

ZOOM IN

The question:

Clarifying freedom of navigation through straits used for international navigation: A study on the major straits in Asia

Introduced by Andrea Caligiuri

Freedom of navigation is a fundamental principle of the public order of the oceans. The right of States to navigate the seas without undue interference and to freely trade with one another is explicitly guaranteed in relevant provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).¹ Under Part III (Articles 34-45) of this Convention, freedom of navigation is also granted to all ships of all kinds in the ‘straits used for international navigation’, based on the ‘right of transit passage’.²

The concept of ‘transit passage’ came into play in 1982 when coastal States agreed to extend their territorial seas to a maximum of 12 nautical miles, thereby removing most of the high-seas passages through international straits.³

This notion seems to offer a more liberal regime than that of ‘innocent passage’ set out for straits in international customary law as ascertained by the International Court of Justice in *The Corfu Channel Case* (1949)⁴

¹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.

² Cf art 38 UNCLOS. For a full discussion of the regime for transit passage, see SN Nandan, DH Anderson, ‘Straits used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea, 1982’ (1989) 60 British YB Intl L 159.

³ See eg US Department of State: Office of the Geographer, ‘World Straits Affected by a 12 Mile Territorial Sea, Chart # 510376’ (1971).

⁴ *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4 [28]: ‘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 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’.

and established in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (1958 Geneva Convention).⁵

This new regime of transit passage refers to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. Thus, this regime does not apply to certain straits for which ‘innocent passage’ continues to operate as a special regime.⁶

On the basis of UNCLOS, the new legal regime for straits used for international navigation, to which Part III Section 2 applies, is so peculiar that the waters affected by it are defined by an Italian scholar as ‘a *tertium genus*, distinct from both the internal waters and the territorial sea’.⁷

In this respect, taking into consideration that the sovereignty of States bordering a strait is limited, UNCLOS provides that user States and States bordering a strait ‘should by agreement cooperate’ in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation, as well as the prevention, reduction and control of pollution from ships.⁸

At first glance, it seems that UNCLOS Part III, Section 2, precisely defines the rights and duties of States bordering straits⁹ and the duties of

⁵ Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205. Cf art 16(4) of the 1958 Geneva Convention: ‘There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State’. This provision extended the scope of straits and, therefore, it was a result of the development of customary law, not simple codification of the law (see RR Churchill, AV Lowe, *The Law of the Sea* (Manchester UP 2010) 104).

⁶ It is important to note that UNCLOS treats these concepts separately: that of innocent passage in the territorial sea, in Part II, Section 3, and innocent passage through straits used for international navigation, in Part III, Section 3. The latter is composed of a single article, art 45 UNCLOS, with the following content: ‘1. The regime of innocent passage, in accordance with Part II, section 3, shall apply in straits used for international navigation: (a) excluded from the application of the regime of transit passage under article 38, paragraph 1; or (b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State. 2. There shall be no suspension of innocent passage through such straits’.

⁷ See T Scovazzi, ‘Management regimes and responsibility for international straits with special reference to the Mediterranean straits’ (1995) 2 *Marine Policy* 137,138.

⁸ Cf art 43 UNCLOS.

⁹ Cf arts 41 and 42 UNCLOS.



user States.¹⁰ In addition, UNCLOS Part XII also takes into account the environmental protection of international straits in light of the risk of marine casualties being higher than in other marine spaces, with the possibility of a bordering State to take ‘appropriate enforcement measures’ if transiting vessels violate the laws and regulations referred to in Article 42, paras. 1(a) and (b), in a manner ‘causing or threatening major damage to the marine environment of the straits’.¹¹

