Transit Passage
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A. Origin of the Concept

1. The concept of transit passage defines the mode of communication through, under and over straits used for international navigation (→ Straits, International). The genesis of the concept is the desire and consensus of the majority of States at the beginning of the 1970s to extend the outer limit of the → territorial sea from the traditional three nautical miles (‘nm’) to a maximum of 12 nm. Such extension would transform the waters of over 100 straits of the world into the territorial seas of the littoral States.

2. The majority of straits used for international navigation are between 6 and 24 nm wide. Thus before the extension of the outer limit of the territorial sea, coastal States could each have territorial seas of less than 12 nm (normally 3 nm), and still leave an area of the → high seas for other States’ exercise of freedom of navigation and → overflight (→ Freedom, Navigation of). In the territorial waters of these straits, foreign ships had the right to non-suspendable → innocent passage. This right was recognized in Art.16 (4) Convention on the Territorial Sea and the Contiguous Zone (→ Contiguous Zone). The right was first spelled out by the → International Court of Justice (ICJ) in the → Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v Albania) (Merits), where the ICJ pronounced:

   It is ... 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 a 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 through straits in time of peace. (AI 28)

3. An extension of the outer limit of territorial sea to 12 nm would curtail the right of maritime powers to freedom of navigation and overflight in the most important straits used for international navigation. This was unacceptable to maritime powers. To allay the concern of these States and make the 12-mile territorial sea acceptable, the concept of transit passage was introduced during the Third United Nations Conference on the Law of the Sea (‘UNCLOS III; → Conferences on the Law of the Sea; → Law of the Sea). It is now incorporated in Part II → United Nations Convention on the Law of the Sea.

4. Transit passage implies more freedom for a foreign ship in the territorial waters of a strait than it would otherwise enjoy under the innocent passage rule, and less freedom than can be exercised under the principle of the freedom of the high seas. The function of this concept is to strike a balance between the interests of coastal States, primarily with respect to environmental, security and safety considerations on the one hand, and the interests of the other States to exercise freedom of navigation and overflight on the other (see also → International Watercourses, Environmental Protection; → Marine Pollution from Ships, Prevention of and Responses to; → Maritime Safety Regulations).

B. Development of the Concept

1. Sea-Bed Committee (1971–73)

5. The wide acceptance of the 12-mile limit for territorial sea in the early 1970s prompted several States between 1971 and 1973 to submit various proposals on straits to the Committee on Peaceful Uses of the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction (‘Sea-Bed Committee’), which acted as the preparatory...
committee for UNCLOS III. The US and the USSR put forward similar proposals in 1971 and 1972 respectively. The American proposal advocated the maintenance of a high-seas corridor for free transit in international straits. It informed that all ships and aircraft, both merchant and military, should enjoy the same freedom of navigation and overflight, for purposes of transit through and over straits that are used for international navigation, as they have on the high seas (‘Annex IV: Draft Articles on the Breadth of the Territorial Sea, Straits, and Fisheries Submitted to Sub-Committee II by the United States of America’ GAOR 26th Session Supp 21, 241; see also → Merchant Ships; → State Aircraft; → State Ships; → Warships; → United Nations, General Assembly). The Soviet proposals treated ships and aircraft separately, but like the American one referred to the right of all ships to free transit through straits (UNGA ‘Draft Articles On Straits Used For International Navigation’ GAOR 27th Session Supp 21, 162). The proposal underscored the right of the coastal State to regulate navigation through its territorial sea and to require authorization or notification prior to the passage of warships.

6 States bordering important international straits were not prepared to recognize any right for foreign ships in the territorial sea other than innocent passage. Unlike maritime powers, which considered passage through territorial sea in general and passage through the territorial waters of straits as two separate issues, strait States adopted a unitary approach applying innocent passage in both cases. This position was reflected in a proposal submitted in 1973 by a group of strait States to the Sea-Bed Committee (UNGA ‘Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain and Yemen: Draft Articles on Navigation through the Territorial Sea Including Straits Used for International Navigation’ GAOR 28th Session Supp 21 vol 3, 3). The proposal underscored the right of the coastal State to regulate navigation through its territorial sea and to require authorization or notification prior to the passage of warships.

