

## STRAITS USED FOR INTERNATIONAL NAVIGATION

The regime of passage through straits used for international passage is entirely independent of the regime of the territorial sea; to the extent to which it is applicable, the former takes precedence over any other regulations of the Convention.<sup>1</sup> Applicability of the provisions is dependent on two conditions: (1) there must be a recognized strait used for international navigation<sup>2</sup> which is not regulated by long-standing international conventions<sup>3</sup> and (2) the vessel must be in transit passage, continuous and expeditious traversing<sup>4</sup> without delay<sup>5</sup> of the strait. Other activities or vessels not in "transit passage" are treated in accordance with the provisions applying to the territorial sea<sup>6</sup>.

The Convention does not define the term "strait". Any geographical formation commonly understood to be a navigable strait would therefore fall under these provisions. However, Part III applies only to those straits which are used for international navigation<sup>7</sup> unavoidable for convenience of navigation<sup>8</sup> and provide access from one part of an exclusive economic zone or the high seas to another part of an exclusive economic zone or the high seas<sup>9</sup>. As the exclusive economic zone commences twelve nautical miles from the baseline, the regime of the passage of straits will generally apply only in straits with a width of twenty-four nautical miles or less, for when there is within the strait an equally convenient route which is part of the high seas or the exclusive economic zone, the regime of passage through straits does not apply, just as it is not applicable if one end of the strait opens only into the territorial sea of a third state<sup>10</sup>.

The concept of transit passage takes its place midway between "freedom of navigation"<sup>11</sup> and "innocent passage,"<sup>12</sup> while being related more closely in structure to the latter. Transit passage includes provisions of conduct<sup>13</sup> and the use of sea lanes and traffic separation schemes;<sup>14</sup> states bordering straits are obligated not to hamper any passage<sup>15</sup> and they have no right to suspend transit passage temporarily even in specifically designated areas as is possible for innocent passage in the territorial sea<sup>16</sup>. The jurisdiction of states bordering straits is restricted to administration: navigation (including sea lanes and traffic separation schemes)<sup>17</sup> pollution, fishing, loading and unloading<sup>18</sup>. However, it also includes the fields for which the state has jurisdiction in the contiguous zone<sup>19</sup> namely the prevention of infringement of customs, fiscal, immigration, and sanitary laws<sup>20</sup>. Any such regulations may not be discriminatory nor may they have the practical effect of abolishing the right of transit passage<sup>21</sup>. Vessels may not conduct research and survey activities without the consent of the states bordering the strait<sup>22</sup>. Aircraft may overfly the straits<sup>23</sup>. Both vessels and aircraft must comply with coastal state regulations<sup>24</sup> refrain from threats<sup>25</sup>, and respect international regulations regarding safety at sea and pollution<sup>26</sup>, regulations for prevention of pollution are to be established by agreement<sup>27</sup>. It should be emphasized that the Convention provisions in respect to pollution from vessels<sup>28</sup> do not affect or apply within the regime of straits; only if there is major damage or the threat of major damage may the bordering states act<sup>29</sup>.

The right of transit passage also applies without restriction to warships and government-owned commercial vessels, but the flag state in each case is responsible for any damage caused by vessels which are entitled to sovereign immunity<sup>30</sup>.

<sup>1</sup> Art. 34, 45

<sup>2</sup> Art. 37; 38, Para. 1;45

<sup>3</sup> Art. 35, Subpara. (c)

<sup>4</sup> Art. 38, Para. 2

<sup>5</sup> Art. 39, Subpara. 1 (a)

<sup>6</sup> Art. 38, Para. 3

<sup>7</sup> Art. 37

<sup>8</sup> Art. 38, Para. 1

<sup>9</sup> Art. 34; 45

<sup>10</sup> Art. 45; 36; 38

<sup>11</sup> Art. 87

<sup>12</sup> Art. 17-26

<sup>13</sup> Art. 39; 40; 42, Para.4

<sup>14</sup> Art. 41; Para. 7

<sup>15</sup> Art. 44

<sup>10</sup> Art. 44; 25, Para. 3

<sup>17</sup> Art. 41.