In practice, States continue to significantly differ in the interpretation of the exact content of conventional provisions and their scope of application. Additionally, digging deeper into the topic, it becomes clear that many questions concerning legal and operational issues remain unanswered. For example, one issue is whether mandatory pilotage can be imposed in strait areas which are at high risk of accidents and/or are ecologically sensitive, such as the Torres Strait and the Strait of Bonifacio. Other uncertainties regard security threats (eg piracy, armed robbery, and terrorism) concerning chokepoint straits, such as the Malacca and Singapore Straits, the Bab al Mandab Strait, and the Strait of Hormuz. Another question concerns the impact of climate change and sea-ice melts on the opening of once frozen seas to international shipping, as is happening in Arctic waters through the Northwest Passage and Russian Arctic straits.¹²

The aim of this *Zoom In* is to define the competences of States bordering a straits which are used for international navigation in controlling or limiting sea traffic. The analysis concerns the possibility for bordering States to affect, restrict or close navigation in international straits. In particular, it is well known that some States bordering straits feel concerned about the threats to their national security, on the one hand, and the damage to the marine environment, on the other, due to the expansion of the principle of free passage of maritime traffic in the straits. For this reason, a growing number of these bordering States have passed legislation and enacted unilateral measures to increase the portion of waters of international straits that lies within the limit of their maritime zones.

¹⁰ Cf arts 39 and 40 UNCLOS.

¹¹ Cf art 233 UNCLOS.

¹² As is well known, UNCLOS prescribes a special regime for ice-covered areas (art 234), but says nothing about the phenomenon of melting ice and the legal regime to be applied to straits opening up to navigation in the seas once frozen.

A reading of UNCLOS Part III raises several questions related to the exact determination of navigation rights through international straits. This Zoom-in will analyse this topic, taking into account that each strait presents unique geographical and factual characteristics and some straits have historically been governed by specific legal regimes.

The right of transit passage is for some scholars,¹³ and for some States,¹⁴ a disputed rule of international customary law. Thus, the clarity of rules applicable to navigation through international straits is perceived by many States as increasingly important given the world trade situation and the increased political tensions affecting some of these areas.¹⁵ The Straits of Malacca and Singapore, other Straits in East Asia, and the Strait of Hormuz are emblematic in this regard.

QIL invited three distinguished Law of the Sea scholars, Giuseppe Cataldi (University of Naples 'L'Orientale'), Keyuan Zou (University of Central Lancashire) and Mariko Kawano (Waseda University) to discuss the regulatory powers of bordering States and the corresponding executive competences regarding navigation rights through the straits used for international navigation, with a special focus on the legal regime of straits constituting strategic chokepoints of critical economic and military importance in Asia. In their contributions, these scholars outline how the subject matter of straits which are used for international navigation continues to be a dynamic area of the Law of the Sea.

¹³ See, among others the following scholars: T Treves, 'Notes on transit passage through straits and customary law' in A Bos, H Siblesz (eds), *Realism in law-making* (Martinus Nijhoff 1986) 247 ff; H Caminos, 'The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea' (1987) 205 *Recueil des Cours de l'Académie de Droit International* 178; R Bernhardt 'Custom and Treaty in the Law of the Sea' (1987) 205 *Recueil des Cours de l'Académie de Droit International* 249; T Scovazzi, 'Management Regime and Responsibility for International Straits: With Special Reference to the Mediterranean Straits' (1995) 19 *Marine Policy* 137; BB Jia, *The Regime of Straits in International Law* (Clarendon Press 1998) 168.

¹⁴ N ŪnlŪ. *The Legal Regime of the Turkish Straits* (Martinus Nijhoff Publishers 2002) 75 lists the countries that 'consider the regime of transit passage as an exclusive part of the UNCLOS' as Chile, Denmark, Egypt, Greece, Iran, Indonesia, Italy, Japan, South Korea, Malaysia, the Netherlands, Oman, and Spain.

¹⁵ For example, in 2019, the Asian-African Legal Consultative Organization (AALCO) decided to introduce the sub-topic 'Issues related to the Freedom of Navigation/Sail in the International Waters and Straits' under the agenda item the Law of the Sea (see AALCO/58/DAR ES SALAAM/2019/SD/S2A).