7 Several other proposals concerning passage through straits used for international navigation were submitted to the Sea-Bed Committee, but they were not substantially different from the two main approaches espoused by maritime powers and strait States.

2. UNCLOS III (1974–82)


9 A major development which ultimately led to the consolidation of the concept of transit passage as an accepted rule was the joint initiative of the UK and Fiji in UNCLOS III in 1975 to create the Private Working Group on Straits used for International Navigation (‘Private Group’). The Private Group consisted of some 17 delegates from moderate maritime nations and strait States. Although major maritime powers such as the US and the USSR and radical strait States such as Spain and Indonesia were not invited or directly involved, the Private Group consulted most of them on all relevant issues. The efforts of the Private Group led to a ‘consensus’ text, which was included, with some modifications, in the Informal Single Negotiating Text [17 May 1975] Third UN Conference on the Law of the Sea Official Records vol 4, 152). Although the controversies about the regime of passage in straits continued until the end of the work of UNCLOS III in 1982, the start provisions of the Informal Single Negotiating Text were finally incorporated, without significant modifications, into Part III UN Convention on the Law of the Sea.

10 One reason for the success of the Private Group in working out a more or less viable text at an early stage of the work of UNCLOS III was the fact that it obtained the significant support of States such as Indonesia, Malaysia and the Republic of Singapore, which are not only important strait States but also archipelagic ones. These States, which were not members of the Private Group, showed a considerable flexibility on the question of straits in return for the support of other States for their demands with respect to the regime of → archipelagic waters. The regime of archipelagic → sea lanes passage in Part IV Convention on the Law of the Sea greatly resembles the regime of passage through straits used for international navigation. The negotiations for these two regimes were inter-linked for both maritime powers and several archipelagic and strait States.

11 A number of strait States remained dissatisfied with the UN Convention on the Law of the Sea straits text. They continued to submit proposals for amendments in the subsequent sessions of UNCLOS III, but none of these proposals found expression in the final text since the Private Group package had already gained the essential support of the majority of delegates.


12 Part III UN Convention on the Law of the Sea, consisting of Arts 34 to 44, deals with the legal regime of straits used for international navigation. Arts 37 to 44 Convention on the Law of the Sea especially relate to transit passage, which as a rule replaces the right of innocent passage in the territorial waters of straits.
1. Scope of Application

13 Art. 38 (1) Convention on the Law of the Sea provides that all ships and aircraft enjoy the right of transit passage in straits used for international navigation between one part of the high seas or an exclusive economic zone (EEZ) and another part of the high seas or EEZ (→ Exclusive Economic Zones). This wording makes no distinction between merchant or military ships and aircraft. Neither does it distinguish between parties to the UN Convention on the Law of the Sea and non-parties. The expression ‘strait used for international navigation’ refers to naturally-formed straits and does not apply to man-made structures such as the → Panama Canal and → Suez Canal.

2. Definition

14 Transit passage is defined in Art. 38 (2) Convention on the Law of the Sea as the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait. The right of foreign ships and aircraft is limited strictly to transit, which shall be continuous and expeditious. The latter requirement does not preclude a foreign ship or aircraft from exercising the right of transit in the strait for the purpose of entering, leaving or returning from a State bordering the strait. Such entry, exit or return shall of course be subject to the conditions of entry to that State. Any activity of foreign ships and aircraft in straits used for international navigation that is not an exercise of the right of transit passage remains subject to the other applicable provisions of the UN Convention on the Law of the Sea (Art. 38 (3) Convention on the Law of the Sea).

