THE REGIME OF STRAITS AND THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

By John Norton Moore*

I. INTRODUCTION

The negotiations at the Third United Nations Conference on the Law of the Sea have been the most important catalyst of this century for a new legal and political order for the oceans. The conference, together with its preparatory work within the "Seabeds Committee," has indelibly stamped ocean perspectives. Even without a widely acceptable, comprehensive treaty the influence of these perspectives on state practice will be profound—indeed, it already has been, for example, in legitimizing 200-mile coastal fisheries jurisdiction. If the conference is able to clear the remaining hurdles, particularly that of deep seabed mining,¹ the new treaty is likely to govern oceans law for the foreseeable future.

One area of the negotiations that is generally regarded as concluded is that of the regime for transit of straits. The revised Informal Composite Negotiating Text (ICNT/Rev.1),² which embodies the conference's work product, includes a chapter on straits used for international navigation and a related chapter on archipelagic states. These chapters are not among the remaining unresolved issues. Within the conference resolution of these issues has been welcomed, as it has been widely understood that their satisfactory resolution was a sine qua non for a successful treaty.

Recently, there have been two serious and opposing challenges con-

* Of the Board of Editors. The author served as a United States Ambassador to the Third United Nations Conference on the Law of the Sea and Chairman of the National Security Council Interagency Task Force on the Law of the Sea. In that capacity, he headed the U.S. team that participated in the development of the navigation and security aspects of the Single Negotiating Text, which with minor modifications have been incorporated in the current Informal Composite Negotiating Text (Rev.1) of April 28, 1979. The author would like to thank William Burke, Admiral Shannon Cramer, David Colson, Louis Henkin, Admiral Max Morris, Bernard Oxman, and George Taft for their comments and suggestions on an earlier draft of this article. In addition, Bruce Alexander provided invaluable assistance in background research on the negotiating context. Responsibility for the views expressed is solely that of the author.


cerning straits from some members of the oceans and international legal communities within the United States. On the one hand, some such as Richard G. Darman, writing in a recent issue of Foreign Affairs,\(^3\) have challenged the importance of straits transit and have sought in a revisionist mode to "rethink United States oceans interests." On the other hand, some such as Professor W. Michael Reisman, writing in this issue of the Journal,\(^4\) while reaffirming the importance of straits transit, have challenged the adequacy of the negotiated straits regime for national security needs. Either of these virtually opposing challenges, if widely accepted, could influence the outcome of Senate debate on advice and consent to a new law of the sea treaty, and more broadly and importantly could sow confusion as to the future regime of straits transit in international law and U.S. policy toward it.

In making this statement, I do not challenge the legitimacy of expression of these strongly held views. Richard Darman and Michael Reisman are among our most sophisticated theorists, and their articulate surfacing of both points of view, which for some time have been undercurrents in the oceans community, should lead to a more complete understanding of the issues.\(^5\)

II. The Importance of a Straits Regime

A straits regime that recognizes the community interest in transit through straits, and provides freedom of navigation through, over, and under


\(^5\) A central theme of the Darman challenge, echoing a view of some members of the seabed industry, is that navigational rights in the treaty may not be worth the costs that they project will be associated with acceptance of the treaty, and particularly with what they feel is likely to be an ambiguous regime for seabed mining. Professor Reisman does not raise the seabed mining issue and is concerned with the merits of the national security issues associated with straits transit. The interpretational challenge he espouses, however, seems first to have been publicly triggered by a letter of July 23, 1976, from Senator Barry Goldwater to a number of international lawyers inquiring in less than neutral terms whether the conference text would "guarantee" submerged transit through straits. It is said by some in Washington that the Goldwater letter may have been inspired by one segment of the seabed mining industry, a speculation perhaps fostered by a negative response from a former partner of a prominent Washington firm representing one of the seabed industries that conceded that the author was "not an international law scholar." This, of course, is in any event not a responsibility of Professors Darman or Reisman whose challenges must be fairly dealt with on their merits and on their merits alone.

The United States should not and will not adhere to a law of the sea treaty unless it unambiguously protects assured access to seabed minerals. This is a pledge repeated by every administration that has dealt with the issue and is an article of faith on Capitol Hill. If seabed mining is dealt with adequately in the negotiation, the hypothetical trade-off that concerns Darman, of course, will be only an imaginary "horrible."
straits used for international navigation while meeting legitimate safety and environmental concerns of straits states, is of fundamental importance in ocean law. Although there has been repeated focus on straits transit as a requirement of maritime states, and particularly as a requirement for acceptance of a comprehensive treaty by the United States and the Soviet Union, the principal reason for such transit rights is that they are strongly in the interest of the entire community of nations. Straits such as Bab el Mandeb, Gibraltar, Hormuz, Dover, Lombok, Malacca-Singapore, and over a hundred others serve as routes for the bulk of the world's shipping trade. To permit extending coastal states' jurisdiction to enable them unilaterally to control or impose conditions on such an important community freedom would be inequitable, inefficient, and conducive to conflict. Transit through such chokepoints is fundamentally different from transit through the territorial sea in general, and in the common interest must be recognized as such.

As with many important interests, the costs associated with any failure to recognize freedom of navigation through straits will not necessarily be immediately manifest. Initial challenges may be subtle, plausible, and limited. Through time, however, the common interest will be eroded by unwarranted restrictions on transit, discrimination among users, uncertainty of transit rights, inefficient and inconsistent regulations, efforts at political or economic gain in return for passage, increased political tensions, and perhaps even an occasional military confrontation as in the Corfu Channel case.6

Similarly, any straits regime, to be lasting, must fairly meet the real concerns of strait states concerning safety of navigation through straits and protection of the marine environment. Failure to establish an adequate international framework for such protection in the short run will detract from the effort to protect the oceans environment and in the long run may seriously threaten navigational freedom as strait states react through unilateral claims.

The issue, in short, is not any one strait, any one country, any one period of time, or any one commercial or strategic need, but rather protection of the common interest in straits transit and a lasting and appropriate balance between it and the safety and environmental concerns of strait states. Had this situation not been broadly understood at the Third United Nations Conference on the Law of the Sea (UNCLOS), no amount of insistence by the maritime nations would have sufficed for agreement.

In addition to this fundamental basis for protecting freedom of navigation through straits, there are a variety of significant commercial, strategic, and conflict management factors of concern to all nations but reflected most immediately in their impact on the interests of the United States, the

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6 The Corfu Channel case (Merits), [1949] ICJ REP. 4.
Soviet Union, and other maritime nations. These include:

- Efforts to increase the stability of the strategic balance between the United States and the Soviet Union (an issue that rationally should be a matter of great concern for all nations) benefit from actions that increase the relative invulnerability of the strategic missile (SSBN) submarines of both sides. The oceans are ideal for dispersing targets and therefore deter any destabilizing temptation toward first strike. Similarly, the number of SSBN submarines of both sides is more easily verifiable and, at least at current technologies, oceans strategic forces are less vulnerable and less accurate than land-based missiles, which doubly deters counterforce first-strike temptations and increases stability through verifiability. Given these stabilizing tendencies of ocean strategic forces, it is in the common interest that an oceans regime protect the secrecy of SSBN forces and not, for example, require that they surface in straits or provide notification to strait states of transit (with associated intelligence targeting of such notice). Arguments made by some American scholars that the Trident and associated missile systems, because of greater range, would not need to transit straits miss the point, as all such arguments accept a lessening of the ocean area available for SSBN forces and thus in some degree decrease the relative invulnerability of seaborne forces. Moreover, to the extent that legal restraints on SSBN forces appear to fall more heavily on Soviet forces, they may encourage further Soviet reliance on the more destabilizing land-based missiles. As technology for detection of strategic submarines develops and as the number of such submarines decreases with deployment of the Trident system, it will be even more important for the oceans regime not to introduce factors further pressuring the relative invulnerability of sea-based deterrent forces.

- As an open society with strong traditions for following a rule of law, the United States would not be unreasonable in being concerned about possible lack of reciprocity in straits transit if its SSBN submarines, for example, were legally required routinely to surface in straits. Would the restraint of law operate equally on other nations, or would there be a temptation to take advantage of the greater secrecy afforded by a less open society? Whether or not this would be the case, as a legal norm with arms control implications, any restrictive requirements for SSBN submarines would have some of the same dangers for all parties as an unverifiable arms limitation agreement.

- It is important to preserve transit rights of aircraft, both civil and military. Moreover, such transit rights are most needed precisely

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Charles E. Pirtle also sounds the Osgood-Darman trumpet. In a recent paper he says, "The purpose of this paper is to challenge the validity of U.S. claims that national security is inexorably bound to a right of unimpeded transit through straits." Pirtle, Transit Rights and U.S. Security Interests: "Straits Debate," 5 OCEANS DEV. & INT'L L.J. 477, 479 (1978). One can only marvel at the rigidity of the straw man constructed by Pirtle in this phrase.
in those settings where political pressure would make them difficult if not impossible to protect if they were ceded to others. United States overflight of the Strait of Gibraltar during the Yom Kippur War is a case in point: overflight of land territory had been denied even by our NATO allies, and negotiation of such a right would have been impractical if not impossible. This concern for freedom of overflight is strongly shared by those charged with protection of commercial aviation interests around the world; it would be a mistake to conceptualize it as a need only for military aircraft or only in a particular area.

- Unimpeded access through straits for commercial ships on a global basis may be as important as preservation of military transit rights. For example, the United States, Japan, the nations of the European Economic Community, and many developing countries are critically dependent on supplies of oil that must initially move through one or more straits. Yet it is precisely large tankers, liquefied natural gas (LNG) ships, and other "controversial" vessels such as nuclear-powered ships that present the greatest potential problem of multiple and inconsistent coastal state regulations or other inefficient restrictions. Moreover, because unnecessary increased costs resulting from an inefficient or restrictive straits regime ultimately will be borne by all, this commercial interest is substantial even for nations with a small merchant marine who rely on flag vessels of other nations.

- Modern nuclear submarines run safest "in their normal mode," that is, submerged, and it is a mode for which they are designed. On the surface they are less maneuverable, their systems for avoiding collision work less well, they are difficult to see even with good visibility, they present only a small and possibly misleading radar target for other shipping seeking to avoid them, and they must travel in an area of higher density of shipping with consequent increased risk of collision. For these reasons, as well as for the inconsistency with their primary mission, SSBN submarines do not transit straits unless the depth and other hydrographic characteristics permit safe submerged navigation. To require them to transit on the surface would be to increase the collision risk significantly, despite the occasional "intuitive" argument to the contrary one sometimes hears based on assumptions about shallow straits these submarines are unlikely to transit in any mode.

- To permit strait states discretion to control shipping or aircraft could lead to expanded conflict. Transit rights through important international canals such as Suez are frequently guaranteed even for belligerents (provided the canal state itself is not involved). The rationale for these provisions is to avoid drawing the canal state into the conflict. Under the laws of neutrality, any differential favoring of one belligerent could occasion loss of neutral rights and broaden the conflict to include the strait state. And in the nuclear age any effort to identify when an SSBN submarine might be in a strait could, if successful, risk routine targeting of the strait, just as home ports of SSBN's may be routinely targeted.

- To permit strait states control of warships or commercial navigation or overflight could spill over into other areas of coastal state functional jurisdiction, such as any potential economic zone, and occasion increased restrictions in those areas. This spillover threat and the long-run relation between transit rights and other oceanic free-
domains are usually ignored by those focusing narrowly on military straits transit rights. There is also a similar spillover effect at work between ship transit rights and overflight rights and between military and commercial rights.

- Military and commercial activities may be as effectively discouraged when rights are uncertain and ambiguous as when there are no legal rights. As Ambassador Elliot Richardson has observed, for adequate protection it is necessary that transit rights be clear and widely accepted. If an exercise of a right is to be accompanied by a severe political dispute about the existence of that right, then the value of the right itself is impaired.8

Reisman and I are in agreement that freedom of navigation through straits is important, and I believe that his article makes an original and substantial contribution to an understanding of that importance. Darman, however, in his revisionist effort at “rethinking U.S. interests,” succeeds only in rethinking them poorly when he questions the importance of straits transit rights. Difficulties with the Darman analysis include, among others, the following.

