

Chapter X In the Territorial Sea

Right of Innocent Passage

One of the fundamental tenets in the international law of the sea is that all ships of all States enjoy the right of innocent passage through the territorial sea of other States.¹ The LOS Convention provides definitions for the meaning of “passage” (Article 18),² and of “innocent passage” (Article 19), and lists those activities not innocent or “prejudicial to the peace, good order or security of the coastal State” (Article 19(2) a-l).

The United States reaffirmed its position on innocent passage in Proclamation No. 5928, December 27, 1988 (by which the President extended the territorial sea of the United States for international purposes to 12 miles) which states in part:

In accordance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea, within the territorial sea of the United States, the ships of all countries enjoy the right of innocent passage . . .³

Since 1986, government officials from the United States and the Soviet Union (now Russia) have met periodically to discuss certain international legal aspects of traditional uses of the ocean, particularly navigation. On September 23, 1989, the United States and the Soviet Union issued a joint statement adopting a uniform interpretation of the rules of international law governing innocent passage through the territorial sea, which all governments were urged to accept⁴ (*see* Appendix 4 for the full text). Highlights of this joint statement include the following:

- The LOS Convention is cited as containing the relevant rules of international law governing innocent passage of ships in the territorial sea.
- All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage, for which neither prior notification nor authorization is required.
- The list set out in Article 19(2) of the LOS Convention is an exhaustive list of activities that would render passage not innocent. A ship not engaging in any of those listed activities is in innocent passage.⁵
- A coastal State which questions whether a ship is in innocent passage must give that ship an opportunity to clarify its intentions or correct its conduct.

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- Ships exercising the right of innocent passage must abide by all laws and regulations of the coastal State adopted in conformity with international law as reflected in Articles 21, 22, 23, and 25 of the LOS Convention.

- If a warship acts in a manner contrary to innocent passage, and does not correct its action upon request, the coastal State may require it to leave the territorial sea in accordance with Article 30. In such case the warship shall do so immediately.

- Without prejudice to the exercise of rights of coastal and flag States, all differences regarding a particular case of innocent passage shall be resolved through diplomatic channels or other agreed means.

Permissible Restrictions on Innocent Passage

For purposes such as resource conservation, environmental protection, and navigational safety, a coastal State may establish certain restrictions upon the right of innocent passage of foreign vessels. Such restrictions must be reasonable and necessary, and not have the practical effect of denying or impairing the right of innocent passage. The restrictions must not discriminate in form or in fact against the ships of any State or those carrying cargoes to, from, or on behalf of any State.⁶ The coastal State may, where navigational safety dictates, require foreign ships exercising the right of innocent passage to utilize designated sea lanes and traffic separation schemes.⁷ Tankers, nuclear powered vessels, and ships carrying dangerous or noxious substances may be required, for safety reasons, to utilize designated sea lanes.⁸

Article 21 of the LOS Convention empowers a coastal State to adopt, with due publicity, laws and regulations relating to innocent passage through the territorial sea in respect of all or any of the following eight subject areas (which do not include security):

1. The safety of navigation and the regulation of marine traffic (including traffic separation schemes).
2. The protection of navigational aids and facilities and other facilities or installations.
3. The protection of cables and pipelines.
4. The conservation of living resources of the sea.
5. The prevention of infringement of the fisheries regulations of the coastal State.
6. The preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof.
7. Marine scientific research and hydrographic surveys.
8. The prevention of infringement of the customs, fiscal, immigration or sanitary regulations of the coastal State.

This list is exhaustive and inclusive. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.

The coastal State is required to give appropriate publicity to any dangers to navigation within its territorial sea of which it has knowledge.⁹

Temporary Suspension of Innocent Passage

A coastal or island nation may suspend innocent passage temporarily in specified areas of its territorial sea, when essential for the protection of its security. Such a suspension must be preceded by a published notice to the international community and may not discriminate in form or in fact among foreign ships.¹⁰

International law does not define how large an area of territorial sea may be temporarily closed to innocent passage. Since the maximum permissible breadth of the territorial sea is 12 miles, any suspension of passage seaward of this limit would be contrary to international law. The law of the sea conventions do not explain the phrase "protection of its security" beyond the example of "weapons exercises" added in the 1982 LOS Convention. Further, the length of "temporarily" is not specified, but it clearly is not to be factually permanent.¹¹ The prohibition against "discrimination in form or fact among foreign ships" refers to discrimination among flag nations, and in the view of the United States, includes direct and indirect discrimination on the basis of cargo or propulsion. This position is strengthened by the provisions in the LOS Convention explicitly dealing with nuclear-powered and nuclear-capable ships.¹²

In 1986, **Sri Lanka** issued a Notice to Mariners, which purported to require that, with certain exceptions, all vessels must obtain permission before entering Sri Lanka's territorial sea. The United States protested this action in a note which read, in part:

The Government of the United States acknowledges the efforts of the Government of Sri Lanka to interdict maritime activities of armed anti-government groups. The United States Government recognizes the right of the Government of Sri Lanka under customary international law as reflected in article 25 of the 1982 Convention on the Law of the Sea to prevent passage which is not innocent and to suspend temporarily, in specified areas of its territorial sea, innocent passage of foreign ships if such suspension is essential to its security. However, the Notice to Mariners is not in accordance with the right of innocent passage because the suspension of innocent passage is overly broad and because the duration of the suspension is not indicated as being temporary.¹³

The Government of Sri Lanka replied in a diplomatic note which read, in part:

The Notice to Mariners was issued as a measure essential for the protection of Sri Lanka's security, in the light of the prevailing security situation. It is a temporary measure and is not intended to be of a permanent nature. The Notice also contains

a comprehensive list of exempted categories to which it would not apply. These include vessels entering or leaving Sri Lanka ports, vessels navigating through the traffic separation zones off Dondra, vessels engaged in Sri Lanka's coastal trade and vessels navigating in the Palk Strait with the permission of the Commander of the Sri Lanka Navy. [See Map 2.]

The Notice therefore ensures that the right of innocent passage in routes used for international maritime traffic are not interfered with. The Ministry wishes to reiterate that the Notice to Mariners is consistent with international law as reflected in the 1982 UN Convention on the Law of the Sea.¹⁴

Excessive Restrictions on Innocent Passage

A concern of many maritime states pertains to requirements placed by some coastal States on certain types of ships either prior to entering the territorial sea or during transit through these waters. The following analysis highlights the types of restrictions the United States finds excessive under international law.

Time Limits for Passage; Prohibited Zones

In 1985, Libya announced regulations which, in part, purported to limit the right of innocent passage of commercial vessels in the Libyan territorial sea to daylight hours only with prior notification and all ships were required to remain out of certain prohibited zones located within the Libyan territorial sea. The United States protested these claims in a *note verbale* to the Secretary-General of the United Nations:

The Government of the United States notes, however, that [Libyan] regulations 6 and 7 do not appear to be limited in their application to vessels intending to call at Libyan ports, but rather that they address themselves to vessels exercising the internationally recognized right of innocent passage. With regard to the said regulations 6 and 7, the Government of the United States makes the following observations: first, the right of innocent passage is one that under long-standing principles of international law may be exercised by all vessels, whether or not engaged in commercial service; second, international law does not permit a coastal state to limit innocent passage of vessels through its territorial sea to certain periods of time, such as daylight hours only; third, under long-standing principles of international law, the coastal State may not claim to condition the right of innocent passage upon prior notification to it.