3. Exceptions

15 Transit passage applies when the strait is completely or substantially within the territorial seas of the States bordering that strait. It does not apply when there exists a high-seas route through the strait which is of similar convenience with respect to navigation and hydrographical characteristics (Art. 36 Convention on the Law of the Sea). Transit passage is not applicable either to the → internal waters within a strait, except where the establishment of the straight baseline has the effect of enclosing as internal waters areas which had previously been high seas or territorial sea (Art. 35 (a) Convention on the Law of the Sea; → Baselines). Another exception concerns straits the passage through which is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits (Art. 35 (c) Convention on the Law of the Sea; → Treaties, Conflicts between). Examples are the Turkish Straits of the → Dardanelles and Bosporus, passage through which is regulated by the 1936 Convention regarding the Régime of the Straits ([done 20 July 1936, entered into force 9 November 1936] 173 LNTS 213). In all these cases, the legal regime applicable before the entry into force of the UN Convention on the Law of the Sea will continue to apply.

16 The UN Convention on the Law of the Sea specifies two cases where non-suspendable innocent passage shall continue to apply instead of transit passage. The first is when a strait is formed by an island of a State bordering the strait and its mainland, provided there exists seaward of the island a route through the high seas or through an EEZ of similar convenience with respect to navigation and hydrographical characteristics (Art. 38 (1) Convention on the Law of the Sea; → Islands). This is better known as the Messina Exception and refers to the situation between the island of Sicily and the mainland Italian Republic; or the Strait of Pemba between Pemba Island and the United Republic of Tanzania mainland. The second exception relates to straits used for international navigation between a part of the high seas or EEZ and the territorial sea of a foreign State (Art. 45 (1) (b) Convention on the Law of the Sea). The Straits of Tiran between the → Red Sea and the Gulf of Aqaba are an example (→ Aqaba, Gulf of).

4. Rights and Duties of States Bordering Straits

17 The right of States bordering straits to designate sea lanes and prescribe traffic separation schemes for navigation is defined in Art. 41 Convention on the Law of the Sea. Proposals for such sea lanes and traffic separation schemes, which shall conform to generally accepted international regulations, shall be made to the competent international organization, ie → International Maritime Organization (IMO), with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits. The right of such States in Art. 41 Convention on the Law of the Sea applies prima facie to ships and does not cover the transit passage of aircraft.

18 According to Art. 42 Convention on the Law of the Sea, States bordering straits have legislative powers with respect to prevention, reduction and control of marine pollution, prevention of fishing, and loading and unloading of any commodity, currency or person in contravention of national laws relating to customs, fiscal, → immigration, or sanitary (→ Customs Law, International). National laws on marine pollution should only give effect to existing applicable international regulations concerning the discharge of oil, oily waste and other noxious substances (see also → Marine Environment, International Protection). Any damage or loss to the State bordering the strait due to the violation of any such laws by foreign State ships or aircraft entails international responsibility for the flag State of the ship or the State of the registry of the aircraft (→ Flag of Ships; → State Responsibility). It is noteworthy that the prescriptive authority of the States bordering straits is limited only to foreign ships in transit whereas international responsibility relates to damage caused by transiting ships or aircraft.

5. Duties of User States

19 User States exercising transit passage have a range of duties that shall be observed. These duties are expressed in Arts 39 and 40 Convention on the Law of the Sea. They include the duty to refrain from any threat or use of force against the → sovereignty, territorial integrity, and political independence of States bordering the
6. Differences between Transit Passage and Innocent Passage

20 The right of transit passage has certain differences from the right of innocent passage. First of all, the position of flag and coastal States in the case of transit passage, compared with innocent passage, is reversed. Whereas innocent passage as an exception departs from the sovereign rights of the coastal State in its territorial sea, transit passage is meant to be a rule, a right for the flag State subject only to some limited and well-defined obligations vis-à-vis the coastal State.