First, the argument “that an increasingly territorialist regime could be of net advantage to the United States”9 is seriously in error for analyzing the U.S. interest in straits transit and navigational freedom as a zero-sum game against the Soviet Union. The most important issue, as discussed above, is fundamentally to preserve through time the common interest in straits transit. Darman’s argument is also simplistic in failing to take account of a variety of important factors that cut the other way in his own analysis. These include the mutual interest in stable sea-based strategic forces, the risk of asymmetrical noncompliance with nonverifiable arms-affecting measures, the greater dependence of the United States on imported raw materials, particularly oil, and indeed the fundamental asymmetry in the strategic geopolitical equation: the Soviet Union is a land power bordering on its most important allies, while the United States must be more concerned with allies across the sea in Europe, Asia, and elsewhere. Because U.S. naval roles are predominantly sea control and Soviet ones predominantly sea denial, even if we were to assume solely a zero-sum analysis against the Soviet Union and that a loss of straits transit

8 See, e.g., Richardson, “National Security and the Law of the Sea” (July 13, 1974) (Remarks by Ambassador-at-Large Elliot L. Richardson, Special Representative of the President for the Law of the Sea Conference, at the Launching of the U.S.S. Samuel E. Morison, Bath, Maine, on file at Center for Oceans Law and Policy, University of Virginia). In this statement Ambassador Richardson points out:

Analysis of the law of the sea, particularly by lawyers, tends to focus on legal substance while ignoring the importance of international consensus in maintaining the international environment needed to support optimum flexibility in global deployments. It is not enough merely to insist that freedom of navigation and overflight beyond a narrow territorial sea and unimpeded transit through, under, and over straits are essential. Nor is it enough to be prepared to assert our rights in the face of challenge. Our strategic objectives cannot be achieved unless the legitimacy of these principles is sufficiently accepted by the world at large that their observance can be carried out on a routine operational basis.

Id. at 8.

9 Darman, supra note 3, at 377, and generally at 376–78.
rights or navigational freedoms would have a heavier impact on the Soviet Navy than on the United States Navy, such a loss still would not necessarily create a security gain for the United States. That is, measures that inhibit use of the oceans, because of the asymmetrical need for oceans use, may affect U.S. security needs even more. Put another way, a hypothetical legal constraint that inhibits U.S. naval forces by 10 percent in ability to carry out a particular mission and simultaneously inhibits Soviet counterforces by 15 percent may still be a net loss to the United States because the inhibition on Soviet naval forces may be only partially passed through in effective sea denial, and thus may be more than offset by the decline in U.S. ability to perform a vital mission. Another way to conceptualize the same effect is that the Soviet role, largely sea denial, may now be partly performed by the across-the-board 10 percent inhibiting factor more efficiently than by Soviet counterforces. By definition, a 10 percent inhibiting restraint is 100 percent effective in achieving a 10 percent reduction, yet it would not be reasonable to assume equivalent 100 percent effectiveness for any counterforce sea denial effort. The net effect, then, could be a reduction in the ability of the United States to perform a vital defense mission. Nevertheless, because the issue is not merely zero sum against the United States and because it involves stability of strategic forces, it would still be in the Soviet interest to support freedom of navigation in general and through straits in particular.

Second, Darman's statement that "[f]or the past decade . . . 'national security' interests—particularly interests associated with military functions—have been predominant in the development of U.S. policy toward a comprehensive treaty on the Law of the Sea" is simplistic. It merely repeats a popular (and no doubt deeply felt and honestly held) belief, particularly of seabed mining groups, that their interest was being neglected—or was about to be traded off—for something else. During the period of over 3 years in which I chaired the process of preparing instructions for the U.S. delegation, it was repeatedly made clear that the United States had a variety of objectives that could not be sacrificed, notably including assured access to seabed minerals as well as freedom of transit through, over, and under straits. The National Security Council Interagency Task Force spent more time by far on nonmilitary issues than on military ones, and if any single issue received more attention than others, it was seabed mining. It is time that analysis of U.S. policy move from this myth about overemphasis on military concerns and understand that just because national security interests are important does not mean that they are the only interests understood to be important or that other interests are being traded off.

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11 Darman, supra note 3, at 375.

12 Ambassador Richardson has reaffirmed this point that we will not trade off basic interests to gain protection for navigation. See Richardson, supra note 8, at 12. No U.S. representative to the conference has stated a different view.
The most bizarre of the Darman arguments is his urging the weak pattern of executive and congressional response to “creeping jurisdiction” as persuasive evidence that straits transit and other navigational freedoms are unimportant to the United States, despite the repeated assertions of official U.S. spokesmen to the contrary. But if an on-the-merits analysis suggests that such freedoms are important, that importance is altered not at all by a recitation of instances in which the interest was not adequately protected. Rather, the argument is a classic error in logic, asserting that the “is” demonstrates the “ought.”

In addition, it simply is not true that core strait transit rights and navigational freedoms have been acquiesced away by the United States. The exercises in low-level pragmatism that have occurred at the expense of ocean interests have generally been only at the periphery of such rights and usually have not directly involved navigational freedoms. Indeed, the United States did reaffirm its continuing position of overflight rights through Gibraltar when challenged by Spain in the Yom Kippur War, and more recently has reaffirmed its longstanding policies on navigational freedom and has initiated a systematic program for assuring its ocean freedoms. The pattern of U.S. response is also complicated by the difficulty of proving in advance the effect of unilateral assertions of one form of jurisdiction on another. In passing the 200-mile Fishery Conservation and Management Act, for example, Congress was not saying that the encroachment of creeping jurisdiction on navigational freedoms was unimportant. Rather, it was not persuaded that an extension of fishery jurisdiction would result in encroachments on navigation, and throughout the debate proponents of the act insisted that these were separate issues.

Finally, the Darman argument fails to take account of the fact that the executive branch has been pursuing a multilateral strategy for resisting “creeping jurisdiction” and in that context unambiguously insisted on straits transit rights and other navigational freedoms. Darman ignores this pattern of practices in concluding that these interests have been left to atrophy. In this connection, it should be remembered that the multilateral forum in which navigational interests were vigorously espoused has been regarded as the most important arena for the development of oceans law and thus for protecting freedom of navigation. Finally, although I believe that the pattern of protection of all ocean interests, not just navigational rights, has been weaker than it should have been, the reason is rooted more in failure to conceptualize and systematize a foreign policy for the oceans than in any assessment that a particular interest was unimportant.

The principal problem with the Darman analysis is less these and other particular failings of his own point of reference than the narrowness of that reference. The importance of straits transit goes far beyond the

13 Darman, supra note 3, at 378–79.
14 Like many other contemporary international relations theorists, Darman seems seriously to underestimate the role of authority in international relations. See Darman, supra note 3, at 382. See generally on the point, Moore, The Legal Tradition and
military needs of any particular country at any point in time. The real issue is whether we will have a lasting oceans regime that protects the navigational heritage of all nations while meeting the legitimate concerns of coastal states. In what may be its principal achievement, UNCLOS has developed such a regime for straits.

III. BACKGROUND TO INTERPRETING THE UNCLOS STRAITS REGIME

A Point of Comparison: Ambiguities and Inadequacies of Straits Transit Prior to the UNCLOS Consensus

Both interpretation and evaluation of the straits regime of the Third United Nations Conference on the Law of the Sea presuppose a point of reference. What is the pre-UNCLOS straits transit regime and how does it compare with the UNCLOS regime? Reisman's analysis suggests that the pre-UNCLOS regime is simply one of freedom of navigation through areas of straits beyond 3 nautical miles and that this is the appropriate point of comparison with the UNCLOS regime. Existing international law, unfortunately, is less clear.

The United States is a party to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone which establishes a general regime of "innocent passage" for transit through the territorial sea. Article 16(4) of that convention seems to envisage the regime of innocent passage for straits used for international navigation subject only to the proviso that "[t]here shall be no suspension" of such innocent passage rights. Under the Geneva Convention, then, whatever ambiguities and inadequacies there are in the regime of "innocent passage" in general will apply in areas within straits overlapped by the territorial sea, except as the doctrine of changed circumstances (increase in breadth of the territorial sea) or a pattern of customary law/historic rights for straits transit has altered that regime.

The current regime of, "innocent passage" unfortunately is replete with ambiguities and inadequacies if applied generally to straits transit. These include:

- failure to recognize the essential separateness from the standpoint of community policies of a regime for passage through the territorial sea in general and for transit of straits used for international navigation;
- no right of overflight as a matter of independent oceans law;
- a requirement that submarines in innocent passage must "navigate on the surface and . . . show their flag";
- the subjectivity inherent in the definition of "innocent passage."

coupled with the right of coastal states to “take the necessary steps in... [their] territorial sea to prevent passage which is not innocent”;

- uncertain and imbalanced coastal state regulatory competence over vessels in innocent passage, particularly uncertain prescriptive and enforcement competence for dealing with vessel-source pollution;

- uncertainties concerning the protected category of “straits used for international navigation”; and

- the failure of some strait states to adhere to the 1958 Geneva Convention with its definition of “innocent passage” and their consequent assertion of even more restrictive norms such as requirements for prior notification for transit of warships, and ambiguous or highly restrictive concepts of passage through “archipelagic waters” or broadly defined “historic waters.”

Equally unfortunate in light of these ambiguities and inadequacies of the innocent passage regime, the Second United Nations Conference on the Law of the Sea in 1960 failed to reach agreement on the breadth of the territorial sea. While one may reasonably infer from its voting records, plus the limitation of the contiguous zone to 12 miles in the 1958 convention, that at maximum the territorial sea may not exceed 12 nautical miles, that is slight comfort for straits transit rights in straits from 6 to 24 nautical miles’ width. Even prior to the UNCLOS consensus that combined a 12-mile maximum breadth for the territorial sea with new provisions on “straits used for international navigation” and “archipelagic states,” considerably more states recognized a territorial sea of up to 12 miles than supported the U.S. position of only 3 miles. In current state practice, as of November 2, 1979, 23 states, including the United States, recognized 3 miles; 7 recognized limits beyond 3 but less than 12; 76 claimed or accepted 12 miles, including the Soviet Union, the People’s Republic of China, Canada, Mexico, Italy, France, India, and Indonesia; and 25 recognized limits beyond 12 miles, ranging from 15 to 200. This pattern of state practice makes it increasingly difficult to urge that any territorial sea beyond 3 nautical miles and up to 12 is unlawful. Certainly as a basis for future protection of straits transit, breadth alone is a frail reed indeed.

There is a sound alternative legal basis in the event of a breakdown in UNCLOS negotiations, but it does not offer the certainty of Reisman’s hypothetical point of comparison. Thus, although the Soviet Union has long maintained a 12-mile limit, it asserts historic rights for freedom of navigation through straits used for international navigation, even if such straits are overlapped by the territorial sea. The United States, I believe, would be on even stronger grounds in asserting customary law rights in straits broader than 6 miles as state practice moves toward a 12-mile limit. Certainly, U.S. acceptance of the 1958 Territorial Sea Convention did not contemplate a territorial sea of 12 nautical miles completely overlapping more than 116 straits used for international navigation. This right of free or unimpeded transit through straits in the 3- to 12-mile range (i.e., in straits broader than 6 miles and narrower than 24) is reinforced by the Japanese decision to recognize a territorial sea of 12 miles except in five
strait where a 3-mile maximum breadth is maintained. It is also power-
fully reinforced by the UNCLOS straits model recognizing transit passage
rights through straits used for international navigation. Indeed, because
of the potential power and influence of the UNCLOS straits model in
interpreting rights of straits transit, it would be difficult to separate the
UNCLOS regime from an evolving customary international law of straits
transit. Under such an evolving customary law, strait state competence
simply does not extend to transit.

Although I believe for these reasons the United States is on sound legal
ground in insisting on freedom of navigation through straits used for inter-
national navigation with or without a comprehensive law of the sea treaty,
the contemporary law is a great deal messier and more uncertain than
is implied in Reisman’s model. Moreover, at least some important straits,
such as Malacca-Singapore, are not protected by Reisman’s "high seas"
model since they are less than 6 miles wide. Finally, the "high seas"
model does not accurately reflect many other ocean claims which, though
not recognized by customary international law, do reflect insistent pressures
for expanded coastal state jurisdiction in the contemporary oceans political
arena. Most importantly, these include claims by "archipelagic states" to
enclose important straits with "archipelagic baseline systems" and claims
by coastal states to regulate vessel-source pollution and thus, fairly di-
rectly, shipping. In the real world, accommodation of these interests in
ways that meet coastal and archipelagic states’ concerns while protecting
navigational freedoms can be achieved far better through broad-based
negotiation than through a pattern of response to unilateral claims.