The United States further notes that regulation 10 of the said Notice to Mariners requires that vessels strictly comply with directives pertaining to the so-called prohibited zones specified in that regulation. In this regard, the United States observes that zones A, B and D [in the vicinity of Tripoli] are all areas within the territorial sea of Libya and therefore subject to innocent passage by vessels of all States. International law does not permit a coastal State to subject an area of its territorial sea to a permanent prohibition of navigation. . . .¹⁵ [See Map 4.]

In 1981, Finland prohibited innocent passage through fortified areas or other areas of the Finnish territorial sea declared to be of military importance, and prohibited the arrival of vessels in such areas except between sunrise and sunset.¹⁶ The United States protest stated that:

the right of innocent passage through the territorial sea extends to the whole of the territorial sea except as it may be suspended temporarily when such suspension is essential for the protection of security of the coastal state and is duly published. This limited right to suspend innocent passage is recognized in customary international law as reflected in article 25 of the 1982 United Nations Convention on the Law of the Sea, as well as in the second paragraph of article 9 of aforesaid Finnish decree.¹⁷

The State Department provided the following information to the Embassy:

The claim in the first paragraph of article 9, to deny any right of innocent passage through those portions of the Finnish territorial sea which are fortified areas or other areas declared by the Finnish Government to be of military importance, and in article 21 to limit arrival of government vessels in such areas only to the time between sunrise and sunset, are without foundation in international law. The national security interests which these provision are apparently designed to protect would seem capable of adequate protection through the generally recognized provisions for temporary suspension of innocent passage set out in the second paragraph of article 9, and in article 16 for arrivals of vessels intending to enter Finnish internal waters.

The United States is concerned that article 21, limiting arrival of government vessels in such areas between sunrise and sunset, could be applied in a manner to restrict further the innocent passage of vessels. The United States seeks the assurances of the Government of Finland that article 21 is not intended to impose restrictions on the right of all vessels to engage in innocent passage through such areas inconsistent with international law.¹⁸

Compulsory Pilotage for Sovereign Immune Vessels

The United States also protested the Finnish requirement to use pilot service when navigating in Finnish territorial waters, by stating that:¹⁹

there is no authority in international law to require compulsory pilotage of vessels entitled to sovereign immunity engaged in innocent passage through the Finnish territorial sea, as is asserted by Article 10 of the aforementioned Finnish law.

The following comment was provided to American Embassy Helsinki:

While the United States has no objection to the Government of Finland offering pilotage services to United States warships and other government ships operated for non-commercial purposes and engaged in innocent passage through the territorial sea of Finland, the Government of the United States understands that, consistent with the immunities of those vessels, such services may be accepted or declined at the discretion of the flag state.²⁰

In response to an attempt in April 1985 by the Government of Italy to require compulsory pilotage for ships over 5,000 tons carrying oil and other pollutants while transiting the Strait of Messina (*see* Map 28), the United States protested in a note dated April 5, 1985, in part as follows:

. . . the Government of the United States must express its objection to the requirement, in the decree, that certain other vessels require pilots in order to exercise the right of innocent passage through the Strait of Messina. The Government of the United States notes that this requirement is inconsistent with the regime of non-suspendable innocent passage that applies in the Strait of Messina. Accordingly, the Government of the United States reserves its rights and those of its nationals, in this regard, as well.

Additional information was provided to the U.S. Embassy: "The USG [United States Government] further considers the compulsory pilotage requirement to be inconsistent with the non-suspendable right of innocent passage enjoyed by vessels of all States in the Strait of Messina."²¹

Passage Limited to Sea Lanes

In the 1981 Finnish decree discussed above, Finland also required that vessels use "public" sea lanes when navigating that country's territorial waters.²² The following analysis was provided to the Embassy for use in presenting the United States protest of this requirement:

Customary international law, as reflected in article 22 of the Law of the Sea Convention, permits a coastal state to establish sea lanes in its territorial sea where needed for the safety of navigation, after taking into account the recommendations of the competent international organization [i.e., the International Maritime Organization]; any channels customarily used for international navigation; the special characteristics of particular ships and channels; and the density of traffic.

Articles 10 and 20 of the Finnish law do not specify the criteria to be used by Finland in specially regulating public sea lanes.

Thus, the United States sought the assurances of the Government of Finland that it will follow these generally recognized provisions of international law in regulating any sea lanes in its territorial sea.²³

A 1982 law of the former Soviet Union claimed that:

Foreign warships and underwater vehicles shall enjoy the right of innocent passage through the territorial waters (territorial sea) of the USSR in accordance with the procedure to be established by the Council of Ministers of the USSR.²⁴

Then, in 1983, the Soviet government published rules for warship navigation in the Soviet territorial sea. In these rules, the Soviet Union acknowledged the right of innocent passage of foreign warships only in limited areas of the Soviet territorial sea in the Baltic, the Sea of Okhotsk, and in the Sea of Japan.²⁵

In March 1986, two U.S. warships, USS *Caron* and USS *Yorktown*, exercised the right of innocent passage through the territorial sea of the Soviet Union in the Black Sea. The Soviet Union protested in two notes. The first, presented the same day to the Naval Attache of the American Embassy in Moscow, read as follows:

On March 13, 1986, at 11 hours 11 minutes (Moscow time) the guided missile cruiser *Yorktown* and destroyer *Caron* violated the state border of the USSR, entering Soviet territorial waters at 44-13.5N 34-09.3E (south of the Crimean peninsula) and penetrated them up to 6 miles.

Disregarding the repeated signals of warning from a Soviet ship about the violation, the American ships continued their illegal operation and not until 13 hours 32 minutes at 44-19.0N 33-21.0E did they leave Soviet territorial waters.

The command of the Soviet Navy calls the attention of the command of the US Navy to the repeated violations of Soviet territorial waters by US Navy ships, which may lead to serious consequences, and requests it to act urgently to take appropriate measures to observe the existing laws and regulations of the Soviet Union with respect to the regime of territorial waters.²⁶

A similar note from the Soviet Ministry of Foreign Affairs, presented to the American Embassy in Moscow on March 17, 1986, added "This is not the first occasion when American naval vessels deliberately failed to observe provisions of the laws and regulations of the USSR relating to operating conditions within Soviet territorial waters."²⁷

The United States responded to the latter *note verbale* as follows:

The transit of the USS *Yorktown* and USS *Caron* through the claimed Soviet territorial sea on March 13, 1986 was a proper exercise of the right of innocent passage, which international law, both customary and conventional, has long accorded ships of all states. The exercise of the right of innocent passage is in no way a violation of a country's territorial sea nor is it "provocative"; it is, rather, an essential part of the international law regime of the territorial sea. The right of ships of all states to engage in innocent passage without prior notification to, or permission of, the coastal state is firmly grounded in international law, including customary law reflected both in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and in the 1982 United Nations Convention on the Law of the Sea. The right of innocent passage may be exercised by all types of vessels, whether they are traversing the territorial sea in connection with a call at a port or traversing the territorial sea without making such a call. Therefore, it is meaningless for the Ministry's note to have alleged that there was "no basis" for

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the entry by the two ships into Soviet claimed waters. Regardless of the unknown restrictions of Soviet law alluded to in the Ministry's note, the right of innocent passage is one guaranteed by international law and is not dependent on the legislation of the coastal state.