21 In the case of innocent passage, the coastal State has the right, according to Art. 25 (1) Convention on the Law of the Sea, to take measures against a foreign ship whose passage is not innocent. The provisions of the UN Convention on the Law of the Sea on transit passage do not afford the coastal State a similar right. This means that transit passage cannot be denied, hampered or impaired because of the application of the laws and regulations of the coastal State. This is emphasized in Arts 38 (1) and 44 Convention on the Law of the Sea. A corollary of this prohibition is that ships in transit passage cannot be inspected, arrested, detained, seized or be subjected to any other form of control (→ Ships, Diverting and Ordering into Port; → Ships, Visit and Search). Despite this general prohibition of enforcement measures against foreign ships in transit, Art. 233 Convention on the Law of the Sea recognizes a certain power for strait States with respect to safety of navigation and pollution prevention in straits. This article was included in the UN Convention on the Law of the Sea on the initiative of some strait/archipelagic States. It empowers the latter to take measures against merchant vessels which, while in transit passage, violate laws and regulations of the coastal State regarding safety of navigation and prevention, reduction and control of pollution. In taking such steps, strait States shall respect the safeguards provisions of Sec. 7, Part XII Convention on the Law of the Sea.

22 There are some other significant differences between innocent passage and transit passage. Submarines in innocent passage must navigate on the surface whereas in transit passage, they can continue submerged. Another difference is that the coastal State has unilateral regulatory powers in the case of innocent passage, but its prescriptive powers for transit passage are subject to coordination with the IMO and approval of proposed national laws by that organization. Another difference relates to the right of overflight. Innocent passage excludes overflight, which is subject to prior authorization of the coastal State. In straits where the right of transit passage is exercised, overflight can take place without notification or authorization of States bordering straits. Unlike the case of ships in transit, where the strait State has the explicit authority, according to Art. 41 UN Convention on the Law of the Sea, to designate air routes in straits. The silence of the UN Convention on the Law of the Sea on this point gives foreign civil and military aircraft the right to exercise freedom of overflight anywhere from shore to shore in the → airspace of the strait. Some strait States have expressed the view that such overflight is restricted to the airspace over the sea lanes designated by the coastal State for the purpose of transit passage.

D. State Practice

23 Despite the early consensus on transit passage in UNCLOS III, States continued to have significant differences in interpreting the concept and its actual application. States’ perception of transit passage is primarily reflected in their declarations at the time of signing or ratifying the UN Convention on the Law of the Sea, in national laws and international agreements, and most importantly in their actual exercise of transit passage and public reactions to such exercise. The practice of major maritime powers and a number of States bordering straits is of particular significance (→ State Practice).

1. Maritime Powers

24 The position of the US is that the right of transit passage is not a new and contractual right, but a part of → customary international law supported by long-standing international practice. This position is based on the similarities between the right of transit passage and freedom of navigation and overflight that was exercised in straits before the expansion of the outer limit of the territorial sea to 12 nm. According to the US, transit passage is a right for the ships and aircraft of all nations, including warships and military aircraft, to unimpeded passage through straits used for international navigation. This position has been declared on several occasions. Presidential Proclamation on an Exclusive Economic Zone (Issued 10 March 1983) 22 ILR 461, Presidential Proclamation on the Territorial Sea of the United States (Issued 27 December 1989) 28 ILR 284, and the Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations (AR Thomas and JC Duncan [eds]) Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations (Naval War College Newport 1999) 121–4.

25 The French Republic and the UK take a similar position with respect to transit passage. This is most evident in the 1988 Joint Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic ([done 2 November 1988] 14 UN Law of the Sea Bulletin 14; Joint
that accompanied the Agreement between the Government of the French Republic and the Government of the United Kingdom of Great Britain and Northern Ireland relating to the Delimitation of the Territorial Sea in the Straits of Dover ([done 2 November 1988] 13 UN Law of the Sea Bulletin 45; → Dover, Strait of). Accordingly, the two Governments recognize rights of unimpeded transit passage for merchant vessels, state vessels and, in particular, warships following their normal mode of navigation, as well as the right of overflight for aircraft, in the Straits of Dover (Joint Declaration 14). This implies that these countries consider the right of transit passage as general → international law.