Applicable Principles of Interpretation

Reisman indicates as a starting point for interpretation of the UNCLOS
text that “[s]ince UNCLOS will produce a complex convention, an essen-
tially textual approach to construction, as conceived by the Vienna Con-
tention on the Law of Treaties, would appear required because of the
Vienna Convention’s directives, and ineluctable owing to the absence of
a formal record of the travaux.” I believe, as will be seen, that even a
strict textualist approach to the UNCLOS regime strongly supports a right
of submerged transit and other essential elements of a viable straits transit
regime. Nevertheless, if a strictly textualist analysis left any ambiguity,
as Reisman feels is the case, it would appear that under the “Vienna
Convention directives” recourse may be had to supplementary means of
interpretation. Thus, Article 32 provides:

Recourse may be had to supplementary means of interpretation, in-
cluding the preparatory work of the treaty and the circumstances of
its conclusion, in order to confirm the meaning resulting from the
application of Article 31, or to determine the meaning when the in-
terpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

16 Reisman, supra note 4, text at notes 19 and 20.
(b) leads to a result which is manifestly absurd or unreasonable.\textsuperscript{17}

Moreover, even Article 31, the "[g]eneral rule of interpretation," requires that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose";\textsuperscript{18} thus, overall textual context and object and purpose should be considered even in threshold determinations. Paragraph 4 of Article 31 also provides, "[a] special meaning shall be given to a term if it is established that the parties so intended,"\textsuperscript{19} and thus makes clear that full context concerning special meanings of terms should also be considered in threshold determinations. Presumably, Reisman's principal substantive thesis is that the UNCLOS regime is ambiguous (and thus squarely triggers Article 32) rather than that it is unambiguously opposed to the United States interpretations. Indeed, in concluding he writes: "It is as unwarranted to contend that UNCLOS rejects outright the types of straits passage needed for U.S. security as it is to contend that UNCLOS grants them outright. The problem is the ambiguity."\textsuperscript{20} Any interpretation asserting that the text clearly prohibits submerged transit, for example, would be manifest nonsense, and to my knowledge no one has made such an assertion.

This somewhat broader interpretive ambit of the Vienna Convention, at least for settings of asserted ambiguity, more nearly reflects the descriptive and prescriptive conclusions of the most sophisticated analysis of the law of interpretation of international agreements to date, that of McDougal, Lasswell, and Miller in \textit{The Interpretation of Agreements and World Public Order}.\textsuperscript{21} In summarizing the practice of examining preliminary events prior to the outcome of an agreement, the authors say: "Thus today it is fair to say that the majority of writers and decision-makers reject the restrictions of earlier years—even if in somewhat indirect ways—and favor instead a thorough contextual analysis within the limitations of time and resources available in any given case" (and by "contextual" the authors refer to full context and not just to full textual context).\textsuperscript{22}

Reisman implies as a second reason for his virtually exclusively textual analysis that it is "ineluctable owing to the absence of a formal record of


\textsuperscript{18}The Vienna Convention on the Law of Treaties, \textit{supra} note 17.

\textsuperscript{19}Ibid.

\textsuperscript{20}Reisman, \textit{supra} note 4, text at note 66.

\textsuperscript{21}M. McDougal, H. Lasswell & J. C. Miller, \textit{The Interpretation of Agreements and World Public Order} (1967).

\textsuperscript{22}Id. at 123. The background of the Vienna Convention, of course, suggests a more rigid textualist emphasis than this quotation. As the legal realists have reminded us, however, doctrine and reality are not necessarily coincident, and in practice interpretation under the convention may well approximate the quoted McDougal, Lasswell, & Miller summary despite the syntax used to achieve such a result under the convention.
It is an overstatement to say there are no formal travaux, since official conference records are kept as well as certain notes and records of the Secretariat. Nevertheless, Reisman is essentially correct that the formal record is sketchy and incomplete. As has been seen, however, it is not merely formal travaux that the Vienna Convention contemplates as a supplementary means of interpretation but also more generally "the preparatory work of the treaty and the circumstances of its conclusion." In its analysis of Article 32 of the Vienna Convention, the International Law Commission clearly refused to limit applicable travaux in any way, for example, by whether the materials were published or unpublished. Instead, it said, in an unmistakably broad concept of travaux, that "trying to define travaux préparatoires . . . might only lead to the possible exclusion of relevant evidence"; and "object and purpose" and "special meanings" of terms are to be taken into account even in the initial determination under Article 31.

When the permissible context is thus broadened as it should be, there is a great deal of relevant evidence that must be considered and that strongly supports the interpretations Reisman questions. This evidence includes repeated statements by the United States, the Soviet Union, and other maritime states concerning the essentiality of transit passage (including submerged transit and other incidents), followed by absence of objections to the ICNT text by these parties; efforts by extreme strait states to reopen the text and prohibit submerged transit or overflight of straits; common and uncontradicted use of special terms during negotiations such as "freedom of navigation" and "in the normal mode" to include submerged transit; and an on-the-record exchange indicating that the United Kingdom's transit passage text contemplated overflight and submerged transit. It is the widespread understanding of these and other background circumstances that is loosely referred to by some as an "understanding" supportive of textual interpretations advanced by maritime states, not some mysterious or secret off-the-record document or agreement.

In this regard I agree with Professor William Burke's general criticism of restrictive interpretation of the UNCLOS straits regime: "One difficulty with this . . . [and] other criticisms of the Revised Text is that they rest almost completely on textual exegesis and manipulation of words without regard for, and with virtually no reference to, the negotiating context." 

23 Reisman, supra note 4, text at note 20.
25 Apparently, the proponent has the burden of showing "special meanings" of terms under the Vienna Convention, but the point is that such special meanings may be shown and are not excluded by an initial textual focus.
26 Burke, Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty Text, 52 Wash. L. Rev. 193, 193 (1977). This article is the definitive work to date on the interpretation of the straits chapter of the ICNT.
In short, although I believe that a purely textualist approach amply supports the generally accepted interpretation of the UNCLOS straits regime, even if it did not, the "circumstances of its conclusion" or "negotiating context" would provide such support. The Reisman analysis is seriously flawed in not taking account of these contextual features.

IV. THE UNCLOS CONSENSUS AND THE REGIME OF STRAINS TRANSIT

This section will analyze the text of the UNCLOS straits regime, discuss counter-textual assertions advanced by Reisman and others, and examine the preparatory work and circumstances of its conclusion (negotiating context). It will proceed individually by major issue, taking in order recognition of the separateness of passage through the territorial sea in general and straits transit, overflight rights, rights of submerged transit, certainty of transit rights, scope of strait state regulatory competence, transit rights for warships, archipelagic sea lanes passage, and categories of straits.

Recognition of the Separateness of Straits Transit

Text. One of the greatest shortcomings of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone is that with the exception of a single clause providing for "no suspension" of innocent passage in straits, it fails to differentiate meaningfully between passage through the territorial sea in general and transit of straits. In the UNCLOS text this crucial distinction is recognized for the first time in the history of oceans law. Thus, "Innocent Passage in the Territorial Sea" and "Straits Used for International Navigation" are separate parts of the text, each clearly with its own regime. Indeed, "Innocent Passage in the Territorial Sea" is a section of part II, the chapter on the territorial sea and the contiguous zone. "Transit Passage," however, is a section of a separate part III, the chapter on straits used for international navigation. Passage through the territorial sea in general is dealt with by the term "innocent passage" and transit of the broadest category of straits is dealt with by the term "transit passage." Similarly, the analogous right of passage through archipelagic sea lanes is termed "archipelagic sea lanes passage."

Lest there be any mistake, part III on straits repeatedly makes it clear that straits are governed by "this Part," that is, by the straits part. Thus, Article 34(1) speaks of "[t]he régime of passage through straits used for international navigation established in this Part." Article 34(2) provides that "[t]he sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part." Article 35, entitled "Scope of this Part,"

Burke goes on to say:

There is a loss of plausibility when the interpreter makes no attempt to take into account the issues being negotiated, their origin, the contrasting views and proposals of the principal participants, contemporary interpretations of these proposals, and the formulation of the outcome in relation to these communications among the parties in the negotiations.

Ibid.
enumerates three categories not affected by "this Part," and Article 36 enumerates another for which "[t]his Part does not apply." By Article 37 "[t]his section applies" to all other categories of straits, except as part III itself specifically applies the innocent passage regime to certain categories of straits in Article 45. In addition, Article 37, which leads off a section of the straits part entitled "Transit Passage," is entitled "Scope of this section" and says, "[t]his section applies to straits which are used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone." Article 38(1) provides that "[i]n straits referred to in article 37, all ships and aircraft enjoy the right of transit passage." Article 38(2) says that "[t]he right of transit passage is the exercise in accordance with this Part." Establishment of sea lanes and traffic separation schemes pursuant to Article 41 is explicitly required to be "[i]n conformity with this Part." And coastal state regulatory competence affecting transit passage is by Article 42 explicitly made "[s]ubject to the provisions of this section."

Similarly, Article 38(3) provides that "[a]ny activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention," and thus clearly implies that activities which are an exercise of the right of transit passage are not subject to the other provisions of the convention. Even more importantly, Article 39(1), which sets out the duties of ships and aircraft during passage, by ending its enumeration with the flag state obligation to "[c]omply with other relevant provisions of this Part," thus completing an inclusive list, excludes duties that might be implied from other parts of the convention, for example the part dealing with innocent passage. In contrast to Section 2, "Transit Passage," Section 3, "Innocent Passage," makes clear that "[t]he régime of innocent passage, in accordance with section 3 of Part II [the innocent passage section of the territorial sea chapter], shall apply" in the categories of straits enumerated. The analogous "archipelagic sea lanes passage" established in Article 53 contrasts clearly with innocent passage applicable outside of designated sea lanes and air routes (or if none are designated, "through the routes normally used for international navigation"). Similarly, Article 25 of the innocent passage section, which is derived from Article 16 of the Territorial Sea Convention, does not include paragraph 4 of Article 16 which deals with straits, and thus confirms that the UNCLOS text deals with straits transit in a separate chapter, unlike the Territorial Sea Convention which treats the issues together. As an added precaution, Article 233 plainly states that the regime for coastal state regulatory and enforcement competence for pollution from vessels in innocent passage in the territorial sea in general shall not "affect the legal régime of straits used for international navigation," except for a specifically enumerated enforcement right against vessels not entitled to sovereign immunity with respect to violations of major, internationally approved traffic separation or discharge regulations, which is rooted in Article 42 of the straits chapter.

This textual record leaves no reasonable doubt that the regime of transit
passage of those straits used for international navigation enumerated by Article 37 (and not excluded by Articles 35, 36, or 38(1)) is established exclusively by the straits chapter and is not governed by provisions elsewhere in the text concerning innocent passage in the territorial sea in general.

**Counter-textual Arguments.** Those who charge the straits regime with "textual ambiguity" generally fail to note the important advance in oceans law made by UNCLOS in providing that innocent passage in the territorial sea in general, on the one hand, and "transit passage" and "archipelagic sea lanes passage" through straits and sea lanes, on the other, are fundamentally different and require different regimes.

In a letter to Senator Barry Goldwater of July 29, 1976, Professor Gary Knight argues that Article 34(1) of the straits chapter might be interpreted to apply Article 20 from the general innocent passage regime stipulating that submarines "are required to navigate on the surface and to show their flag." Article 34(1) provides: "The régime of passage through straits used for international navigation established in this Part shall not in other respects affect the status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil."

To prevail in this interpretation, Knight must establish that "other respects" means "other respects of passage not dealt with in this part" (as...
well as establish that submerged transit is not dealt with in this part), rather than the more straightforward “respects other than the regime of passage.” Were it not that the overall textual structure of the straits chapter and transit passage section repeatedly limits the scope of transit passage to that enumerated in “this Part,” and that submerged transit is provided for by the straits chapter, this interpretation might be arguable, though strained. Even if taken alone, it would not be the most reasonable textual construction, in view particularly of its operative focus on status of waters and exercise of jurisdiction without mention of residual applicability of a regime of innocent passage or duties of transiting vessels. Nor is it consistent with the omission in Article 25 of paragraph 4 of the parent Article 16 of the Territorial Sea Convention, an omission confirming the repeated textual indication that straits transit issues are governed by the straits chapter, or with the use of a specific cross-reference to straits in Article 233: that is, where straits used for international navigation were meant to be affected outside the straits chapter, a specific cross-reference was used.

In fact, the draft convention consistently achieves such cross-chapter effect either through specific cross-reference or by use of the term “this Convention” rather than “this Part.” No such reference appears in conjunction with Article 20. In short, the straits chapter deals with all aspects of the regime of passage (either by inclusion or exclusion) and cannot be said to leave any of those aspects to part II by implication.

If the text is taken as a whole, then, as the Vienna Convention requires, the interpretation espoused by Knight is not credible. Rather, in overall context Article 34(1) is unmistakably intended to preserve coastal state resource rights and regulatory competence over scientific research and activities other than “passage.” To argue that Article 34(1) prohibits submerged transit in the face of the overwhelming textual evidence to the contrary is logic chopping at its worst.

Negotiating Context. Nothing could be clearer in the overall negotiating context than the attempts by the strait states to have innocent passage through the territorial sea in general and straits transit treated as synonymous. Thus, the eight-nation strait state working paper introduced in the Seabeds Committee on March 27, 1973, recited as a first “basic consideration” that “navigation through the territorial sea and through straits used for international navigation should be dealt with as an entity since the straits in question are or form part of territorial seas.” And a representative of Spain said during debate on the straits article:

Straits used for international navigation were an integral part of the territorial sea in so far as they lay within territorial waters. Any attempt to set up separate regimes for the territorial sea and for straits would clearly violate the fundamental principle of the sovereignty of the coastal State over its territorial sea.