Therefore, the United States rejects the protest of the Ministry of Foreign Affairs and reserves its rights and those of its nationals.

The Department of State's instructions to American Embassy Moscow noted that the United States "would not want to lend any validity to a Soviet position that their domestic law was at all relevant in determining U.S. navigational rights under international law."²⁸

Two years later, the same two U.S. warships were again involved in an incident in the Black Sea. On February 12, 1988, two Soviet vessels "bumped" the two U.S. Navy ships in the Soviet territorial sea (*see* Map 23). A number of press accounts, letters, and editorial articles misconstrued the law, the facts and the fundamental issues involved.²⁹ In an unpublished article offered to several major newspapers, the United States stated in part:

Since World War II, an increasing number of coastal states have asserted claims to control activities off their shores in ways contrary to traditional freedoms of the sea. Concern grew that a failure to exercise our navigational rights could progressively undermine these rights. Accordingly, President Carter in 1979 established a program to preserve our international legal rights and freedoms of navigation by having United States ships and aircraft exercise them periodically in areas where coastal states assert the ability to deny them. President Reagan has continued this program.

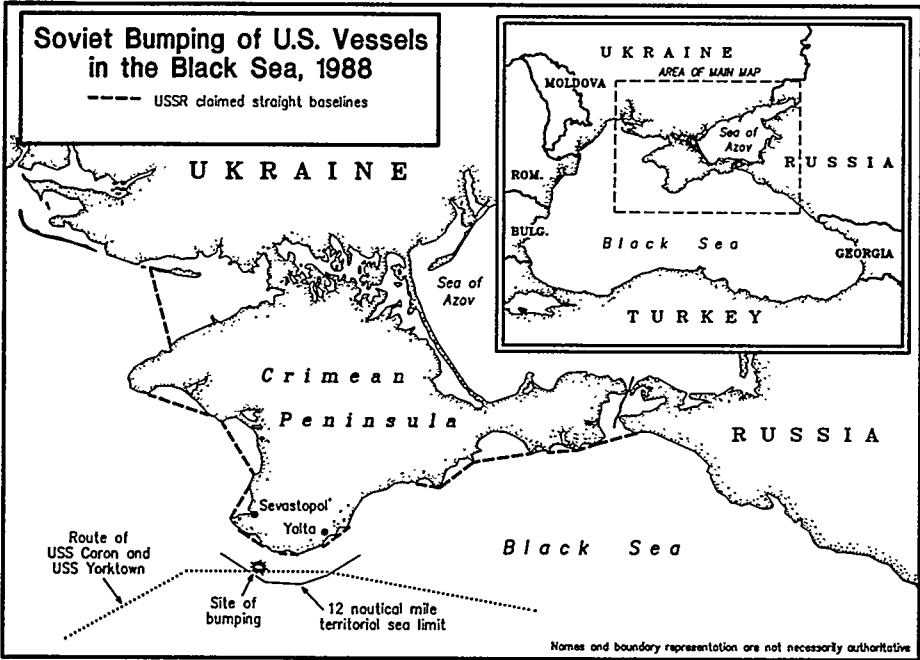
The USS *Yorktown* and the USS *Caron* were in the Soviet territorial sea as part of this program. At issue was not the breadth of the Soviet territorial sea, much less that of our own. . . .

Our disagreement with the USSR involves Soviet efforts to limit, indeed virtually to abrogate, the right of innocent passage for warships through the Soviet territorial sea. According to Soviet legislation, foreign warships may exercise innocent passage in only five specified locations out of the thousands of miles of Soviet coastline. The Soviets made no provision for innocent passage in the Black Sea.

. . . .

The Soviet legislation at issue severely restricts innocent passage, contrary to international law. Nowhere does the 1982 Convention declare that innocent passage is a right limited to particular types of ships; the right applies to warships just as much as to merchant vessels. Nor does the Convention declare that innocent passage applies only in limited areas of the territorial seas — for example areas that are somehow judged to be normal or traditional sea lanes. On the contrary, the Convention declares that the laws of coastal states shall not "impose requirements on foreign ships which have the practical effect of denying or impairing the

Map 23



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right of innocent passage.” For the USSR to prohibit warship passage in all but a few places is to do exactly that.³⁰

The 1988 incident was followed by an exchange of notes between the two governments. The Soviet Ministry of Foreign Affairs protested in a note to the American Embassy in Moscow as follows:

On 12 February 1988 the U.S. Navy vessels destroyer *Caron* at 1045 hours (Moscow time) and cruiser *Yorktown* at 1103 hours (Moscow time) violated the USSR state border in the region of the southern coast of the Crimea at the point with the coordinates 44 degrees, 15.6 minutes north latitude, 33 degrees, 30 minutes east longitude. The American vessels neither responded to the warning signals that were issued in advance by Soviet border vessels, nor undertook the recommended change of course. Having gone deeper into the territorial waters of the USSR for a significant distance, the American warships conducted dangerous maneuvers which led to a collision with Soviet warships.

Despite this collision, the cruiser *Yorktown* and destroyer *Caron* remained in USSR territorial waters and only departed at 1249 hours at the point with the coordinates 44 degrees, 12.5 minutes north latitude, 34 degrees, 05.5 minutes east longitude.

Regarding with all seriousness the dangerous incident which has occurred, the Soviet side declares a strong protest in connection with the provocational and clearly intentional action of the American naval forces.

The Soviet side cannot consider the activities of the USA Navy as other than directed at undermining the notable process of recent improvement of Soviet-American relations, and at charging international tension.

The responsibility for this provocation, which led to the collision of warships of the two countries, lies fully and completely with the American side.

The American side has already been warned about the impermissibility of violating USSR laws and regulations with regard to the regime of Soviet territorial waters and of the serious consequences to which such actions can lead.

The Ministry demands that the Government of the USA undertake immediate measures that will exclude such incidents in the future.³¹

The United States responded:

The United States rejects the protest of the Soviet Union. Moreover, the United States protests the actions of the Soviet Union in this matter as inconsistent with its international law obligation to respect the right of innocent passage and to ensure that its state vessels navigate in a manner that does not endanger other vessels.

The United States rejects the contention of the Soviet Union that the US Navy ships *Yorktown* and *Caron* at any time violated the borders of the Soviet Union. Rather, at all times that the two vessels were within the territorial sea of the Soviet Union, they were exercising the right of innocent passage in complete conformance with relevant customary international law, including that reflected in the 1982 United Nations Convention on the Law of the Sea. Under customary international law, including that reflected in the 1982 United Nations Convention on the Law of the Sea, ships of all states, including warships, have a right of innocent passage through the territorial seas of other states.

The coastal state may not subject the exercise of the right of innocent passage to requirements of prior notification or authorization, nor may the coastal state purport to limit the innocent passage of certain ships or types of ships to areas of its territorial sea which it has designated as traditional routes or sea lanes. The United States reaffirms the right, under international law, for the US Navy ships *Yorktown* and *Caron* to have engaged in innocent passage through the Soviet territorial sea at the place and time, and in the manner, in which they did.

