. Freedom consistently abused demands controls to limit the action of the abuser. In international law the meld of controls must be carefully apportioned so as to permit coastal state protection of vital interest, while maintaining international constraint upon coastal state powers which would exceed necessary limits. Although in an expanded territorial sea context, reasonable pollution and traffic control measures consistent with freedom of passage are within the purview of coastal state powers, international rules must be established to prevent detrimental conduct, with appropriate remedies for damages.

The many problems arising from ocean use and the continual clash among nations on grounds of sovereignty could result in mutual rejection of the international law of the sea, leading to chaos and a resort to armed conflict. As to navigational interests, a more rational approach would allow states representing opposing interests to acknowledge that the underlying principles upon which high seas access is founded remain valid, but must be malleable in their application to modern problems.

Any equitable legal order for the oceans must be acceptable to most, if not all, states. A solution which a majority attempts to impose, and which does not take into account existing realities and the differing interests of states, will be unsatisfactory. Established rights of states under existing law must not be arbitrarily derided or altered without consent of the states concerned. Where legitimate conflicts exist, the solution must be sufficient to guarantee continued access for all. If, for example, the majority attempts to force certain states to relinquish their existing right to access, by concluding a treaty to which such states are not parties, the dangers are significant. First, the actual burden of enforcing such an unlawful denial of the use of a particular strait to such vessels would lie with the state bordering the strait. If the transiting vessel chose to exercise its right of access and the coastal state forced a

protection of their laws over an undefined and indefinite stretch of coastal water . . . .

[T]he whole idea of a peculiar and definite marginal sea tends to be discredited. Real danger to the littoral state or its laws, and actual infractions of these laws, are the tests of the right of the state to act, rather than the scene of that action.

confrontation, it could rapidly become embroiled in a major dispute. Second, the legality of coastal state action, except in specific cases where actual harm of considerable magnitude is threatened, is not well-founded as states presently have vested international customary law rights to use international straits. Third, even if the nations of the world concluded a treaty in the United Nations permitting states controlling straits to deny such passage, it would not bind non-signatories, nor could it eventually become customary international law as against states which continued to use such straits and did not acquiesce to coastal state control. A final alternative is armed force, which offers little that is constructive to stability or final settlement of the problem.

By far the most advantageous solution is a functional approach which is not at the expense of any nation. If the notion of the territorial sea must persist, functional recognition of community interests such as navigation must result. The minimal requirements of a durable solution would include recognition (1) that the right of access to international straits is an established community right; (2) that the right of access exists independent of the breadth of the territorial sea; hence, a state which validly extends its territorial sea does so subject to the navigation rights already vested in the community of nations; (3) that respecting navigation, sovereign states, as equals, have a mutual right to pursue their sovereign activities in ocean space; (4) that, whether by international means or objective coastal state means, regulatory authority, short of prohibiting transit, or subjecting it to unreasonable constraints, must be permitted the coastal state for purposes of pollution and traffic control; and (5) that the benefit to the world community in a continued right of access requires a higher standard of care and willingness to compensate coastal states in the event of actual injury resulting from the use of straits to the latter's detriment.

These elements, properly formulated in a Law of the Sea treaty, can go a long way toward providing the framework for resolving the present and future problems respecting navigation.

The principle of freedom of access still forms the basis of the present law of the sea and should not be indiscriminately blended with fisheries, seabed, resource, or other issues. In the long-term perspective, the existing, historically recognized rights of free passage must not be made subject to the good will, the international political conditions, and the vicissitudes of the foreign policy and relations of coastal states. Armed confrontation must be avoided if at all possible. The wide array of peaceful methods of resolving substantive issues must certainly con-
INTERNATIONAL STRAITS

demn such action. The means of solving the navigation problem functionally within the framework of an acceptable international treaty exist. The time to reach accommodation peacefully is opportune. An increasingly interdependent world cannot settle for less.

EPILOGUE

The necessary elements for a successful LOS treaty have not as yet solidified. Although last summer marked the formal beginning of a conference which many nations hope will eventually result in such a treaty, little real progress was made in the opening session in Caracas, Venezuela, which conluded with more than 1,500 delegates from 148 nations deadlocked on many key issues, including straits.

The outlook for the spring session in Geneva, Switzerland, moreover, remains, at best, cautiously optimistic. Although some states appear to have based their positions on their fundamental LOS interests, others appear to have aligned themselves on issues for political reasons having little nexus to LOS. This relatively strict political rigidity leaves little opportunity to address issues on their merits and may not only prevent individual states from adopting positions wholly in their best interests, but also result in formulation of a collective position which, if adopted, will fall short of a viable solution. Because of this, there is considerable danger that the Conference may fail to achieve any long-range settlement of LOS issues, the nonresolution of which will assuredly have far-reaching economic and political consequences.

The lack of significant progress on the straits issue has been discouraging to many observers. This is not surprising, however, because straits are but one of many important LOS problems before the Conference, many of which will impact reciprocally on each other. Whereas this interdependence has been a justification for a comprehensive treaty, perhaps the greatest shortcoming revealed by the Conference is that it is overambitious in attempting to deal so comprehensively with the problems affecting the allocation and use of ocean space and resources. Resolution is sought of such complex issues as breadth of the territorial sea, coastal state economic jurisdicion over fisheries and resources of the continental shelf and seabed, marine pollution, scientific research and international machinery for dealing with seabed areas beyond the limits of coastal state economic jurisdiction. Each could be the subject of a separate treaty. It is not surprising, then, that agreement on straits has been particularly difficult to obtain. Substance aside, because of the high priority placed by the major maritime powers on access to straits, states appear to be holding that issue as a bargaining chip to obtain
other important concessions, particularly resource concessions. Consequently, it is difficult to ascertain how realistically the straits problem will ultimately be resolved once resource and other key issues unrelated to straits have been accommodated.