28 Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain and Yemen: Draft articles on navigation through the territorial sea including straits used for international navigation, UN Doc. A/AC.138/SC.II/L.18 (March 27, 1973).

29 Statement of Mr. Ruiz Morales of Spain, UN Doc. A/AC.138/SC.II/SR.60 at 188
Similarly, nothing could be clearer than that the United States, the Soviet Union, and other maritime states sought to have this difference recognized as a fundamental distinction in oceans law. For example, the United States representative said in Committee II of the Seabeds Committee on April 2, 1973:

We should be clear, Mr. Chairman, that the community interest at stake in international straits is far more vital than simply the right of innocent passage in the territorial sea. The issue is no less than whether the freedoms of the high seas enjoyed by all nations are to remain meaningful.

A principal goal of the Law of the Sea Conference must be to agree on a regime which will minimize the possibilities of conflict among nations, conflicts which may arise because of uncertainties as to legal rights and responsibilities. In view of the importance of straits used for international navigation, any regime for such straits which depended upon a set of criteria that could be subjectively interpreted by straits states would sow the seeds of future conflict and undercut a major goal of the Conference. For these reasons, Mr. Chairman, it is completely inappropriate to approach the problem of transit through straits as though it were simply a problem of passage through the territorial sea which could be dealt with by the doctrine of innocent passage.\(^{30}\)

Again, at the Caracas session of the conference on July 22, 1974, it was said:

The U.S. delegation has stated on numerous occasions the central importance that we attach to a satisfactory treaty regime of unimpeded transit through and over straits used for international navigation. Indeed, for states bordering as well as states whose ships and aircraft transit such straits, there could not be a successful Law of the Sea Conference unless this question is satisfactorily resolved. The inadequacies of the traditional doctrine of innocent passage—a concept developed not for transit through straits but for passage through a narrow belt of territorial sea—are well known.\(^{31}\)

To my knowledge, since the initial appearance of the straits chapter in the Single Negotiating Text (SNT), which clearly made this distinction, no nation has questioned that this separate regime is established in the text and that the straits chapter, and not the innocent passage articles, governs all aspects of transit through Article 37 straits used for international navigation. Based on my experience in the negotiations, I am cer-


tain that any other interpretation would have produced an instant rejection from the United States, the Soviet Union, and other maritime states.

The Knight argument that Article 34(1) incorporates Article 20 by implication is further contravened by the circumstance that Article 34 was originally presented and explained by the United Kingdom in April 1975 in the Straits Working Group of the conference. An interpretation of this article as denying submerged transit rights hardly seems credible in view of the commitment of the United Kingdom to those rights. Rather, it was intended to protect resource and other nontransit interests.

Overflight Rights

**Text.** The UNCLOS text states unmistakably that transit passage includes overflight rights as a matter of general oceans law. Article 38(1) speaks of "all ships and aircraft," 38(2) provides for "freedom of navigation and overflight," 39(1) says "ships and aircraft," 39(3) sets out specific duties of "[a]ircraft in transit," 42(5) speaks of "a ship or aircraft," and 44 uses "navigation or overflight." Similarly, the analogous right of archipelagic sea lanes passage established by Article 53 speaks of "navigation and overflight" and "ships and aircraft."

**Counter-textual Arguments.** To my knowledge, no arguments have been made that the UNCLOS text fails to provide overflight rights. In general, however, those criticizing the straits chapter have failed to point out that in contrast to the Geneva Convention's "innocent passage" regime, the UNCLOS text fully protects overflight rights.

**Negotiating Context.** From the beginning of the negotiation the United States, among others, insisted that there be full overflight rights through straits for all categories of aircraft. Certain strait states opposed this position. Indeed, the continued efforts by Spain and Greece to remove overflight rights from the text only resulted in enhancing its clarity, and the amendments they recently introduced to that effect were not adopted by the conference.\(^{32}\)

Submerged Transit

**Text.** An analysis of the full text makes clear that transit passage includes rights of submerged transit through straits for those straits covered by the transit passage regime. The innocent passage section includes a specific article requiring submarines "to navigate on the surface and to show their flag"; by contrast, there is no such requirement in either the transit passage section or the archipelagic states chapter dealing with the

analogous archipelagic sea lanes passage, even though the transit passage section expressly enumerates the duties of ships during passage. That list of duties is clearly exhaustive since it ends with a catch-all obligation to “comply with the other relevant provisions of this Part.” Moreover, both the Territorial Sea Convention and the innocent passage section of UNCLOS establish a pattern that if submerged transit is to be prohibited, it will explicitly be so stated. In contrast, there is nowhere in the straits and archipelago chapters a duty to navigate on the surface through straits or “archipelagic sea lanes.” In my judgment, these textual provisions, taken together, undeniably establish the right of submerged transit in straits, and nothing else, text or travaux, is needed. Nevertheless, the existence of the right of submerged passage is further attested to by a wide variety of other textual indications.

- Not even the high seas chapter provides explicitly for submerged transit. The reason is that the phrase “freedom of navigation” in Article 87 includes submerged operations, just as it did in Article 2 of the 1958 Geneva Convention on the High Seas. Given this background, no provision other than “freedom of navigation” is needed to include a right of submerged transit. In contrast, the innocent passage chapter requiring surface transit does not use this terminology.

- The term “freedom of navigation” is used in defining transit passage in Article 38(2). Given the high seas background of this term, it surely includes rights of submerged transit, and the text cannot reasonably be read to exclude those rights from the “freedom” granted. Indeed, the use of the term establishes that any requirement in derogation of such “freedom of navigation” must be spelled out in the text. Given the important and consistent use of the term to refer to high seas rights, it would have little meaning in the article unless it was intended to reserve rights of submerged transit and other freedoms of transit. That is, it preserves “freedoms” associated with transit.

- The provision in Article 39(1)(c) that ships shall “[r]efrain from any activities other than those incident to their normal modes of continuous and expeditious transit” establishes, since it appears in a list of duties, that transit passage includes a right of transit in the “normal mode of continuous and expeditious transit.” Because the “normal mode of continuous and expeditious transit” of modern submarines is submerged, a right of submerged transit is comprehended. It should be noted that normal mode in this regard is modified only by “of continuous and expeditious transit,” not some other standard.

- Article 53(3) concerning the analogous right of archipelagic sea lanes passage provides that it is a right “of navigation and overflight in the normal mode.” Even more importantly, the archipelagic sea lanes passage regime employs a specific cross-reference to and only to Articles 39, 40, 42, and 44 (not to Article 20 requiring navigation on the surface) in enumerating duties of ships and aircraft. It simply is not credible in light of the overall object and purpose of the text that archipelagic states have accepted a right of submerged transit in sea lanes through archipelagic waters if no such right is provided through straits used for international navigation outside of such waters.
In any event, the similar terminology and repeated cross-references in the archipelagic states chapter indicate that transit passage and archipelagic sea lanes passage are equivalent rights. There seems no difference in any other important respect, and in the absence of a clear intention otherwise, it would not seem reasonable to assume that they differ on the right of submerged transit.

- The existence of Article 45 makes it clear that when a cross-reference is intended to the innocent passage section from the transit passage section, it is made explicitly. Similarly, Articles 29, 31, and 32 in the innocent passage chapter make it clear that when a provision of that part is intended to have effect beyond that part or to be affected by another part, it is so stated. This specific cross-reference practice is also followed in the environmental chapter on issues concerning navigational rights as spelled out in Articles 211(4), 220(2), and most importantly, 233 and 236, which also apply in straits. Articles 233 and 236 particularly show that whenever an article outside of the straits part is intended to have an effect on the straits part, it is specifically stated to so apply or to apply to the entire convention. In short, the overall textual scheme of the convention is that in the absence of a specific cross-reference in at least one of the parts to be affected, nothing in the convention outside the straits chapter affects transit rights through straits used for international navigation.

- The innocent passage and straits transit sections are not even parts of the same chapter. Rather, innocent passage appears in a general part on the territorial sea and contiguous zone, and straits transit appears in a separate chapter on straits used for international navigation. Similarly, paragraph 4 of Article 16 of the Territorial Sea Convention, the only paragraph in the Territorial Sea Convention dealing explicitly with straits, is omitted from the comparable Article 25 in the innocent passage section of UNCLOS, and the issue is dealt with instead in the separate straits chapter of UNCLOS.

- Finally, of some peripheral support are the Article 39 duty to “proceed without delay,” which is most consistent with transit rights in a normal mode, that is submerged, for a modern submarine, and the articles making reference to nuclear-powered vessels in the innocent passage section, Articles 22(2) and 23, which, like Article 20, are omitted from the transit passage section of the text.

Under the Vienna Convention requirements, these provisions must be read together in their overall context. In that context, for all the reasons just mentioned, as well as the omission of a duty to navigate on the surface from the exhaustive list of transit duties in Article 39 and the repeatedly expressed assertion mentioned earlier that transit passage is governed by “this Part,” that is, by the transit passage section of the straits chapter, there can be no reasonable doubt that even solely on a textual analysis the UNCLOS text provides a right of submerged transit.

Counter-textual Arguments. A number of textual arguments have been advanced by Knight and Reisman to demonstrate that the existence of a right of submerged transit is ambiguous under the UNCLOS text.

Knight seems to ask why, if submerged transit is so important and is included, it was not spelled out in the text as such. The answer is quite

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33 See the letter to Senator Barry Goldwater from H. Gary Knight, supra note 27, at 11.
clear. The existing 1958 Geneva Convention on the High Seas and the high seas chapter of the ICNT both speak only of "freedom of navigation." They do not spell out a right of submerged transit beyond use of that phrase. Yet such rights on the high seas are understood by all to include the right of submerged transit. Moreover, altering the UNCLOS straits text to spell out that submerged transit is included in "freedom of navigation" could without such alterations elsewhere have negative implications not only for Article 87 (high seas) of the UNCLOS text—which presumably might be altered—but also for Article 2 of the 1958 Geneva Convention—which cannot be without a new conference of its own. Because of the clarity of meaning of the term "freedom of navigation," none of the straits proposals advanced by the United States, the Soviet Union, and the United Kingdom, which were well known as intended to include submerged transit, explicitly used language providing for that right. Rather they relied on the clearly understood phrase, "freedom of navigation."3a There can be no doubt, then, that the absence of such an explicit provision is not a persuasive argument for an interpretation negating the right of submerged transit when neither the paradigm straits articles for submerged transit nor the high seas articles themselves include such an explicit provision.

Knight also argues that Article 20 might be applicable to the transit passage section through Article 34(1). For the reasons previously discussed in connection with the separation of the innocent passage regime and the transit passage regime, this argument is but logic chopping. It does not fairly take account of the overwhelming range of textual indications running counter to this interpretation, but rather relies on a vague argument to the exclusion of all such indications.

Reisman argues that the language, "in the normal mode," does not clearly establish a right of submerged transit, although he seems to concede that some submerged transit may be "in the normal mode." Thus, he implicitly disagrees with Knight's argument that Article 34(1) by incorporation of Article 20 provides for an obligation to transit on the surface.3b Taken alone as a textual issue without benefit of the broader textual setting or the negotiating context, this provision, "in the normal mode," would seem an unsatisfactory basis on which to rely for a right of submerged transit. The most important textual bases for such a right, however, are not rooted in this provision, which is only an incidental indication of its existence. Moreover, if the phrase "normal mode" is ambiguous, as Reisman seems to argue, then recourse may be had to the negotiating context, which I be-

34 The United Kingdom draft articles, for example, provided that

[1] Transit passage is the exercise in accordance with the provisions of this chapter of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas and another part of the high seas or a State bordering the strait.


35 Reisman, supra note 4, text at notes 53 and 54.
lieve makes abundantly clear that this phrase includes submerged transit. Indeed, paragraph 4 of Article 31 of the Vienna Convention provides that the intention of the parties is the guide to special meanings of terms, so that negotiating context must be examined on the meaning of such terms even if no ambiguity is alleged.

Reisman also argues that “normal mode” may be determined by the strait states acting pursuant to their competence under Articles 39 to 42. For example, implementation of certain sea lanes by strait states may be inconsistent with a right of submerged passage. This argument is premised on what I believe to be a serious misinterpretation of the UNCLOS text. That is, Articles 39 and 40 are intended solely to establish flag state obligations and not to create rights unilaterally enforceable by a coastal state. Similarly, Articles 41 and 42 are carefully drafted to require international approval for any sea lanes or traffic separation schemes, and there is nothing inconsistent between such internationally agreed lanes and a general right of submerged transit. In fact, the initial U.S. straits article, which clearly contemplated submerged transit, would have permitted even the unilateral imposition of such lanes by strait states without assuming any inconsistency with a right of submerged transit. To the same effect, the areas of regulatory competence granted the strait state under Article 42 are carefully drafted so as not to create problems for submerged transit. (Both these issues of “flag state obligations” and coastal state regulatory competence will be discussed in some detail in the next few sections of this article.) Even if these articles did grant significant regulatory competence to the strait states, which they do not, Article 44 requires that “[s]tates bordering straits shall not hamper transit passage” and Articles 32, 42(5), and 233 taken together establish immunity for warships transiting straits. In light of the abundant textual evidence that submerged transit is contemplated and is not subject to strait state interference, it is difficult to understand how the inconsistency that Reisman sees would be a reasonable interpretation of the straits chapter.