The Soviet Union is well aware, not only of the fact that international law guarantees all ships, including warships, the right of innocent passage, but also that the United States is committed to exercising its navigational rights and freedoms around the world. Such exercises of navigational rights and freedoms are not in any way intended to be provocative; they are a necessary part of the process of preserving international law rights through consistent practice as well as diplomatic communications. The Soviet Union has no reason to interpret this routine exercise of international law rights as intended to bear upon the current state of US-Soviet relations.

Nevertheless, the United States notes with grave concern the actions of the Soviet vessels during this incident. After the Soviet warships improperly directed the US warship to depart the Soviet territorial sea, the US warships maintained course and speed and clearly informed the Soviet warships that they were engaged in innocent passage. Thereupon, the Soviet warships deliberately struck the US Navy warships, endangering both the vessels and their crews. The actions of the Soviet warships were utterly unjustified in international law and thoroughly incompatible with prudent seamanship.

As a result of the unlawful and unseamanlike actions of the Soviet warships, both the US Navy warships suffered damage. The United States hereby informs it reserves the right to seek from the Soviet Union appropriate compensation for such damage.

The United States vigorously protests both the illegal Soviet restrictions on innocent passage of warships in the Soviet territorial sea and the deliberate infliction of damage on US Navy warships exercising that right. The United States reserves its rights and those of its nationals in this regard.³²

The issue of innocent passage of warships was resolved between the United States and the Soviet Union by the issuance on September 23, 1989, of a Joint

Statement with attached Uniform Interpretation of the Rules of Innocent Passage signed by Secretary Baker and Foreign Minister Schevardnadze. This understanding clearly reflects the right of warships to conduct innocent passage through the Soviet territorial sea.³³

Prior Notice or Permission for Passage of Warships

The content of the right of innocent passage of warships was much debated during the Third United Nations Conference on the Law of the Sea (UNCLOS III). That debate has been summarized as follows:

Many delegations were engaged on both sides of this issue during the general debates. (The basic split, of course, was between the maritime powers and the coastal states and their supporters. The debates took place in Committee Two on several occasions, as well as in small groups chaired by Ambassador Aguilar, chairman of the Second Committee. While the opponents of innocent passage for warships appeared at times to outnumber the maritimes, they were in fact split among themselves. A final attempt was made by Ambassador Aguilar to achieve a negotiated solution during the final week of the substantive negotiations, without avail.) All the debates proved was that there was no middle ground between the antagonists. (At one point, the opponents of innocent passage for warships offered to settle for prior notification only, but this was seen by the maritimes as no different from requiring authorization.) For that reason, no accommodation of views was possible through the medium of negotiation. In the closing days of the Conference, Gabon offered a formal amendment to Article 21 to allow coastal states to require prior authorization or notification for passage of warships through the territorial sea. (U.N. Doc. A/CONF.62/L.97 (1982).) The proposal, of course, was tenaciously opposed by the maritime states, and, in the end, the amendment was withdrawn (partially in response to a plea by the Conference President for the withdrawal of all formal amendments to better enhance consensus) in favor of a proposal to add a reference to “security” to the provision in Article 21(1)(h), which gives coastal states the authority to enact laws regarding customs, fiscal, immigration, or sanitary laws. (U.N. Doc. A/CONF.62/L.117 (1982).) To permit a coastal state to enact laws preventing infringement of security regulations would give such states extremely broad regulatory powers in the territorial sea—not necessarily limited even to warships. This proposal was even more strongly resisted. It therefore appeared imminent that the issue would go to a vote in the plenary. At the last minute, however, the sponsors of the proposal agreed to withdraw it in favor of a statement by the President of the Conference on the record, that its withdrawal was “without prejudice to the rights of coastal states to adopt measures to safeguard their security interests, in accordance with articles 19 and 25 of this Convention.” (This statement was made by President T.T.B. Koh in plenary session on April 24, 1982. U.N. Doc. A/CONF.62/SR.176 (1982).) Since those articles had already been accepted as governing the rights of coastal states, it cannot be said that the President’s statement does more than restate the obvious. Accordingly, the traditional view of the maritime States that warships, like other ships, are entitled to a right of innocent passage in the territorial sea is still the law of the sea.³⁴

At noon, April 26, 1982, the Conference President Tommy Koh announced that the amendment offered by Gabon³⁵ had been withdrawn;³⁶ that evening he read the following statement:

Although the sponsors of the amendment in document A/CONF.62/L.117 had proposed the amendment with a view to clarifying the text of the draft convention, in response to the President's appeal [to consider carefully and seriously what the consequences of their actions might be and to not press for their amendments to be put to the vote] they have agreed not to press it to a vote. They would, however, like to reaffirm that their decision is without prejudice to the rights of coastal States to adopt measures to safeguard their security interests, in accordance with articles 19 and 25 of the draft convention.³⁷

Following the Conference President's statement from the chair, a number of speakers continued to insist on the right to restrict the innocent passage of warships: **Albania** ("the right of innocent passage did not apply to warships. . . . The warships of a State had no right to pass through the territorial sea of another State without prior consent of the latter");³⁸ **Benin** ("there was no such thing as innocent passage of warships");³⁹ **China** ("the right of the coastal State to require prior authorization or notification for the passage of foreign warships through the territorial sea in accordance with its laws and regulations");⁴⁰ **Iran** ("in the light of customary international law, provisions of Article 21, read in conjunction with Article 19, on the meaning of innocent passage, and Article 25, on the rights of protection of coastal States, recognize, though implicitly, the rights of coastal States to take measures to safeguard their security interests, including the adoption of laws and regulations regarding, *inter alia*, the requirement of prior authorization for warships willing to exercise the right of innocent passage through the territorial sea");⁴¹ **Malta** (the Convention "recognizes the right of coastal States to adopt measures to safeguard their security, including the requirement of prior authorization or notice for the innocent passage of warships through territorial waters");⁴² **North Korea** ("reaffirms the right of coastal States to adopt measures to safeguard their security interests, including the right to require prior notification or consent in regard to passage of foreign warships through their territorial sea");⁴³ and **Pakistan** ("coastal States could demand prior notification or authorization for the innocent passage of warships through their territorial waters").⁴⁴

During the debate on the amendments, a number of other speakers insisted that all ships, including warships, enjoyed the right of innocent passage without prior notification or authorization: *e.g.*, **France** ("any amendment to article 21 would create a serious obstacle to participation in the convention by maritime Powers such as France and the United States");⁴⁵ and **Thailand** ("current opinion appeared to favour freedom of navigation and the right of innocent passage by vessels of all kinds even through territorial waters, since that was vital

to the national security of all countries, including Thailand").⁴⁶ Other States spoke to the same effect after the Conference President read his statement, including the **United Kingdom** ("Many of the Convention's provisions are a restatement or codification of existing conventional and customary international law and State practice. Within this category are the articles concerning the right of innocent passage through the territorial sea, which is not subject to prior notification or authorization by the coastal State").⁴⁷ Other States exercised their right of reply to the same effect, including the **Federal Republic of Germany**⁴⁸ and **France**.⁴⁹ On signature to the Convention, **Italy** stated:

None of the provisions of the Convention, which corresponds on this matter to customary International Law, can be regarded as entitling the Coastal State to make innocent passage of particular categories of foreign ships dependent on prior consent or notification.⁵⁰

Shortly before the concluding session of the Conference in Montego Bay, Jamaica, during an address to the Duke Symposium on the Law of the Sea on October 30, 1982, Ambassador Koh stated:

I think the Convention is quite clear on this point. Warships do, like other ships, have a right of innocent passage through the territorial sea, and there is no need for warships to acquire the prior consent or even notification of the coastal State.⁵¹

In response to the statements made during December 1982 plenary meetings of UNCLOS III, on March 8, 1983, the United States exercised its right of reply, which in regard to innocent passage in the territorial sea stated:

Some speakers spoke to the right of innocent passage in the territorial sea and asserted that a coastal State may require prior notification or authorization before warships or other governmental ships on non-commercial service may enter the territorial sea. Such assertions are contrary to the clear import of the Convention's provisions on innocent passage. Those provisions, which reflect long-standing international law, are clear in denying coastal State competence to impose such restrictions. During the eleventh session of the Conference formal amendments which would have afforded such competence were withdrawn. The withdrawal was accompanied by a statement read from the Chair, and that statement clearly placed coastal State security interests within the context of articles 19 and 25. Neither of those articles permits the imposition of notification or authorization requirements on foreign ships exercising the right of innocent passage.⁵²

The Uniform Interpretation of the Rules of Innocent Passage attached to the Joint Statement signed by U.S. Secretary of State Baker and Soviet Foreign Minister Shevardnadze⁵³ provides, in part, that "[a]ll ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent

passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.”

Table 10, below, provides a listing of those States which have promulgated claims that restrict the innocent passage of warships. The United States has protested the claims of various of these States to require prior notice or authorization for innocent passage of warships. For example in a 1984 *aide memoire* to the Government of Sweden, the United States said:

The United States similarly considers the 1982 Law of the Sea Convention to be reflective of existing maritime law and practice with regard to the regime of innocent passage within the territorial sea. The Convention clearly recognizes the right of vessels of all States to engage in innocent passage through the territorial seas of other States. International law as reflected in the 1982 Law of the Sea Convention permits no distinction, for these purposes, between vessels on commercial service and warships or other governmental vessels on non-commercial service, except as specifically contained in the Convention. Neither does international law permit a coastal State to condition another State's exercise of that right on prior notification to the coastal State.

The 1958 Convention on the Territorial Sea and the Contiguous Zone contains no provision explicitly or implicitly recognizing a right of a coastal State to condition innocent passage on prior notification. On this point, the meaning of the Convention is neither ambiguous nor obscure.

Although international maritime law and practice has continued to develop since the First United Nations Conference on the Law of the Sea, on that issue, international law has remained the same. Recent developments in international maritime law and practice give juridical support to Sweden's post-1958 extensions of maritime jurisdiction, both in the territorial sea and in the 200 nautical mile fisheries zone. The practice of a vast number of States, both coastal and maritime, amply supports the proposition that coastal States may claim territorial seas of up to twelve nautical miles and economic zones of up to 200 nautical miles, provided that they recognize the rights and freedoms of other States in those waters. By contrast, the requirement of prior notification as a condition to warship innocent passage has no such broad base in contemporary practice.

The 1982 Law of the Sea Convention reflects this contrast. Whereas the concepts of a twelve-nautical-mile territorial sea and of a 200-nautical mile exclusive economic zone both commanded consensus acceptance in the Convention text, the conditioning of innocent passage on prior notification clearly did not. It may be noted that the 1982 Convention reflects, in its provisions relating to navigation and other traditional uses of the oceans, worldwide, rather than regional, maritime law and practice. As a matter of customary international law as reflected in the Convention, a coastal State's rights are neither increased nor diminished by virtue of practices peculiar to its region of the globe.

In stating this position, and in exercising its right of warship innocent passage in accordance with international law, the United States implies no disregard for

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the sovereignty of Sweden or for its rights in the territorial sea. Innocent passage of any vessel, including a warship, is the continuous and expeditious transit of such a vessel in a manner not prejudicial to the peace, good order or security of the coastal State. United States warships engaged in innocent passage adhere strictly to the requirements of international maritime law and practice regarding the modalities of innocent passage. Thus, for example, submarines must navigate on the surface and fly their national flags. Ships may neither launch nor recover aircraft, and there may be no exercise or practice with weapons. The passage of United States warships under such conditions poses no threat to the security of the coastal State and constitutes no violation of its territorial sovereignty.⁵⁴

Protests have also been submitted to other States purporting to require prior notice, including **Egypt**,⁵⁵ **Finland**,⁵⁶ **Guyana**,⁵⁷ **India**,⁵⁸ **Libya**,⁵⁹ **Malta**,⁶⁰ **Mauritius**,⁶¹ **Seychelles**,⁶² **People's Democratic Republic of Yemen**,⁶³ and the former **Yugoslavia**.⁶⁴

The United States has similarly protested the claims of other States to require prior permission before warships may engage in innocent passage: **Albania**,⁶⁵ **Algeria**,⁶⁶ **Antigua & Barbuda**,⁶⁷ **Bangladesh**,⁶⁸ **Barbados**,⁶⁹ **Bulgaria**,⁷⁰ **Burma**,⁷¹ **Cape Verde**,⁷² **China**,⁷³ **Congo**,⁷⁴ **German Democratic Republic**,⁷⁵ **Grenada**,⁷⁶ **Iran**,⁷⁷ **Maldives**,⁷⁸ **Oman**,⁷⁹ **Pakistan**,⁸⁰ **Philippines**,⁸¹ **Poland**,⁸² **Romania**,⁸³ **Somalia**,⁸⁴ **Sri Lanka**,⁸⁵ **Sudan**,⁸⁶ **Syria**,⁸⁷ **Vietnam**,⁸⁸ and the **Yemen Arab Republic**.⁸⁹

Table 10
Restrictions on Warship Innocent Passage

<u>State</u>	<u>Restriction, Year of Claim</u>	<u>U.S. Protest</u>	<u>U.S. Assertion of Right of Innocent Passage</u>
Albania	Special permission; 1946	1989	1985 ^a
Algeria	Prior permission; 1963	1964 ^a	1979 ^a
Antigua & Barbuda	Prior permission; 1982	1987	1987
Bangladesh	Prior permission; 1974	1982	
Barbados	Prior permission; 1979	1982	1982 ^a
Brazil	Prior permission; 1954		
Bulgaria	Limited to sea lanes; 1987		
Burma	Prior permission; 1977	1982	1985 ^a
Cambodia	Prior permission; 1982		1986 ^a
Cape Verde	Prior permission; 1982	1989	1991
China (PRC)	Prior permission; 1958, 1992	1992	1986 ^a
Congo	Prior permission; 1977	1987	
Denmark	Prior permission; 1976	1991	
Egypt	Prior notification; 1983	1985	1993
Finland	Prior notification; 1981	1989	
Grenada	Prior permission; 1978	1982 ^a	1988
Guyana	Prior notification; 1977	1982	1988
India	Prior notification; 1976	1976 ^a	1985 ^a
Indonesia	Prior notice; 1962		
Iran	Prior permission; 1982, 1993	1987 ^a	1989 ^a

Table 10 (Cont.)