<sup>18</sup> Art. 42, Para. 1

<sup>19</sup> Art. 33

<sup>20</sup> Art. 42, Subpara. 1(d)

<sup>21</sup> Art. 42, Para.2

<sup>22</sup> Art. 40

<sup>23</sup> Art. 39, Para. 3

<sup>24</sup> Art. 42, Para. 4

<sup>25</sup> Art. 39

<sup>26</sup> Art. 39, Para. 2

<sup>27</sup> Art. 43

<sup>28</sup> Art. 233 (Art. 211-232)

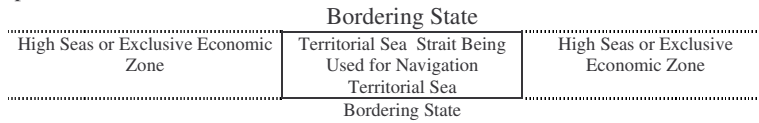
<sup>29</sup> Art. 233

<sup>30</sup> Art. 42, Para. 5; Art. 236

## THE REGIME OF PASSAGE THROUGH STRAITS

### I. STRAITS FOR WHICH THE PROVISIONS GOVERNING PASSAGE THROUGH STRAITS ARE APPLICABLE

Principle: Article 37



*Including:* Internal waters which have become such only as a result of the application of provisions of the Convention for drawing baseline (Article 35, Subparagraph (a))

*Unless:*

- (1) Strait is not used for international navigation (Article 37)
- (2) Passage through the strait is regulated by a long-standing international convention
- (3) Another route of similar convenience through the strait exists in the high seas or exclusive economic zone (Article 36; Article 38, Paragraph 1; Article 45, Subparagraph 1(a)); but the right of innocent passage may not be suspended (Article 45, Para. 2)
- (4) Strait connects the high seas or exclusive economic zone with the territorial sea of a third (foreign) state (Article 45, Subparagraph 1(b)); but the right of innocent passage may not be suspended (Article 45, Paragraph 2)

### II. THE IMPACT OF THE CONCEPT OF "TRANSIT PASSAGE"

Sovereignty and Jurisdiction of the State Bordering the Strait	Right of Transit Passage for Vessels
<p><i>1st Restriction:</i> State may adopt laws and regulations only as enumerated in Article 42</p> <p><i>2nd Restriction:</i> Laws may not be discriminatory nor undermine the right of transit passage (Article 42, Paragraph 2)</p> <p><i>3rd Restriction:</i> Transit passage may not be hampered or suspended (Article 44)</p> <p><i>4th Restriction:</i> Co-operation with other states with regard to navigational aid and pollution prevention (Article 43)</p> <p><i>5th Restriction:</i> No restrictions on warships (Article 38 - all ships enjoy the right of transit passage)</p> <p><i>6th Restriction:</i> Provisions on prevention of pollution from vessels (Part XII, Sections 5, 6, 7, Articles 211-232) are not applicable, unless major damage or threat of major damage (Article 233)</p> <p>NB: Any activity not an exercise of the right of transit passage is subject to regime of territorial sea (Article 38, Paragraph 3)</p>	<p><i>1st Restriction:</i> Vessels must observe laws adopted, in accordance with Article 42 (Article 42, Paragraph 4)</p> <p><i>2nd Restriction:</i> Vessels must comply with duties enumerated in Article 39 (e.g., refrain from threats or use of force), passage must be continuous and expeditious (Article 38, Paragraph 2) and comply with international safety and pollution regulations (Article 39, Paragraph 2)</p> <p><i>3rd Restriction:</i> Vessel must refrain from research and surveys (Article 40)</p> <p><i>4th Restriction:</i> Vessel must observe sea lanes and traffic separation schemes (Article 41, Paragraph 7)</p> <p><i>5th Restriction:</i> Flag states are liable for vessels entitled to immunity (Article 42, Paragraph 5; Article 236)</p> <p><i>6th Restriction:</i> Must comply with international safety and pollution regulations (Articles 38 and 42)</p>