Finally, in a letter to Senator Goldwater, Reisman argues:

It is true, as our negotiators aver . . . , that Article 19 [Article 20 of the ICNT] appears in Chapter I rather than in Chapter II of the Text [Parts II and III of the ICNT]. On the other hand, innocent passage is reapplied in Section 3 of Chapter II [section 3 of part III of the ICNT] (dealing with a second species of straits—“straits used for international navigation”) and Article 38(1)(d) [39(1)(d) of the ICNT] obliges transit passage ships to “comply with other relevant provisions of this chapter.” If, to argue in the manner of our negotiators, Article 19 is part of the regime of innocent passage and if innocent passage is a relevant provision of Chapter II, then the duty of surface transit may be “understood” to apply.

Reisman's effort to demonstrate ambiguity in the UNCLOS text is particularly strained by this argument, for it completely ignores the purpose
of Article 45, which is to establish the innocent passage regime in certain straits not covered by transit passage. By its terms, Article 45 does not apply to transit passage straits; thus, it is not "relevant" under Article 39(1)(d) to such straits and is not included within the list of duties comprehended for transit passage. If anything, the specific reference in the transit passage section to the Article 45 category of straits, in which the regime of "non-suspendable innocent passage" is to be applied, lends clarity to the separateness with which the regimes of innocent passage and transit passage are regarded.

In summary, none of the arguments made to demonstrate that the UNCLOS text is ambiguous on submerged transit are persuasive, even on their individual merits, and the greatest failing of them all is that they do not fairly deal with the abundant evidence from the text as a whole supporting a right of submerged transit.

Negotiating Context. Even if there were any ambiguities concerning the right of submerged transit in the UNCLOS text, they would be overwhelmingly dispelled by the negotiating context.

First, the United States and the Soviet Union repeatedly made clear that they could not accept a law of the sea treaty that did not provide for freedom of navigation through straits, including submerged transit. In fact, on no other issue in the negotiation did the major participants express themselves so unmistakably on and off the record and make their views so well known. That they accepted the ICNT straits chapter during Committee II's article-by-article reading of the text strongly suggests that they believed the right of submerged transit was included. There can be no doubt that this is the U.S. interpretation. On July 14, 1979, Ambassador Richardson said in a major speech, "National Security and the Law of the Sea": "Under the text [ICNT/Rev.1] we would enjoy free and unimpeded passage, through, under, and over straits and archipelagic waters."38

In marked contrast to these views of the principal proponents of submerged transit, its principal opponents have continued their efforts to alter the text to prohibit it. Thus, in 1976 Spain introduced an amendment to the SNT straits chapter that provided: "Submarines and other underwater vehicles are required to navigate on the surface and to show their flag, unless otherwise authorized by the coastal State."39

38 See the remarks by Ambassador Richardson, supra note 8, at 11.

39 See also the letter of August 11, 1976, from Stuart P. French, Secretary of Defense Representative for the Law of the Sea Conference, to Senator John C. Stennis, Chairman of the Senate Committee on Armed Services (on file at Center for Oceans Law and Policy, University of Virginia). French writes, after a careful analysis of the issues raised in the replies to the Goldwater letter:

I want to assure you personally that our national security interests in free transit of straits (both submerged transit of submarines and overflight of aircraft without notification or authorization) connecting high seas to high seas are fully protected in the Law of the Sea negotiations as reflected in the Revised Single Negotiating Text. This letter also details the negotiating history of the phrase, "in the normal mode," fully supporting that it includes, indeed primarily refers to, submerged transit.

Greece introduced virtually the same amendment to be included in Article 39, "Duties of ships and aircraft during their passage" (exactly the article where such a duty would be expected if intended). Neither of these amendments was adopted by the conference, as it was well known that to do so would end any chances for agreement. In summarizing the work of the 1977 New York session, Professor Bernard Oxman writes of the attempted amendments: "Earlier attempts to impose a requirement that submarines navigate on the surface failed and were not revived.”

In addition, the United Kingdom, whose draft articles formed the basis for the ICNT straits articles and who served as cochairman, with Fiji, of the straits negotiating group, obviously intended that the new concept of “transit passage” include the right of submerged transit. Among other contemporary indications of this interpretation, during discussion in the House of Lords on March 9, 1976, Lord Campbell said:

"Britain, I understand, has taken a leading part in putting forward the concept of transit passage. . . ."

On the question of strategic considerations, we want the Conference to accept that warships and even submerged submarines have the right to go through international straits, even though the territorial seas are to be expanded to 12 miles. And similarly Lord Goronwy-Roberts in the same forum on May 19, 1976: "We also advocated the creation of a special regime for passage through international straits . . . so as to ensure . . . a right of submerged transit.”

Burke, in the best analysis of the straits chapter to date, concludes from statements in the formal conference records that submerged transit is provided by the straits text:

Statements by Sri Lanka, Egypt, Peru and Spain, in commenting both on the United Kingdom proposal and on a United States intervention

40 Proposed amendments by Greece, supra note 32, at 530.

It should also be noted that both the innocent passage and transit passage provisions of the SNT built heavily on the UK dual proposal, and that proposal, which was understood by all to permit submerged transit, specifically included in the innocent passage part a general requirement like that in Article 20 of the ICNT that submarines must surface and show their flag. But since in the UK text the article requiring surfacing clearly applied only to innocent passage and not to straits transit, there seems no justification for alleging that in the ICNT, deriving from the SNT patterned on the UK text, Article 20 applies to transit passage.

The Article 34 phrase about the passage regime "not in other respects" affecting the status of the waters was drafted to meet concerns in the UK-Fiji straits negotiating group that a state would not be able to exercise territorial sea rights other than passage, e.g., resource rights. It was not intended to and does not reintroduce innocent passage in any way.
on the subject, are especially revealing of the contemporary understanding of freedom of navigation in this context. Each of these delegations questioned the need for, and desirability of, submerged passage for submarines. The comments, questions, and proposals advanced by these delegations are virtually impossible to explain unless they understood that submerged passage was intended to be included in the concept of "freedom of navigation" in straits.44

The record of discussions, proposals, and proposed amendments also shows clearly that those states who sought right of submerged transit supported the language, "freedom of navigation" or "in the normal mode," for this purpose, while those who opposed that right consistently tried to delete these phrases. To my knowledge, no participant in the negotiations has doubted that the ICNT includes a right of submerged transit, nor has it ever been questioned that the phrases, "freedom of navigation" and "normal mode," used interchangeably in that text, include submerged transit.

From my own experience as a United States negotiator of the straits and archipelago chapters I can say unequivocally that at no time did the United States, or to my knowledge any other maritime power, including the Soviet Union and the United Kingdom, or any other participant in the straits and archipelago negotiations, have any doubt that the text fully provides a right of submerged transit through covered straits and archipelagic sea lanes. This issue was made abundantly clear throughout the negotiation and there are absolutely no travaux of any kind, on or off the formal record, supporting a contrary interpretation. It should be kept in mind that no one questions that the United States has made it clear that it cannot accept a law of the sea treaty that does not provide freedom of navigation through straits, including submerged transit. Yet not even the U.S. draft articles included a specific phrase referring to submerged transit, as the phrase "freedom of navigation" through a strait was felt to be abundantly clear on this point.

Certainty of Transit Rights

Text. The chapter on innocent passage through the territorial sea provides for a right of "innocent passage." This right is qualified by Article 19, which defines passage as innocent "so long as it is not prejudicial to the peace, good order or security of the coastal State," a test subsequently defined in paragraph 2. Most indicative of an intent to give coastal states certain rights to take unilateral action to prevent noninnocent passage is Article 25, which provides that "[t]he coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent." Similarly, Article 30 provides: "If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require it to leave the territorial sea immediately."

44 Burke, supra note 26, at 205.
In marked contrast, "transit passage" in the straits chapter is defined as

the exercise in accordance with this Part of the freedom of navigation
and overflight solely for the purpose of continuous and expeditious
transit of the strait between one area of the high seas or an exclusive
economic zone and another area of the high seas or an exclusive eco-
nomic zone.

Even more importantly, Article 39 setting out the duties of ships and
aircraft during their passage does not say, as does Article 19, that passage
"shall be considered to be prejudicial . . . if"; rather, it says, "ships and
aircraft, while exercising the right of transit passage, shall," and thus dif-
ferentiates flag state duties from the definition of transit passage rights.
Articles similar to 25 and 30, which permit coastal states to interfere with
passage under certain circumstances, are notably absent. Finally, under
Articles 31, 32, 42(4) and (5), 233, and 236, coastal states shall not inter-
fone with or take enforcement action against warships or other vessels
entitled to sovereign immunity. Rather, as expressed in 42(5): "The flag
State of a ship or aircraft entitled to sovereign immunity which acts in a
manner contrary to such laws and regulations or other provisions of this
Part shall bear international responsibility for any loss or damage which
results to States bordering straits."

Counter-textual Arguments. Reisman is concerned that, similarly to the
innocent passage provisions in general, a state might be able to characterize
passage as "nontransit"—particularly by reference to Article 39(1)(b), which
creates a duty for ships and aircraft in transit passage to refrain from use
of force in violation of the United Nations Charter—and subsequently to
deny passage unilaterally. He points out in this connection that Article
44 merely creates a duty not to hamper "transit passage," not one not to
hamper "passage" in general. This argument, however, does not deal
with the principal point that, in contrast with the innocent passage section,
Article 39 delinks duties of ships and aircraft during passage from the
definition of transit passage rights. Rather, these duties are flag state
obligations "while exercising the right of transit passage." His argument
also does not deal with the previously mentioned structural difference
between the two sections, that strait states are not given a unilateral claim
to prevent passage, nor with the clear design throughout the convention
for warship immunity.

It does not follow as a matter of logic that the existence of flag state
duties in Article 39 gives strait states a right to determine violations of such
duties unilaterally and to seek to enforce them by denial of passage.
Rather, it is entirely consistent with that text and clearly within the specific
language of Articles 31 and 42(5) that the flag state shall bear "international
responsibility" for such violations, and that enforcement shall be
solely through the normal diplomatic (and, if available, judicial) chan-
nels. In fact, these provisions, as well as the second sentence of Article
233, would make little sense if strait states could prohibit transit passage

45 Reisman, supra note 4, at 70.
46 Ibid.
for violation of Article 39 duties, and they confirm for vessels entitled to sovereign immunity the other textual evidence of Article 39 itself and the absence of articles comparable to 25 and 30 from the innocent passage chapter. Moreover, Part XII, "Protection and Preservation of the Marine Environment," makes abundantly clear that broad international obligations concerning vessels in navigation do not necessarily result in coastal state rights enforceable by unilateral action, and when they do the text is specific in so stating and providing safeguards.

Finally, even if Reisman's interpretation were accepted, and transit passage rights and flag state duties were linked, it would not follow that a unilateral determination by a coastal state of violation of an Article 39 duty or other straits chapter obligation would terminate the right of transit passage. Rather, the duty would in fact and in law have to be violated, and the transiting state would be on firm ground in protecting its transit rights if there were no such violation. It is precisely this need to avoid confrontation caused by differing interpretations on so important a right that led to the delinkage in the straits chapter between rights of transit passage and duties of transiting ships and aircraft.

Negotiating Context. From the beginning of the negotiation, maritime nations were aware of the problem of linkage of transit rights with vague duties or restrictions that could lead to confrontation over straits transit rights. This defect in the innocent passage regime had been all too evident. For this reason, early Soviet draft straits articles, in stipulating duties of transiting ships and aircraft, provided them as flag state obligations not directly enforceable by the strait state. This approach was carried over into the United Kingdom text and the work of the Straits Working Group. Moreover, it was hardly novel: the same distinction between what was commonly referred to as a "flag state obligation" and coastal state authority to take unilateral enforcement action underlay the initial U.S. marine scientific research articles. For that chapter, however, this approach was set aside in favor of a modified consent regime requiring the coastal state's consent. This distinction between a "flag state obligation" approach and broader coastal state authority to take unilateral enforcement action was also fully understood in the vessel-source pollution negotiations over part XII of the text. Although that chapter creates broad flag state obligations to comply with international standards, they are enforceable by coastal states only as specifically set out in the text. Article 233 makes a clear link between that part and the straits chapter, which fully preserves this distinction. Indeed, a "flag state obligation" approach, which creates obligations but not direct rights of enforcement in other states, is a principal underpinning of the 1958 Geneva Convention on the High Seas. Not surprisingly, this result is again consistent with the use of the phrase "freedom of navigation" in the straits chapter taken from that convention.