<u>State</u>	<u>Restriction, Year of Claim</u>	<u>U.S. Protest</u>	<u>U.S. Assertion of Right of Innocent Passage</u>
Korea, South	Prior notification; 1978	1977	
Libya	Prior notice; 1985	1985	
Maldives	Prior permission; 1976	1982	1981 ^a
Malta	Prior notification; 1981	1981 ^a	
Mauritius	Prior notification; 1977	1982	
Oman	Prior permission; 1989	1991	1991 ^a
Pakistan	Prior permission; 1976	1982	1986 ^a
Philippines	Prior permission; 1968	1969	1994
Poland	Prior permission; 1968	1989	
Romania	Prior permission; 1956	1989	1985 ^a
St. Vincent & the Grenadines	Prior permission; 1983		
Seychelles	Prior notification; 1977	1982	
Somalia	Prior permission; 1972	1982	1979 ^a
Sri Lanka	Prior permission; 1977	1986	1985 ^a
Sudan	Prior permission; 1970	1989	1979 ^a
Sweden	Prior notification; 1966	1984 ^a	1991 ^a
Syria	Prior permission; 1963	1989	1984 ^a
Vietnam	Prior permission; 1980	1982	1982 ^a
Yemen	Prior permission (PDRY); 1967	1982	1982 ^a
	Prior notification (YAR); 1978	1986	1979 ^a
Yugoslavia, Former	Prior notification; 1965	1986 ^a	1990

^aMultiple protests or assertions

Source: U.S. Department of State, Office of Ocean Affairs.

Enforcement of Violations

In 1981, the United States expressed its concerns to **Malta** regarding a portion of a Maltese law which claimed the right to impose imprisonment, as well as fines, for violations of regulations issued to control and regulate the passage of ships through the "territorial waters of Malta", without also recognizing the duty of the coastal State not to impede the innocent passage of foreign ships through its territorial sea. The State Department's note read, in part, as follows:

... refers to Act XXVIII of 1981, approved July 24 by the Parliament of Malta, which amends the Territorial Waters and Contiguous Zone Act of 1971. Section 3 of the Act adds a new Section 5 to the Territorial Waters and Contiguous Zone Act. Section 5 provides that the Prime Minister of Malta may make and enforce regulations to control the passage of ships through the territorial sea of Malta. The regulations may relate to the arrest, detention and seizure of ships "and such other power as may be necessary" to ensure compliance with "any law, rule, regulation or order" and the imposition of punishments, including imprisonment, for the violation of any regulation issued under the Section.

...

The United States Government also wishes to express its concern that Section 5 of the Territorial Waters and Contiguous Zone Act makes no reference to the internationally recognized right of innocent passage. Pursuant to Articles 14 and 15 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, the Government of Malta is obligated to recognize that all ships of all States enjoy the right of innocent passage through the territorial sea and is prohibited from impeding innocent passage. The United States Government wishes to express its expectation that the Government of Malta will apply Section 5 in a manner consistent with its obligation not to impede innocent passage.⁹⁰

Limitation on Number of Warships

A few states have claimed the right to limit the number of warships that may be present at any one time in their territorial sea. The United States has protested these unlawful restrictions on the right of innocent passage by **Denmark**,⁹¹ **Vietnam**⁹² and by the former **Yugoslavia**.⁹³

Nuclear Powered Warships

While nuclear powered warships and conventionally powered warships enjoy identical international legal status,⁹⁴ several states require nuclear powered warships to give prior notice to, or obtain prior permission of the coastal State before exercising the right of innocent passage through the territorial sea. The United States has protested these claims.

In 1977, the **People's Democratic Republic of Yemen (Aden)** enacted a domestic statute which claimed that "foreign nuclear-powered ships or ships carrying nuclear substances or any other radio-active substances or materials shall give the competent authorities in the Republic prior notification of their entry into and passage through the territorial sea."⁹⁵ The United States protested, stating:

that the internationally recognized legal right of innocent passage through the territorial sea may be exercised by all ships, regardless of type of cargo, and may not in any case be subjected to a requirement of obtaining prior authorization from or giving notice to the coastal State. . . .⁹⁶

Similar legislation by **Pakistan** provided that: "foreign super-tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials may enter or pass through the territorial waters after giving prior notice to the Federal Government." This requirement was protested by the United States on June 8, 1982.⁹⁷

Djibouti's 1979 claim that "foreign vessels with nuclear propulsion or transportation of nuclear materials or other radioactive substances must inform

Djibouti beforehand about entering and crossing of Djibouti territorial waters” was protested by the United States on May 22, 1989.⁹⁸

When it signed the 1982 Law of the Sea Convention in December 1982, the **Yemen Arab Republic** (which merged with Yemen-Aden on May 22, 1990), made an accompanying declaration which stated in part that “nuclear powered craft, as well as warships and warplanes in general, must obtain the prior agreement of the Yemen Arab Republic before passing through its territorial waters, in accordance with the established norms of general international law relating to national sovereignty.” The United States Government, in a note dated October 6, 1986, protested as follows:

The United States considers the statement to be without legal foundation because it attempts to subject the passage of foreign warships as well as nuclear powered ships to the requirements of prior authorization in order to transit the Yemeni territorial sea. The 1982 Law of the Sea Convention, which represents customary international law in this regard, permits no such restriction. Indeed, it provides in article 19 a comprehensive list of activities which shall be considered to be inconsistent with the exercise of the right of innocent passage. This exhaustive list of proscribed activities does not expressly or implicitly permit the exercise of that right to be preconditioned upon prior authorization or even notification. Further, it cannot legally be maintained that the lack of authorization or notification has any bearing on passage within the meaning of Convention article 19(2)(l). Nor is the competency claimed by the Government of the Yemen Arab Republic justified under article 21(1).

The United States wishes to point out that there is no justification whatever for distinguishing, for these purposes, between warships or nuclear-powered ships and other ships, as the statement of the Government of the Yemen Arab Republic seeks to do. Convention articles 17-32, concerning innocent passage, apply to all ships, and they do not in any way distinguish between warships or nuclear-powered ships and other ships with respect to prior notification or permission as a condition of innocent passage.

...

For the above reasons, the United States cannot accept the claim of authority by the Government of the Yemen Arab Republic to condition the exercise of the right of innocent passage by warships or nuclear-powered ships . . . upon prior authorization. Accordingly the United States reserves its rights and those of its nationals in this regard.⁹⁹

The United States protested a similar declaration made by the Government of **Egypt** upon deposit of its instrument of ratification of the 1982 LOS Convention on August 26, 1983, by diplomatic note delivered February 26, 1985, by the American Embassy at Cairo.

The Egyptian declaration reads:

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Pursuant to the provisions of the Convention relating to the right of the coastal State to regulate the passage of ships through its territorial sea, and whereas the passage of foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous and noxious substances poses a number of hazards,

Whereas article 23 of the Convention stipulated that the ships in question shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements,

The Government of the Arab Republic of Egypt declares that it will require the aforementioned ships to obtain authorization before entering the territorial sea of Egypt, until such international agreements are concluded and Egypt becomes a party to them.