26 → Russia as a maritime nation has advocated the right of transit passage largely in line with other maritime powers. However, its practice has not been consistent and unequivocal. This is particularly the case regarding application of this right to its own straits. As regards the Kuril Straits, which consist of several straits connecting the Pacific Ocean and the Sea of Okhotsk, the USSR had designated only one of the straits as the route for international navigation (see also → Kuril Islands). Following the passage of some US warships in 1984 and 1986 through two of the non-designated straits, the USSR protested that the action violated international law (→ Protest). In both cases, the US invoked the right of transit passage as customary international law. There are other Russian straits that are excluded from the regime of transit passage. In the case of the Northeast Passage, prior authorization for passage is required. Passage through the straits of Vilkitsky, Shokalsky, Dimitrii Laptev and Sannikov is subject to compulsory icebreaking piloting.

2. States Bordering Straits

27 States bordering straits generally view transit passage as a contractual right. Their interpretation of transit passage varies, e.g., those bordering the Straits of Malacca, Gibraltar and Hormuz, is of particular significance for international navigation (→ Gibraltar, Strait of; → Malacca, Straits of).

28 Spain and the Kingdom of Morocco are the coastal States of the Strait of Gibraltar. In the UN negotiations, both rejected the applicability of transit passage to that strait. Spain has been considered as the most persistent opponent of the regime of transit passage. Even though by ratifying the UN Convention on the Law of the Sea the country accepted transit passage, it has consistently insisted on the separation of the regimes of navigation and overflight. In the 1984 Declaration of the Government of Spain Made Upon Signature of the UN Convention on the Law of the Sea ([done 4 December 1984] 4 UN Law of the Sea Bulletin 14), Spain emphasized the right of a coastal State to issue and apply its own regulations in the air area of the strait, whether such regulations impede the transit passage of aircraft. An important test of Spain’s position was when US military aircraft flew over the Strait of Gibraltar in 1986 to bomb targets in Libya. The flight did not elicit any protest from either Spain or Morocco. Spain commented on the flight as not having taken place in Spanish airspace. There is no public information about possible Spanish or Moroccan protests to transit passages of foreign vessels and aircraft in → Gibraltar.

29 Indonesia, Malaysia and Singapore border the Straits of Malacca and Singapore, and were among the staunch opponents of transit passage. The main concern of these States was the threat that the passage of oil tankers and other large tankers posed in these straits. At the same time their most important objective in UNCLOS III was to achieve general acceptance of the regime of archipelagic sea lanes passage was achieved, these three strait States could in principle accept the applicability of the transit passage regime to the straits named. The main reason for this acceptance was that these States’ demands concerning safety of navigation and control of pollution in the said straits were met. This took place in 1977 partly through consensus on the content of Art. 233 UN Convention on the Law of the Sea and partly through the adoption by the IMO of the traffic separation schemes and other navigational requirements, which had been proposed by the three strait States and accepted by naval powers. Available information shows that the practice of the States bordering the Strait of Malacca, particularly Indonesia, with respect to archipelagic sea lanes passage has occasionally been challenged by maritime nations. However, no similar conflict of views with respect to transit passage through the Straits of Malacca and Singapore has been reported in recent years.