The seriousness with which the United States viewed the question of certainty of transit rights is indicated by the statement of Secretary of State Henry Kissinger in August 1975, that "[w]e will not join in an agreement which leaves any uncertainty about the right to use world communi-
cation routes without interference.” 47 Many such statements on transit rights were made by conference participants.

**Strait State Regulatory Competence**

*Text.* Unlike the broader regulatory competence provided coastal states under Articles 21 and 22 for ships in innocent passage, the unilateral regulatory competence accorded strait states under the straits chapter is carefully circumscribed. The only provision that creates any such right is Article 42. Article 41, which deals with sea lanes and traffic separation schemes, in marked contrast with Article 22 on the same subject in the innocent passage chapter, provides in paragraph 4:

> Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall refer proposals to the competent international organization [IMCO] 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, after which the States may designate, prescribe or substitute them.

Thus, Article 41 requires that sea lanes or traffic separation schemes be internationally adopted before permitting their designation by a strait state. The only unilateral competence in this article is to prevent the international organization from imposing a scheme without the consent of the strait state.

Only Article 42 is entitled “Laws and regulations of States bordering straits relating to transit passage.” No other article in the straits chapter gives any regulatory competence to strait states. Substantively, Article 42 provides for four instances, and four instances only, where coastal states “may make laws and regulations relating to transit passage.” The first category is for laws and regulations implementing Article 41, and thus does not provide a basis for regulation except to effectuate sea lanes or traffic separation schemes as internationally adopted. The second category permits pollution control laws and regulations “giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait.” Again, this authority is limited to effectuating international regulations previously adopted and relating only to discharge standards and not, for example, to design, construction, manning, or equipment. The third basis of authority concerns fishing vessels and permits laws for “the prevention of fishing, including the stowage of fishing gear.” The fourth and final basis permits strait states to make laws and regulations concerning loading and unloading for effectuating their “customs, fiscal, immigration or sanitary regulations.” Article 233 demonstrates that nothing in the marine environment chapter, which deals with the sensitive vessel-source pollution problem, adds to this prescriptive

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competence of strait states with respect to transit passage, and it clarifies the circumstances in which violation of internationally established discharge standards or traffic separation schemes, including associated regulations on under-keel clearance, may entail enforcement measures against vessels in transit passage.

This narrowly drawn regulatory competence is then subjected to four important sets of safeguards. First, Article 42(2) provides: "Such laws and regulations shall not discriminate in form or in fact amongst foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section." Second, Article 44 provides: "States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which it has knowledge. There shall be no suspension of transit passage." Third, Articles 31, 32, 42(4) and (5), 233, and 236 taken together establish that such laws and regulations may not be directly applied to warships or other vessels or aircraft entitled to sovereign immunity. And finally, Article 233 incorporates by reference certain additional safeguards into its enforcement authority.

As a result of both the narrowness of coastal state regulatory competence and the strong safeguard provisions of the UNCLOS text, coastal states are not given authority to suspend or hamper submerged transit, overflight, or other essential components of the transit passage regime.

Counter-textual Arguments. Reisman assumes broad strait state prescriptive and applicative competence stemming from Articles 39, 40, 41, and 42. He writes: "Though Article 39 speaks of user duties, it necessarily imports coastal rights. It must be construed as allowing the coastal states a broad prescriptive and applicative competence with regard to transit passage unless we are to assume that the 'duties' are no more than moral imprecations." 48

Reisman is correct in his premise that Article 39 establishes user duties and "necessarily imports coastal rights"; a duty, of course, implies a correlative right. Wesley Hohfeld has at least taught us that. 49 But his conclusion that "it must be construed as allowing the coastal state a broad prescriptive and applicative competence" is not required as a matter of logic and is inconsistent with the overall context of the UNCLOS text. That the coastal state has rights correlative to the Article 39 flag state duties does not mean that they are unilateral rights to suspend transit passage, and much less that they are of prescriptive and applicative competence. To use a homely property analogy, that I have a right as landlord to receive rent from the tenant does not mean that I necessarily have a right unilaterally to evict him by force when the rent is not paid, much less to prescribe new regulations for payment of rent not spelled out in the lease.

48 Reisman, supra note 4, at 69.
49 See generally, W. Hohfeld, Fundamental Legal Conceptions (1923) (see particularly the Introduction by Walter Wheeler Cook).
Counter to the Reisman theory, the whole structure of UNCLOS serves to decouple transit passage rights from flag state obligations, as was discussed in the preceding section. That is, they are rights (not merely "moral imprecations") to be pursued through diplomatic channels or, where applicable, third-party dispute settlement, but certainly not unilateral action by the strait state. More important than a larger than permissible logical leap, Reisman's argument on this point ignores the fact that coastal state prescriptive and applicative competences under the straits chapter are narrowly limited to those enumerated in Article 42 (and the safeguards that go along with them). It is no accident that only Article 42 speaks of "[l]aws and regulations of States bordering straits relating to transit passage." No other article in the straits chapter, including Article 39, uses such terminology. And if such competence was intended to be granted under Article 39, why was it not included in the Article 42 listing? The inclusion of a specific cross-reference to implementation of Article 41 shows that where some other article was intended to be implemented unilaterally by strait states, it was included in the Article 42 list. Furthermore, Reisman's interpretation does not seem to square with the clear purport of Articles 233 and 236.

Reisman also uses his assumption of broad coastal state regulatory competence to cast doubt on a right of submerged transit. Thus, he argues, "Article 39(1)(c) [would not] appear to override the state's regulatory competence for matters such as navigation and safety. In other words, the user would be hard pressed to justify evading such regulations on grounds that they required departure from its normal mode of transit."\(^{50}\) And:

There are . . . internal contradictions if Article 39(1)(c) is read to permit submerged transit of straits. The subsection immediately preceding subparagraph (c) recognizes the coastal state's competence to appraise the contemplated passage, *inter alia*, for its conformity to the principles of international law embodied in the UN Charter. If submerged passage is secret passage, then how can the coastal state perform that function under subsection (b)? How can it control unauthorized research and survey activities which may be undertaken by the submerged vessel under Article 40? How can it implement its safety and sea lanes regulations (Articles 41 and 42), and so on? If anything, the structure of the entire section dealing with transit passage emerges as a more coherent drafting complex if no right of submerged passage is hypothesized.\(^{51}\)

This line of argument fails completely if, as has been demonstrated in this and the immediately preceding sections, states bordering straits have no right of unilateral action to inhibit passage based on the flag state duties under Articles 39 and 40, and no right of regulatory competence except as is narrowly provided in Article 42 and subject to the safeguards applicable to that provision. In fact, under Article 42 any sea lanes or pollution discharge regulations would need to be rooted in previously adopted international regulations. Even then, they could not "have the practical effect

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\(^{50}\) Reisman, *supra* note 4, text at note 55.

\(^{51}\) *Id.*, text at note 58.
of denying, hampering or impairing the right of transit passage [including submerged transit]” and could not be applied against warships such as an SSBN submarine. If anything, Reisman’s argument is yet another good reason why the UNCLOS text is constructed as it is, as not providing unilateral strait state competence to prohibit transit pursuant to Article 39 duties or broad coastal state regulatory competence, both of which would indeed be inconsistent with a meaningful right of submerged transit.

Negotiating Context. Again, as with certainty of transit rights, it was fully understood in the negotiation that one of the defects of the innocent passage regime, if applied to straits, was a vague and overly broad coastal state regulatory competence that could be productive of conflict and seriously impair freedom of navigation through straits. Maritime states, including the United States, asserted repeatedly that any such competence concerning safety and pollution matters would need to be narrowly circumscribed and could not be applied against warships or other vessels or aircraft entitled to sovereign immunity. Extreme strait states espoused contrary views. The United Kingdom articles reflected the former view, and by way of the SNT became the ICNT straits text. Subsequently, the United States, the Soviet Union, and other maritime powers accepted this text by not objecting during the article-by-article reading of the SNT in the Second Committee at the 1976 New York meeting. Spain, however, among other extreme strait states, continued to press its views and in 1976 offered a set of amendments that among other things would have permitted strait states to establish sea lanes and traffic separation schemes unilaterally, except those established “through the waters of two or more States.”

In April 1978, Spain again introduced amendments that not only reiterated the previously espoused sea lanes provision but also included specific provisions broadening the limited pollution control authority of Article 42(1)(b) and requiring under Article 39 that ships comply with safety and pollution control standards “established by the coastal State, in accordance with the provisions of Article 42.” Also in April 1978, Morocco introduced a set of amendments to the straits chapter that would have substantially broadened strait state regulatory competence under Article 42, including a new provision concerning “marine scientific research and

52 Most recently, Ambassador Richardson confirmed:

The provisions on these subjects [transit passage and archipelagic sea lanes passage] emphasize the obligations of transiting states rather than the right of coastal States to control transit. This approach is designed to protect legitimate coastal State interests without permitting coastal State interference with transit. As you might expect, the only significant exceptions pertain to enforcement of internationally approved maritime safety and pollution measures.

Remarks by Ambassador Richardson, supra note 8, at 11. The “exceptions” refer to Article 233 in conjunction with Article 42.

53 See Amendments . . . Proposed By the Spanish Delegation, supra note 39, at Art. 42(4).

54 See the Informal Suggestion by Spain, supra note 32, at Arts. 39(2)(a), 41(5), and 42(b) and (e).
hydrographic surveys.” These and similar amendments were not adopted by the conference. But if Reisman’s interpretation were correct, there would have been no need for Spain or Morocco to introduce them. Also contrary to Reisman’s view, these amendments recognize that strait state regulatory competence is established under the straits chapter only by Article 42.

Finally, the current version of Article 233, which cross-references Article 42 and clarifies the circumstances in which laws and regulations would be directly applicable to ships in transit passage, was worked out in 1977 after the adoption of the straits chapter as part of a concession on commercial vessels made to Malaysia. This article, with its carefully limited enforcement right, strongly confirms the basic structure of the UNCLOS text described in this section and is inconsistent with the Reisman argument of a threat to submerged passage from inferred broad strait state prescriptive and applicative competence.

Transit Rights for Warships

Text. The Corfu Channel case made clear that warships as well as commercial vessels have a right of transit through straits used for international navigation. The preparatory work for the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, however, reveals that there was a debate about requiring warships to provide notice to coastal states for innocent passage through the territorial sea, or even to obtain coastal state consent for passage. The issue was resolved in that convention, in conformity with the Corfu decision, by not requiring any such notification or consent, even for passage through the territorial sea in general. Nevertheless, in the intervening years such conditions have sporadically been raised.

Both the innocent passage and straits sections (and the archipelagic states chapter as well) of the UNCLOS text continue the Geneva Convention practice that no such notification or consent is required. No article in either part establishes any such requirement, and the references in Articles 19(2)(b) and (f), 29, 30, 31, 32, 39(1)(b) and (c), 39(3)(a), 42(5), 54, 233, and 236 clearly establish that transit by warships and military aircraft in straits (as well as other categories of vessels and aircraft in straits) was contemplated. Similarly, Articles 37 and 53 in the straits and archipelagic sea lanes passage chapters use the phrase, “all ships


56 See generally McDOUGAL & BURKE, supra note 15, at 216–21. They conclude on the merits of this issue:

Denial of a right of innocent passage would . . . constitute a greater burden on passage than in the past when lesser breadths were claimed, yet because of progress in weapons technology, would offer much less protection against actual harm to coastal interests. For these reasons it appears desirable from a community policy perspective that there should be no special, discriminatory rule established in regard to access of warships.

Id. at 194.
and aircraft enjoy the right of transit [archipelagic sea lanes] passage,” a phrase wholly inconsistent with any differentiation on the basis of the military or commercial nature of the vessel or aircraft. Indeed, the security concerns of the “archipelagic states” are creatively dealt with by providing for archipelagic sea lanes and for the regime of innocent passage outside such sea lanes, and by permitting temporary suspension of innocent passage pursuant to Article 52(2) for specified areas outside such sea lanes.

Counter-textual Arguments. To my knowledge, there have been no arguments advanced that the UNCLOS straits regime (or any other provision of the ICNT) in any way requires notification or consent for warship passage.

Negotiating Context. On this issue, as well as on other vital transit rights, the United States and other maritime nations have repeatedly stated that they could not accept requirements for either notification or consent for warship transit. Contrary views were initially advanced by certain extreme strait states in discussion and draft articles, although the issue did not become as significant as it had at Geneva in 1958. The SNT maintained the freedom in this respect provided by the Territorial Sea Convention, both for vessels in innocent passage in general and for transit passage of straits in particular. In 1976 Yemen introduced an amendment to the RSNT straits chapter that stated: “The coastal State may require prior authorization or notification for the passage through its strait in its territorial sea of foreign warships or nuclear-powered ships or ships carrying dangerous substances.”

This amendment, which would have reversed the decision of the International Court of Justice in the Corfu Channel case and rolled back more than 20 years of state practice to the contrary, was not adopted by the conference.