One talking point provided by the Department of State to the U.S. Embassy for use in conjunction with delivery of the note said:

In consonance with prior law and practice, the Law of the Sea Convention provides that all ships enjoy the right of innocent passage in the territorial sea. Neither warships nor any other type of ship, regardless of means of propulsion or materials carried may be required to give notice to, or obtain the permission of, the coastal State before exercising this right.¹⁰⁰

In depositing its instrument of ratification of the LOS Convention on August 17, 1989, **Oman** "guaranteed" to foreign nuclear-powered ships and ships carrying nuclear or other substances that are inherently dangerous or harmful to health or the environment, whether or not warships, the right of innocent passage "subject to prior permission". On August 13, 1991, the United States protested this requirement.¹⁰¹

The 1989 U.S.-U.S.S.R. Uniform Interpretation of the Rules of International Law Governing Innocent Passage states in part: "[a]ll ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required."¹⁰²

Claims Rolled Back

The **Soviet Union** modified its legislation on September 20, 1989. The **Bulgarian** requirement for prior permission was replaced in its July 8, 1987 Act with a limitation of innocent passage to designated sea lanes.¹⁰³

In response to the promulgation by **Turkey** on February 20, 1979, of Decree 7/17114, requiring foreign warships to provide prior notice before transiting the Turkish territorial sea, the United States protested in part as follows:

The Government of the United States recognizes the right of a State consistent with international law to establish requirements for notification and other conditions of entry for visits to its ports as well as the specific rights of notification of transit of the Turkish Straits accorded to Turkey by the Montreux Convention.

The Government of the United States notes with concern, however, that the regulations purport to extend the requirements of the Montreux Convention and port visit conditions to establish similar conditions and requirements for notification and other limitations of transit of the Turkish territorial sea outside the straits. This is contrary to international law, as reflected in international practice and codified in the 1958 Convention on the Territorial Sea and Contiguous Zone. Specifically, these regulations constitute a restraint on the right of innocent passage through the territorial sea which exists for all ships, whether military or commercial, regardless of their characteristics.

Consequently, the Government of the United States does not recognize the validity or effectiveness of the regulations in question to the extent that provisions thereof are inconsistent with accepted principles of international law, and reserves its rights and those of its vessels and nationals with regard to such provisions in the regulations.¹⁰⁴

On May 2, 1985, the Counselor at the Turkish Embassy in Washington informed the Department's Geographer that:

the provision of the Decree 7/17114 which states that the foreign warships must provide notice prior to transiting territorial sea, has been cancelled by the Directive dated November 24, 1983, No. 83/7467. [From] then on foreign warships transiting territorial seas of Turkey are subject to the general provisions of the International Law.¹⁰⁵

Hazardous Waste

In 1988, Haiti prohibited the entry into its territorial waters and exclusive economic zone, as well as into its ports, of "any vessel transporting wastes, refuse, residues or any other materials likely to endanger the health of the country's population and to pollute the marine, air and land environment."¹⁰⁶ The United States protested this action in a 1989 note which recalled "that customary international law, as reflected in the 1982 United Nations Convention on the Law of the Sea, does not recognize the right of a coastal State to prohibit the passage of ships transporting hazardous waste through a coastal State's territorial sea or exclusive economic zone without intending to enter the internal waters or ports of the coastal State."¹⁰⁷

The 1989 **Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal**,¹⁰⁸ establishes a notice and consent system in which any export, including any export by ship, of hazardous waste requires the prior approval of, *inter alia*, any "transit state." That

term is defined in article 2(12) of the Basel Convention, as any State "through which" wastes are transported on their way from an exporting State for disposal in another State. As noted in the Secretary of State's letter of submittal, "the United States has consistently maintained that, under international law, notification to or authorization of coastal states is not required for passage through territorial seas . . ." ¹⁰⁹ This is reflected in Article 4(12) of the Basel Convention, which provides that the Convention does not affect "the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments." However, Article 4(12) also provides that nothing in the Basel Convention "shall affect in any way the sovereignty of States over their territorial sea established in accordance with international law . . ."

This compromise formula prompted Portugal to declare that it required the notification of all transboundary movements of such wastes across its waters, and several Latin American countries, including Columbia, Ecuador, Mexico, Uruguay and Venezuela, to declare that, under the Basel Convention, their rights as coastal States were adequately protected. Germany, Italy, Japan and the United Kingdom on the other hand, declared that nothing in the Convention requires any notice to, or consent of, the coastal State for vessels exercising the right of innocent passage. ¹¹⁰

In granting its advice and consent to ratification of the Basel Convention, the U.S. Senate stated the understanding of the United States of America that "a State is a 'transit State' within the meaning of the convention only if wastes are moved, or are planned to be moved, through its inland waterways, inland waters, or land territory." ¹¹¹

Notes

1. It is unclear whether Judge Oda, dissenting in *El Salvador v. Honduras*, 1992 I.C.J. Rep. 745, para. 23, in writing that the right of innocent passage is "granted to foreign commercial vessels in the territorial sea," would extend that right to warships.

2. The I.C.J. stated that Article 18(1)(b) "does no more than codify customary international law". *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgment, 1986 I.C.J. Rep. 14, at 111 para 214.

3. Presidential Proclamation No. 5928, Dec. 27, 1988, 54 Fed. Reg. 777 (January 9, 1989); 24 Weekly Comp. Pres. Doc. 1661 (Jan. 2, 1989), Appendix 3.

4. DEP'T ST. BULL., Nov. 1989, at 26; 28 I.L.M., 1444-47 (1989); 84 Am. J. Int'l L. 239-42 (1990); U.N. LOS BULL., No. 14, Dec. 1989, at 12-13.

5. The Territorial Sea Convention contained no comparable listing of activities deemed to be innocent. See Stevenson & Oxman, *The Third United Nations Conference on the Law of the Sea: the 1975 Geneva Session*, 69 Am. J. Int'l L. 763, 771-72 (1975); Froman, *Uncharted Waters: Non-innocent Passage of Warships in the Territorial Sea*, 21 San Diego L. Rev. 625, 659 (1984); Grammig, *The Yoron Jima Submarine Incident of August 1980: A Soviet Violation of the Law of the Sea*, 22 Harv. Int'l L.J. 331, 340 (1981).

However, since the activities must occur "in the territorial sea" (LOS Convention, article 19(2)), any determination of non-innocence of passage by a transiting ship must be made on the basis of acts committed while in the territorial sea. Thus cargo, destination, or purpose of the voyage can not be used as a criterion in determining that the passage is not innocent. Professor H.B. Robertson testimony, *before the House Merchant Marine & Fisheries Comm., 97th Cong., Hearing on the Status of the Law of the Sea Treaty Negotiations*, July 27,

1982, Ser. 97-29, at 413-14. *Acord, Oxman, The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 Va. J. Int'l L. 813, 853 (1984) (possession of passive characteristics, such as the innate combat capabilities of a warship, do not constitute "activity" within the meaning of this enumerated list).

On the other hand, since coastal States are competent to regulate fishing in their territorial sea, passage of foreign fishing vessels engaged in activities that are in violation of those laws or regulations is not innocent. Territorial Sea Convention, article 14(5); 1982 LOS Convention, article 21(1)(e).