30 The position of the Islamic Republic of Iran and the Sultanate of Oman, bordering the Strait of Hormuz between the Arabian Sea and the → Persian Gulf, was originally resistance on the continued application of non-suspendable innocent passage in that strait. During the → Iran-Iraq War (1980–88), foreign warships and aircraft frequently passed through the Strait of Hormuz exercising, according to the US, the right of transit passage. Part III The Declaration of the Sultanate of Oman Made Upon Ratification of the UN Convention on the Law of the Sea ([done 17 August 1989] 14 UN Law of the Sea Bulletin 8) from passage of warships through Omani territorial waters, but is notably silent on the passage in straits used for international navigation. This may imply that Oman has aligned its position with respect to transit passage with the provisions of the UN Convention on the Law of the Sea. In the Declaration of the Islamic Republic of Iran Made Upon Signature of the UN Convention on the Law of the Sea ([done 10 December 1982] 1 UN Law of the Sea Bulletin 17), Iran underlined that provisions relating to transit passage are products of quid pro quo. The contractual nature of these provisions, according to Iran, necessitates that only States Parties to the UN Convention on the Law of the Sea can invoke them. This view has been shared by several other States including Switzerland and Greece (Comments of Switzerland to the ICQO Secretariat Study ‘Consideration of the Report of the Rapporteur on United Nations Convention on the Law of the Sea—Implications, if any, for the Application of the Chicago Convention, its Annexes, and other International Air Law Instruments’ [1987] LC/26/WP/5-31; Comments of Greece to the ICAO Secretariat Study ‘Consideration of the Report of the Rapporteur on United Nations Convention on the Law of the Sea—Implications, if any, for the Application of the Chicago Convention, its Annexes, and other International Air Law Instruments’ [1987] LC/26/WP/5-42). In April 1987 Iran formally protested against the US’s violation of the territorial waters of Iran. The Iranian government stated that the right of transit passage was customary international law. The actual practice of States in the Strait of Hormuz since the early 1990s seems to suggest that transit passage is indeed exercised in that strait.
3. Other States

31 In addition to those States whose practice is particularly important for assessing the legal status of transit passage, the practice of some other States should also be briefly touched upon.

32 A number of strait States have chosen to leave corridors of high seas in straits. This has been done by not extending the territorial sea to the maximum permitted limit and with a view to taking advantage of Art. 36 UN Convention on the Law of the Sea to avoid the application of transit passage. Japan, eg through its 1977 Law No 30 on the Territorial Sea [(done 2 May 1977) 21 JapanAnnIntrNL 92], established high-seas corridors in the Straits of Soya (La Perouse), the Eastern and Western Channels of Tushima (the Korean Strait) and in the Straits of Osumi and Tsugaru. Similar measures have been taken by the Republic of — Korea, France, Denmark, Sweden, and Germany within certain of their respective straits used for international navigation.

33 The Straits of the Sound and the Belts (consisting of the Little Belt and the Great Belt) connect the → Baltic Sea and the → North Sea (→ Belts and Sound). Denmark and Sweden as the bordering States are of the view that the innocent passage through these straits is regulated by a long-standing international convention, namely the Treaty for the Redemption of the Sound Dues between Austria, Belgium, France, Great Britain, Hanover, the Hansa Towns, Mecklenburg-Schwerin, the Netherlands, Oldenburg, Prussia, Russia, Sweden-Norway, and Denmark [(signed 14 March 1857) [1857] 116 CTS 357; '1857 Treaty']. According to them, the exception in Art. 35 (c) UN Convention on the Law of the Sea is applicable. Both Denmark and Sweden made Declarations elaborating their positions in this respect at the time of signature and ratification of UNCLOS (Declaration of the Kingdom of Denmark Made Upon Ratification of the UN Convention on the Law of the Sea [done 16 November 2004] 56 UN Law of the Sea Bulletin 14; Declaration of the Kingdom of Sweden Made Upon Ratification of the UN Convention on the Law of the Sea [done 25 June 1996] 32 UN Law of the Sea Bulletin 11]). The US argues that the 1857 Treaty granted free passage in the Sound and the Belts for all flags and that the 1857 Treaty did not apply to ‘warships’ since then had never been subject to ‘Sound Dues’. According to the US, in the Sound and the Belts an international right of transit independent of coastal State interference exists. No public records of the actual exercise of passage and possible protest of the coastal States is available.