Archipelagic Sea Lanes Passage

Text. Part IV of the ICNT, “Archipelagic States,” establishes a right of “archipelagic sea lanes passage” through archipelagic waters and adjacent territorial sea seaward of archipelagic baselines. This right is in all major respects the equivalent of the right of transit passage through straits. In fact, Article 54 expressly incorporates by reference Articles 39, 40, 42, and 44 of the straits chapter. Comparison of Article 53(3) with Article 38(2) illustrates the interchangeability in the text of the phrases “freedom of navigation and overflight” and “navigation and overflight in the normal mode.”

Counter-textual Arguments. To my knowledge, no arguments have been advanced that interpret the right of archipelagic sea lanes passage counter to its clear textual intent.

Negotiating Context. “Archipelagic States,” part IV of the ICNT, was a product of informal consultations between maritime and archipelagic...
states and a balanced Archipelago Working Group composed of both groups. If a convention is ultimately accepted, it will recognize the concept of mid-ocean archipelagic states for the first time in the history of oceans law, and thus will meet important political objectives of those states. As may be recalled, this recognition was not accorded by the First United Nations Conference on the Law of the Sea in 1958. At the same time, the convention would establish a right of archipelagic sea lanes passage in broad sea lanes through archipelagic waters and adjacent territorial seas. The text reflects the understanding—without which the conference would not have accepted the mid-ocean archipelagic concept—that in all major respects the underlying concepts of “transit passage” of straits and “archipelagic sea lanes passage” are identical, including rights of overflight and submerged transit.\(^8\)

**Categories of Straits**

Text. The ICNT recognizes the following four categories of straits used for international navigation.

1. Those governed by Article 35(c), “in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.” This category includes the Turkish Straits, the Danish Straits, and the Strait of Magellan. In those straits all concerned felt that it would be better to continue existing special legal regimes which provide for freedom of navigation. Part III of the text does not affect the special legal regimes in these straits.

2. Those governed by Article 36, in which “a high seas route or a route through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists through the strait.” By definition, these straits contain an equally usable corridor with high seas freedoms of navigation and overflight. Thus, there was no need to apply the straits chapter to them.

3. Those governed by Articles 37 and 38(1), “between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone . . . . except . . . . if the strait is formed by an island of a State bordering the strait and its mainland . . . [and] a high seas route or a route in an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists seaward of the island.” This general category includes the great bulk of straits used for international navigation and would be governed by the regime of transit passage established in the straits chapter. Similarly, straits in archipelagic waters would be governed by the equivalent regime of archipelagic sea lanes passage.

4. Those governed by Article 45 that either fall within the “island exception” of the preceding category (Article 38(1)) or that lie “between one area of the high seas or an exclusive economic zone and the territorial sea of a foreign State.” In these straits the regime of nonsuspendable innocent passage in accordance with Article 45.

\(^8\) See also Oxman, *supra* note 41, at 66.
and section 3 of part II of the text applies. If an equally convenient route exists seaward of an island, it was felt that there was no need to preserve more than a right of nonsuspendable innocent passage through such a strait. This "island exception" applies to straits such as Pemba (between Pemba Island and the Tanzanian mainland) and Messina (between the Italian mainland and Sicily). The category of high seas to the territorial sea of a foreign state includes the Strait of Tiran, Head Harbor Passage, the Strait of Georgia, and the Gulf of Honduras, all of which are overlapped by a 3-mile territorial sea. The existing 1958 Geneva Convention provides for nonsuspendable innocent passage in this category of straits connecting high seas to the territorial sea of a foreign state. No changes from existing law, except with respect to clarification of the innocent passage regime, apply to this high-seas-to-territorial-sea category by virtue of Article 45.

It should also be noted that the overall qualification applying to all these categories, "straits used for international navigation," reflects customary international law as evidenced by the Corfu Channel case, as well as by Article 16(4) of the 1958 Territorial Sea Convention. Therefore, this threshold test will not create additional restrictions on straits transit. Indeed, any category of "straits not used for international navigation" is extremely small. Presumably, the regime of innocent passage would apply pursuant to ICNT/Rev. 1 Article 17 in any such straits overlapped by the territorial sea, and if broader than 24 nautical miles, full freedom of navigation and overflight would apply pursuant to Articles 58 and 87.

UNCLOS has not altered or clarified the existing uncertainty in customary international law over the definition of "straits used for international navigation." Still, the Arctic straits controversy (including the Northwest Passage question) may be defused by the "[i]ce-covered areas" understanding embodied in Articles 234, 236, and 296, which would apply "within the limits of the exclusive economic zone."

Counter-textual Arguments. Reisman indicates that UNCLOS "establishes two categories of straits." Actually, it recognizes four categories of straits used for international navigation with four different regimes, as enumerated above, and only the regime of transit passage (with its counterpart archipelagic sea lanes passage) is new (although the other regimes may be varied for some straits falling under the "island exception" of Article 38(1)).

Of greater importance, Reisman suggests that there is an "undertow" running toward Article 45 that over the long haul could subject vital straits to the less protective regime of innocent passage. He seems to overstate the importance of the Article 45 exception to the transit passage regime and to understate the extent to which innocent passage already applies in the high-seas-to-territorial-sea category of straits.

First, Reisman misinterprets Article 45 when he says that it includes "those straits not included in ICNT Article 38." Article 45 includes instead those "[e]xcluded under article 38, paragraph 1, from the application of the régime of transit passage." The difference, though subtle, is sub-

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59 Reisman, supra note 4, at 65.
60 Id. at 66.
61 Id. at 65–66 (emphasis added).
stantial. It means, for example, that the Article 35(c) and Article 36
straits are not included within the Article 45 nonsuspendable innocent
passage regime.

Second, the “island exception” from the transit passage regime by defini-
tion is operative only “if a high seas route or a route in an exclusive eco-
nomic zone of similar convenience with respect to navigational and hydro-
graphical characteristics exists seaward of the island,” and then only “if
the strait is formed by an island of a State bordering the strait and its main-
land.” To argue that the straits within the “island exception,” such as
Pemba, are “vital” in requiring transit passage as opposed to nonsuspendable
innocent passage, when such an alternative route is available, may be to
overwork the term. In Reisman’s own frame of reference, one would
also need to ask how many of the straits in this category are less than 6
miles wide and, as a result, already governed by a regime of nonsuspendable
innocent passage.

Third, in connection with the high-seas-to-territorial-seas category, Reis-
man is theoretically correct that a shift from a 3- to a 12-mile territorial sea
would increase the number of straits connecting to “the territorial sea of a
foreign State,” and thus those in which innocent passage would be ap-
plied. In the real world, however, no strait would be so affected because
those in this category are all less than 6 miles wide. Thus, under the as-
sumptions of Reisman, Tiran would already fall under the nonsuspendable
innocent passage regime of Article 16(4) of the 1958 Territorial Sea Con-
vention (at least for parties to the convention), were it not for applicable
UN Security Council decisions. Indeed, the addition of the high-seas-to-
territorial-seas provision was regarded at Geneva in 1958 as designed ex-
pressly for Tiran. But the Security Council has dealt specifically with
the issue in Resolutions 242 and 338 as part of the overall effort at achieving
a durable Middle East peace. These actions, which affirm “the necessity
... [f]or guaranteeing freedom of navigation through international water-
ways in the area,” are binding on all members of the United Nations, and
thus override both the Territorial Sea Convention and UNCLOS Article
45(1) (b) for the Strait of Tiran (as would any agreements concluded be-
tween the parties pursuant to the Security Council requirements, e.g., the
recent Egyptian-Israeli agreement cited by Reisman).

Finally, the suggestion that the use of the term, “straits used for inter-
national navigation,” in the straits chapter is “a legislative overruling of the
Corfu judgment,” narrowing the customary international law right of
passage, is wrong. The International Court of Justice specifically said in
that case:

It is, in the opinion of the Court, generally recognized and in ac-
cordance with international custom that States in time of peace have
a right to send their warships through straits used for international

62 Id., text at note 45. 63 Id. at 67.
66 Reisman, supra note 4, text at note 43.
navigation between two parts of the high seas without the previous authorization of a coastal State. . . . 67

And again:

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 geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation.68

The UNCLOS text tracks the Corfu decision closely and, if anything, broadens the category of straits in which passage is protected. In any event, as Reisman points out, “used for international navigation” is found in the 1958 Territorial Sea Convention, to which the United States is party. Reisman might also have pointed out, however, that both the 1958 convention and the UNCLOS text broaden the Corfu decision by extending non-suspendable innocent passage to straits connecting to “the territorial sea of a foreign State.” Furthermore, since the qualification, “used for international navigation,” appears not only in Article 37 (incorporated by reference in Article 38) but also in the title of the straits chapter, as well as in Article 45 itself (as a qualifying criterion), Reisman’s argument would not seem to demonstrate much of an “undertow” toward Article 45.

It should be mentioned that Article 45 creates a regime of non-suspendable innocent passage rather than mere “innocent passage,” as Reisman labels it.69 This distinction is not inconsiderable because the non-suspendable regime is the only recognition of the separateness of straits in the Territorial Sea Convention and is an essential protection for passage.

Had Reisman made the point that previous uncertainties over whether a strait is “used for international navigation” have continued under the UNCLOS text, he would be correct. But to say that UNCLOS has not resolved all straits problems is quite different from implying that it has resolved them so as to give less protection to navigation.

Negotiating Context. Article 35(c) on straits with “long-standing international conventions in force” was carefully worded, after lengthy negotiations with the concerned states, to preserve the special legal regimes within the Danish Straits, the Turkish Straits (the Bosphorus), and the Strait of Magellan, without affecting the normal straits chapter coverage of other straits. In all three cases, freedom of navigation is preserved pursuant to the special convention regime.70

68 Ibid. (emphasis added).
69 Reisman, supra note 4, at section III, “Straits.”
70 With respect to the special convention regimes in each of these three straits, see generally E. Brüel, 1 INTERNATIONAL STRAITS 395–200 (1947) (Montreux Convention of 1936 and Danish-Swedish Declaration of 1932), and E. Brüel, 2 INTERNATIONAL STRAITS 11–118, 200–51, 252–424 (1947) (the Danish Straits, the Strait of Magellan, and the Turkish Straits). Passage through the Strait of Gibraltar is not subject to special international treaty provisions within the meaning of Article 35(c) of the revised ICNT. See id. at 165. This was well understood in the negotiations.
Article 36 was intended, and was so understood by those participating in the straits negotiations, as an “exception” to the transit passage regime only because straits more than 24 nautical miles wide would contain a high seas or economic zone route of equal convenience that would make it unnecessary to traverse even a 12-mile territorial sea. It has never been controverted that high seas freedoms of navigation apply and will continue to apply in such straits.

The regime of nonsuspendable innocent passage under Article 45 was intended to apply to “island exception” straits and to those connecting to “the territorial sea of a foreign State.” The first is a narrowly drawn exception made in deference to the availability of a route “of similar convenience.” The paradigm straits of applicability for this exception are the Pemba Channel and the Strait of Messina. The second exception continues the broadening of the Corfu decision described in the previous section.

V. THE UNCLOS CONSENSUS AND THE REGIME OF THE TERRITORIAL SEA

Breadth of the Territorial Sea

Reisman writes that UNCLOS “has . . . produced a new regime” broadening the territorial sea and that

[t]he rather alarming tendency, enunciated most authoritatively by the International Court in the Iceland Fisheries case, to view select provisions in international drafts as indicators of consensus and hence evidence of innovative customary law, despite their failure to win the formal support necessary for adoption in conformity with constitutive processes, virtually transforms Article 3 [establishing a maximum permissible breadth of 12 nautical miles for the territorial sea] into custom.22

I would agree that the existence of the law of the sea negotiations, with the consequent political focus on oceans jurisdictional limits, has probably accelerated the trend toward a 12-mile territorial sea. Nevertheless, Reisman does not fully treat this issue in context. First, prior to the UNCLOS negotiations, the trend toward a territorial sea of 12 miles (or even more) was unmistakable. Indeed, it was one of the reasons the United States joined with the Soviet Union and other states in seeking a new straits transit regime to be coupled with a limit on the maximum territorial sea to 12 nautical miles. Through time the 12-mile trend would likely have made itself felt as clearly as it is today anyway, particularly since the Soviet Union had itself taken the step long before UNCLOS. Second, any effort to contain the overall trend of unilateral extensions of coastal state jurisdiction through international negotiation would inevitably have stimulated appetites as well.