Despite the vast number of issues, their complexity, and the little substantive progress in negotiations to date, some trends have emerged. There is broad support for at least a 12 mile territorial sea and a broad coastal state economic zone up to 200 miles. (Maritime states will accept the foregoing providing access rights through and over straits used for international navigation are preserved.) There is also wide support for freedom of navigation on the surface, submerged and in the air beyond 12 miles.

Most proposals have focused on straits 24 miles or less in width and have emphasized either the need for all nations to retain their right of access, or the need for coastal states to permit or deny access as necessary to protect their interests. The latter approach does not differentiate straits from the territorial sea and would subject them to the territorial sea regime with a right of nonsuspendible innocent passage.

Typical of this approach are the proposals of various straits states, principally Spain, Morocco, Philippines, Indonesia, Greece, Cyprus, Yemen and Malaysia. They advocate broad coastal state competence to prescribe and enforce regulations governing virtually all facets of navigation in straits, including designation of sealanes, establishment of anti-pollution controls, safety requirements and regulations of maritime transport in general, and the passage of ships with special cargos or special characteristics. Such competence would include prior authorization for passage of certain ships, such as warships, or those carrying oil or other hazardous substances. Security interests would also be a basis to deny passage to particular vessels.

The United States and USSR advocate the continued access approach and have submitted proposals to accommodate straits states. These proposals would limit coastal state authority in that no state could prescribe conditions on which other states exercise their transit rights. Instead, regulatory authority would be placed under the auspices of an international authority and individual states would be responsible for ensuring compliance of their flag carriers with the international standards. Vessels would be required to comply with traffic separation schemes initiated internationally, as by the International Maritime Consultative Organization (IMCO) and aircraft would be required to comply with regulations of the International Civil Aviation Organization (ICAO), with strict liability for damage caused by deviations from inter-
national regulations and procedures.

The proposals of the straits states and major maritime states submitted in the UN preparatory sessions prior to the Caracas session remained largely unchanged. In that session, however, the United Kingdom submitted its draft articles on the territorial sea and straits. The portion of its draft dealing with straits used for international navigation offers what is probably the most realistic proposal yet submitted to the Conference. It comes closest to imparting to both straits states and maritime states the essence of what they require (as opposed to demand). It would preserve a right of access which it terms “transit passage” for all ships and aircraft which “shall not be impeded.” Functionally, it permits navigation through straits connecting high seas or connecting high seas to a bordering state, yet it does not alter existing international agreements relating to specific straits. Neither does it attempt to internationalize narrow straits which, although widely used by international traffic, have been regulated by straits states. It provides certain provisions as protection to coastal straits states in that specific duties are imposed upon ships and aircraft exercising the right of transit passage. These include proceeding through the strait without delay, engaging in no activities not incident to transit, refraining from any threat or use of force against the territorial integrity or political independence of the adjacent straits state, and complying with generally accepted international regulations governing safety and pollution. It also permits the straits state, subject to approval of a competent international organization, to designate sea-lanes or to prescribe traffic separation schemes, as well as nondiscriminatory laws implementing international regulations governing the discharge of oil and other noxious substances. The flag state of aircraft and ships entitled to sovereign immunity would be liable for any damage resulting from acts in contravention of the foregoing. Conversely, if the straits state abuses its authority it must compensate the owners of the vessel or aircraft for resulting loss or damage. User states are expected to share with straits states the costs of necessary navigation and safety aids or other improvements in aid of international navigation or for the prevention and control of pollution from ships.

The United Kingdom proposal may not find wide acceptance. On the other hand, it presents a realistic framework for negotiation. It is the best compromise to date of the drafts submitted by the straits states and the United States and Soviet Union. Whether those states are prepared
to negotiate along those lines, must, of course, be resolved at the Conference itself.

The criteria for a successful treaty may be difficult to articulate, but that should not be permitted to dissuade negotiators from attempting to do so. Clearly, successful negotiations must allow for the continued access to international straits by all states in a framework which permits the resolution of problems created for adjacent coastal straits states by the increased use of international air and sea traffic. A lasting settlement cannot exist if individual states have their vital access rights subject to the arbitrary control of other states. Safe, efficient transit in congested straits areas is essential. To attain this inevitably will require that air and sea movement in many straits be subject to much more detailed control and supervision than was previously needed, or than is necessary in larger high seas areas. The source of this authority must be an international body. Coastal states should, however, participate in the process of prescription and reasonable enforcement of international standards. Also there should be a reasonable distribution among the user states of costs resulting from international traffic.

Finally, it is clear from both the preparatory and Caracas Conference sessions that not only must substantive issues be negotiated, but agreement must be had by those most vitally affected. If, for example, a treaty acceptable to the majority of states is unacceptable to the numerically few major maritime states, it will have little vitality. Equally unsuccessful would be an agreement failing to accommodate the numerically few straits states. Hopefully, the Geneva session this spring will permit states to take greater cognizance of these factors and to enter into more meaningful, realistic negotiations.