34 Passage through the Great Belt became the subject of a case between Finland and Denmark before the ICJ in 1991 (→ Passage through the Great Belt Case [Finland v Denmark]). The case concerned Denmark’s plans to construct a 65 metre-high bridge over the Great Belt and the impact of this bridge on the passage of ships carrying Finnish oil drilling rigs to the North Sea. Such rigs are normally towed in vertical position. The two governments reached an agreement out of court and withdrew the case in September 1992. In its memorial, Finland argued that the concept of transit passage was both accepted in UNCLOS III as the applicable rule in straits used for international navigation and considered as customary international law in the national law of some States and in agreements concluded between some States (Case concerning Passage through the Great Belt [Finland v Denmark] [Memorial of the Government of the Republic of Finland] [ICJ, December 1991] 124–25). Denmark, on the other hand, rejected transit passage as emerging customary international law, substantiating the rule of non-suspendable innocent passage as enshrined in the Convention on the Territorial Sea and the Contiguous Zone (Case concerning Passage through the Great Belt and the Little Belt Case [ICJ, May 1992] 242–47). The ICJ regretfully did not get the chance to go into the merits phase of the case, which could have thrown light on some aspects of the right of transit passage.

35 Transit passage has been specifically mentioned as an applicable rule in a few bilateral agreements. These include the Agreement between the Republic of Trinidad and Tobago and the Republic of Venezuela on the Delimitation of Marine and Submarine Areas (signed 18 April 1990, entered into force 23 July 1991) 19 UN Law of the Sea Bulletin 22) and the Treaty between the Independent State of Papua New Guinea and Australia Concerning Sovereignty and Maritime Boundaries in the Area between the Papua New Guinea and the Area Known as Torres Strait, and Related Matters (done 18 December 1978) 18 ILM 291. In these bilateral agreements, the right of transit passage is acknowledged as applicable to the parties’ vessels and aircraft. As regards the → Torres Strait, it is noteworthy that the Commonwealth of Australia established in October 2006 a system of compulsory pilotage in this strait. Australia has justified its move by referring to an IMO resolution which extended to the Torres Strait the Great Barrier Reef’s status as a Particularly Sensitive Sea Area (International Maritime Organization Resolution MEPC.133(53) [adopted 22 July 2005] MEPC.53/24/Add.2). Several countries, including the US, have criticized and rejected the legal position of Australia.

36 Some regional agreements have also recognized the right of transit passage. Examples are the South Pacific Nuclear Free Zone Treaty (concluded 6 August 1985, entered into force 11 December 1986) 1445 UNTS 177) and the Treaty on the Southeast Asia Nuclear Weapon-Free Zone (done 15 December 1995) 35 ILM 635).

E. Assessment

37 There is an inherent link between the right of transit passage and extended territorial sea. An outer limit of 12 nm for territorial sea would most probably not have been accepted by major maritime powers had the right of transit passage through straits used for international navigation not been agreed upon in UNCLOS III. Since a 12-mile territorial sea is general international law, the right of transit passage may, due to the link named, have acquired the same legal status (→ General International Law [Principles, Rules and Standards]). The actual practice of naval powers, particularly the US, in exercising this right, and the → acquiescence or lack of known protests of many strait States in recent years may support this proposition.

38 Despite apparent general acceptance of transit passage as the applicable rule to straits, it cannot be denied that there are still some differences of opinion among States as regards its implication and application. The
various interpretations of the right of overflight over straits, the assumed applicability of transit passage even to approaches to straits, the coastal State’s possibility of limiting international navigation to only one strait when there are several other straits equally convenient for international navigation—eg Greece in the Aegean Sea and Russia in the Sea of Okhotsk—and conditions and extent of the coastal State’s enforcement powers in straits under Art. 233 UN Convention on the Law of the Sea, are some examples. Thus, even if the right of transit passage seems to have been accepted as general international law, its exact content and scope of application are not yet fully settled.

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