If the UNCLOS text is creating instant custom in this area, it should be remembered that this custom also acts against a territorial sea broader than 12 miles, a not inconsiderable issue today when more nations claim beyond 12 than a 3-mile or narrower limit. Additionally, if UNCLOS is creating

21 Reisman, supra note 4, at 59.  
22 Ibid. (footnote omitted).
custom concerning a 12-mile limit, it is simultaneously creating custom for transit passage of straits, as these issues have been linked at every stage of the negotiation. Finally, if Reisman is correct that Article 3 has virtually been transformed into custom, a proposition that does not at this time reflect the U.S. view, then it would no longer seem appropriate to use the 3-mile limit and high seas freedom as the point of comparison for approval of UNCLOS—unless one were to spell out, as I believe is fully sustainable, an equivalent customary-historic right to freedom of navigation through, over, and under straits used for international navigation.

**Innocent Passage**

In addition to establishing a separate regime for straits transit, the UNCLOS text updates and strengthens the regime for innocent passage through the territorial sea. This “Innocent Passage” section of the territorial sea chapter is rooted in the provisions of the 1958 Geneva Territorial Sea Convention but in important respects modernizes and improves it. These improvements include:

- The vague regulatory competence of the coastal state, reflected in Article 17 of the 1958 Geneva Convention, has been clarified in Article 21 of the ICNT in a balanced fashion and reasonably accommodates both coastal state concerns and navigational rights.

- Coastal state regulatory competence over pollution from vessels in innocent passage has been clarified to balance environmental concerns and protection of navigational rights. In particular, Article 21(2) makes it clear that no “[s]uch laws and regulations shall . . . apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.”

- Coastal state duties not to hamper innocent passage have been strengthened in Article 24. Most importantly, the article includes new obligations not to “[i]mpose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage” and not to “[d]iscriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.”

- Balanced provision for sea lanes, traffic separation schemes, and nuclear-powered ships is made in Articles 22 and 23.

- The ambiguity associated with the concept of “innocent passage” has been somewhat reduced by limiting it in Article 19(2) to activities engaged in “in the territorial sea” and by defining it in the same article in terms of a specified list of 12 noninnocent forms of activity.

- Provision has been made in Article 296 for compulsory third-party settlement of innocent passage disputes, at least those concerning commercial vessels.

One of the major defects of the 1958 Territorial Sea Convention is that it did not deal with the environmental issues associated with innocent passage. As a result, it left doubts about competence genuinely needed by coastal
states, such as authority to establish traffic separation schemes (outside of straits), and risked their overreacting to environmental threats by trying to limit navigational rights as, for example, by establishing design or construction standards for vessels in transit. This issue was debated at length at UNCLOS and, in association with its treatment in the chapter on marine pollution, was resolved in a creative and balanced manner.

Failure to provide for assured recourse to third-party compulsory dispute settlement was also a significant weakness of the Territorial Sea Convention. Without it there was only halting opportunity to develop a reasonable jurisprudence of “innocent passage” based on the treaty. Provision for compulsory settlement of disputes, even if confined to commercial vessels, would be a significant strengthening of oceans law in this area.

Without mentioning the several important respects in which the UNCLOS innocent passage regime has been strengthened over the 1958 Geneva Convention currently binding on the United States, Reisman offers several criticisms of the updated regime that center on the definition of innocent passage. He is particularly concerned by what he interprets as both a removal of the Geneva limitation that the peace, good order, or security of the coastal state must be prejudiced and a broadening of the range of effects that can be determined to be noninnocent.\(^7\) This interpretation is based exclusively on Article 19, paragraph 2 through 2(a), a portion of the article entitled “Meaning of Innocent Passage” that attempts an objective definition. That portion provides:

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State, if in the territorial sea it engages in any of the following activities:

(a) Any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations. . . .

While agreeing with Reisman that it is important to increase specificity and objectivity in an article so importantly relating to community navigational rights, I believe his concern is overstated and that the UNCLOS text makes some progress in defining innocent passage objectively.

First, while Reisman’s argument that Article 19(2) abandons the Geneva limitation that prejudice must be to the coastal state for passage to be noninnocent is a possible interpretation, I believe that a better one and the conference’s intention is that it does not change the Geneva Convention in this respect. Article 19(1) and the first paragraph of 19(2) specifically retain the requirement, “of the coastal State,” which seems inconsistent with the interpretation that it has been eliminated. Moreover, 19(2)(a) itself retains the phrase, “of the coastal State,” which can be read as easily, if not more easily, as modifying the “in any other manner” clause, just as this clause is modified by “threat or use of force” in the first half of 19(2)(a). That is, the “in any other manner” clause refers to and requires a threat

\(^7\) Id., text at notes 31–35.
or use of force against the coastal state. As a textual matter this interpretation is reinforced by the repeated use of "the coastal State" in limiting the noninnocent activities enumerated in Article 19(2). The phrase appears five times in the list of activities, whenever drafting suggests the need for a limiting factor. Most importantly, Article 19(2)(a) was taken from Article 2(4) of the UN Charter, and the phrase "any other manner" clearly refers back in that context to threat or use of force. The "coastal State" phrase is merely substituted for the "of any State" phrase in Article 2(4), and thus is intended in an obvious way to limit the broader applicability of the Charter usage to threats against the "coastal State" only. Moreover, why should a more serious threat against territorial integrity be limited to threats against the coastal state if lesser violations of Charter principles in the Article 19 enumeration were not so limited? As one who helped negotiate this provision, I certainly understood that it was modeled on the Charter prohibition against use of force in the manner I have just described.74 Never was there any sign during the negotiations that Article 19(2) was to make the major change in the Geneva Convention framework that Reisman finds in it.

Second, Reisman understates the importance of the new Article 19(2) phrase requiring that activities to be noninnocent must be engaged in "in the territorial sea." Given the long background of this provision in oceans law, it seems more reasonable to interpret it as a limitation intended to avoid the expansive interpretations that Reisman rightly fears. McDougal and Burke point out in their encyclopedic study of oceans law that the failure of the 1958 Geneva Conference to include a weaker but similar phrase meant that it was "now open to the coastal state to take other factors into account, including, for example, the purpose of the projected passage, the cargo carried and destination in a third state."75 In this respect a change from Geneva is intended by the ICNT.

Third, Reisman fails to take account of the explicit new duty in Article 24 that "in the application of this Convention . . . the coastal State shall not . . . [d]iscriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State." Such an obligation would seem to point against an expansive interpretation of 19(2) that sees it as permitting discrimination against third states, based on their alleged violation of Charter norms.

Fourth, under the overriding norms of the Charter any state, coastal or not, is free pursuant to Article 51 collectively to assist a state unlawfully attacked in violation of Article 2(4). But if such a determination is made

74 A statement of the U.S. representative in the Second Committee at Caracas on July 22, 1974, lends some support to this interpretation of the limitation to forceful threats against the coastal state. Thus, it was said: "The convention should require that ships and aircraft in transit refrain from any threat or use of force, in violation of the Charter of the United Nations, against the territorial integrity or political independence of a State bordering the strait." Record of the 12th meeting of the Second Committee (July 22, 1974), 2 OFFICIAL RECORDS: THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 128 (1974).
75 McDougal & Burke, supra note 15, at 253.
by a coastal state, it loses its neutral status and under the law of neutrality could itself be treated as a belligerent. This potential loss of neutral status should be a deterrent to such coastal state interventions against passage.

Fifth, Reisman may somewhat overstate the certainty of the linkage between prejudice and strait state interests in the Territorial Sea Convention. McDougal and Burke suggest this linkage was the principal reason for the separation between the first and second sentences in Article 14(4), but that "this supposed dichotomy between innocence of passage and conformity with international law cannot be taken as an absolute separation." 76 And with particular relevance to Reisman's concern about a possible new linkage to Charter norms, McDougal and Burke go on to say, "infringement of more fundamental prescriptions, such as those of the United Nations Charter, would clearly justify prohibition of passage as non-innocent." 77 Whether or not one accepts this interpretation if applied to a breach other than toward the coastal state, it points out yet again that the 1958 innocent passage regime was no model of clarity. By contrast, the textual thrust of the ICNT is to limit the determination of noninnocence to threats or use of force against the coastal state in violation of the Charter.

Finally, it is not true that "only when [the coastal state] has affirmatively characterized a passage as appropriately innocent] is the passage insulated from lawful suspension by the coastal state," as Reisman suggests. 78 The provisions of the innocent passage regime do not in this respect either require affirmative action by the coastal state or assign complete discretion to it. Rather, they establish an objective normative standard that is binding on coastal and transiting states alike. Under Article 25 the coastal state may take steps to prevent passage "which is not innocent" (emphasis added), not which it deems not to be innocent. If passage is innocent, then the coastal state has no right under UNCLOS to prevent it, and transiting states presumably can be expected to defend their rights of passage. It should also be remembered that in a major improvement over the 1958 Geneva regime, third-party compulsory adjudication is available for determining noninnocence, at least with respect to disputes involving commercial vessels.

VI. Conclusion

Despite the contemporary development of new uses of the oceans, their use as a global highway for trade and commerce remains economically the most important. Oceans commerce is an indispensable part of the highly interdependent global economy. If to this economic dependency is added the vital, and often interdependent, interests of many nations in the use of ocean space for strategic deterrence and defense, the protection of the community interest in navigational freedom throughout the world's oceans becomes of first-rank importance.

Fortunately, there is no necessary conflict between the extension of

76 Id. at 257–58.
77 Id. at 258.
78 Reisman, supra note 4, at 65.
coastal state jurisdiction over resources and the full protection of community navigational freedoms. Navigational use can be repeated without depletion and most efficiently remains a shared freedom. In reaffirming that basic truth for the present era in oceans law, it is essential that it be clearly expressed in a functional separation of expanded forms of coastal state resource jurisdiction and full protection of navigational freedom. Dysfunctional claims to ocean space are not most usefully avoided by futile efforts to prevent all claims, but rather by allowing specialized resource competence and limited functional jurisdiction when in the common interest and simultaneously protecting navigational and other community freedoms fully and effectively in areas of expanded coastal state jurisdiction. For example, modern oceans law must provide for effective protection from vessel-source pollution. Any construct that fails to address itself to this environmental issue or the major trend toward expanding the resource jurisdiction of coastal states invites overreaction from those states, which would threaten the environment or navigational freedom, or even both. It is in establishing this careful functional division in the straits regime, which respects both legitimate coastal state needs and protection for navigational freedom, that UNCLOS has made a lasting contribution. That contribution is likely to be more enduring if UNCLOS succeeds in concluding a comprehensive treaty, but in any event it seems likely to have substantial influence on the development of oceans law.

Criticisms of the UNCLOS straits regime rooted in misperceptions of purported trade-offs or narrow analyses of national needs view the issues through a peephole on the world. Richard Darman's *Foreign Affairs* article denigrating the importance of straits transit misses the point. The real stake is not the strategic interests and national needs of any one nation, however important. Rather, it is no less than maintenance, indeed strengthening, of the common interest in navigational freedom in an age of increasingly complex oceans use and oceans politics. The regime of straits transit is the most essential element in that freedom. And in the real world of oceans politics, it is nonsense to believe that either the United States or the Soviet Union would accept a law of the sea treaty that did not fully protect freedom of navigation through straits.

Similarly, criticisms that do recognize the importance of straits transit but assert narrow interpretations of the work at UNCLOS, though correctly cautious in dealing with so important a community interest, overstate both the certainty of the existing international law of straits transit and the uncertainty alleged to be associated with the new UNCLOS regime. In my judgment, there is no reasonable doubt, based on either a purely textualist or a broader contextual interpretation of the UNCLOS text, that the straits regime protects freedom of navigation through, over, and under straits used for international navigation. Specifically for covered straits this protection includes:

- a right of overflight as a general right of oceans law;
- recognition of the separate needs of straits transit as opposed to passage through the territorial sea in general;
the excellent analysis by Burke and, I believe, reflect a common interpretation at UNCLOS, including that of the United Kingdom as principal draftsman of the background text as well as those of the United States and the Soviet Union as principal affected nations. Indeed, I know of no interpretation to the contrary that has been advanced by any nation participating at UNCLOS.

It is to be hoped that the major effort of over 10 years that has gone into UNCLOS by nations and leaders from all regional groups will result in a widely accepted “Caracas Convention on the Law of the Sea.” For that to happen, the conference must still clear formidable hurdles such as deep seabed mining, continental margin delimitation, principles for resolution of continental margin boundary disputes, protection for marine scientific research, protection for cetaceans, final articles, and procedures for completing and adopting a package text. With or without a new convention, however, the UNCLOS straits regime seems destined to serve as a powerful model for the development of a new customary law of straits transit.

On a topic as important as UNCLOS straits transit, the appearance of articles interpreting the text during the continuation of the conference may, of course, tempt disgruntled participants to attempt to reinforce revisionist interpretations.

Acceptance—as a reasonable accommodation—of the UNCLOS straits regime reflected in the ICNT should not be assumed to extend to all other aspects of the ICNT, or even to all other navigational and security aspects of that text. In my judgment, the text remains seriously deficient on seabed mining, the “status of the economic zone,” protection of cetaceans, delimitation of the outer edge of the continental margin, and marine scientific research. In its present form it could not obtain Senate advice and consent.