In February 1993, Thailand issued a Circular Note in Bangkok in which the Ministry of Foreign Affairs announced the position of the Royal Thai Government regarding laws and regulations of several States "the effect of which is to restrict the rights of passage and freedom of navigation of foreign ships in their maritime zones." The note stated:

1. According to the well-established rules of customary international law and state practice as recognized and codified by the 1982 United Nations Convention on the Law of the Sea, ships of all states have the right of innocent passage in the territorial sea, the right of transit passage in straits used for international navigation, and the freedom of navigation in the exclusive economic zone of another state.
2. All foreign ships, including warships, merchant ships and fishing vessels, can exercise such rights and freedoms without having to give prior notification to, or obtain prior permission, approval or consent from the coastal State concerned regarding their intended passage.
3. Therefore, any laws and regulations which tend to restrict the aforesaid rights and freedom are contrary to the rules of customary international law and are, moreover, incompatible with the obligations assumed by the states concerned when they signed the 1982 Convention.
4. For these reasons, the Royal Thai Government feels obliged to declare that Thailand does not consider herself bound by the laws and regulations in question. In the meantime, it is hoped that states which have enacted such laws and regulations will not actually carry out any measure to impede or interfere in any way with the legitimate exercise by foreign ships of the right of innocent passage in their territorial seas, the right of transit passage in their straits used for international navigation or the freedom of navigation in their exclusive economic zones.

Letter dated Feb. 18, 1993, from the Permanent Representative of Thailand to the United Nations, U.N. GA Doc. A/48/90, Feb. 22, 1993; U.N. LOS BULL., No. 23, June 1993 at 108.

The seizure by Cambodian forces of the SS *Mayaguez* on May 12, 1975, was justified by Cambodia on the ground that her passage was not innocent. However, the location of the seizure was outside Cambodian territorial seas. Thus, the seizure was unlawful. 1975 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 423-26 [hereinafter DIGEST]; *Note, The Mayaguez: The Right of Innocent Passage and the Legality of Retrial*, 13 San Diego L. Rev. 765 (1976). More importantly, even if a ship enters territorial waters and engages in non-innocent activity, the appropriate remedy, consistent with customary international law, is first to inform the vessel of the reasons why the coastal State questions the innocence of the passage, and to provide the vessel a reasonable opportunity to clarify its intentions or to correct its conduct in a reasonably short period of time. In the case of a warship engaging in conduct which renders its passage not innocent, and which does not take corrective action upon request, the coastal State may require the ship to leave the territorial sea, as set forth in article 30 of the 1982 LOS Convention, in which case the warship shall do so immediately. Customary international law requires that the coastal State normally take steps short of force to prevent non-innocent passage.

An informal survey of coastal State maritime legislation conducted by the State Department Office of the Legal Adviser revealed that the following nations had specific domestic legislation recognizing the right of innocent passage.

Antigua and Barbuda	Federal Republic of Germany (warships)
Brazil	Guatemala (warships)
Cape Verde	Indonesia
Colombia	Iraq
Comoros	Ireland
Costa Rica	Italy (warships)
Dominica (warships)	Kiribati
Equatorial Guinea	Mauritania
Fiji	Mexico
France (warships)	Nicaragua (merchant ships)

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Nigeria (warships)	Trinidad and Tobago
Oman	Tuvalu
Saint Kitts and Nevis	United Kingdom (warships)
Saint Vincent and the Grenadines	United States (warships)
Senegal	USSR (warships)
Solomon Islands	Uruguay
Thailand (warships)	Vanuatu

Reference to "warships" in this listing signifies that the legislation specifically recognizes the right of innocent passage for warships. Nicaragua's legislation is specific only with respect to merchant shipping. The United Kingdom has publicly stated that "under international law all ships enjoy the right of innocent passage in the territorial sea of the United Kingdom". 55 Brit. Y.B. Int'l L. 1984, at 549 (1985). See also 58 Brit. Y.B. Int'l L. 1987, at 599 (1988).

6. LOS Convention, article 24(1).

7. LOS Convention, article 21.

8. LOS Convention, article 22(2).

9. Territorial Sea Convention, article 15; LOS Convention, article 24. The United States has adopted special Inland Rules applicable to navigation in U.S. waters landward of the demarcation line established by U.S. law for that purpose. See U.S. Coast Guard publication CG 169, 33 C.F.R. part 80, and 33 U.S.C. §§ 2001 to 2073. The 1972 COLREGS apply seaward of the demarcation line in U.S. national waters, in the U.S. Contiguous Zone and Exclusive Economic Zone, and on the high seas.

10. Territorial Sea Convention, article 16(3); LOS Convention, article 25(3). Authorization to suspend innocent passage in the U.S. territorial sea during a national emergency is given to the President in 50 U.S.C. § 191. See also 33 C.F.R. part 127. "Security" includes suspending innocent passage for weapons testing and exercises.

11. MCDUGAL & BURKE, THE PUBLIC ORDER OF THE OCEANS 592-93.

12. Articles 22(2) & 23.

13. Diplomatic Note No. 137 dated Sept. 12, 1986, from American Embassy Colombo. State Department telegram 246211, Aug. 6, 1986; American Embassy Colombo telegram 06963, Sept. 13, 1986.

A talking point provided to the Embassy stated in part that:

Sri Lanka's restrictions contained in Notice to Mariners No. 1 of 1986 do not appear warranted, because they are not limited in duration and because they are broader than they must be to protect the state's security in that they interfere with maritime traffic which could not be a threat. . . . [T]he Notice to Mariners . . . amounts to an indefinite suspension of the right of innocent passage in a great part of the territorial sea.

State Department telegram 246211, Aug. 6, 1986.

14. Sri Lanka Ministry of Foreign Affairs Diplomatic Note no. L/POL/22 dated Dec. 9, 1986, to American Embassy Colombo, Department of State File No. P92 0098-0745. For other instances in which nations have sought to suspend innocent passage, see 4 WHITEMAN, DIGEST OF INTERNATIONAL LAW 379-86 (1965) [hereinafter WHITEMAN].

15. U.S.U.N. note dated July 10, 1985, circulated to the permanent missions of the States members of the U.N. by U.N. Doc. NV/85/11, July 10, 1985, and reproduced in U.N. LOS BULL., No. 6, Oct. 1985 at 40. Regulation 7 of the Libyan Notice to Mariners stated:

7. All types of commercial ships may pass in innocent passage within the Libyan territorial waters during the day time only (from sun rise to sun set) provided informing the Libyan authorities at least 12 hours prior to entry, and to give the following information:

- point of entering defined by latitude and longitude.
- duration of stay within the territorial waters and course of sailing and speed.
- point of leaving the territorial waters defining the latitude and longitude.

The Federal Republic of Germany also protested this claim in August 1985.

16. Finnish decree number 656/80, of January 1, 1981, amending decree number 185, of April 18, 1963, which prohibited, in the first paragraph of article 9, innocent passage through fortified areas or other areas of the Finnish territorial sea declared to be of military importance, and prohibited in article 21, arrival in such areas except between sunrise and sunset. This decree does not appear to have been published in English.

17. *Note verbale* No. 92 of June 6, 1989, from American Embassy Helsinki reported in American Embassy Helsinki telegram 4302, June 2, 1989.

18. State Department telegram 174994, June 2, 1989. Finland replied by MFA Note No. 14570, dated July 10, 1989, in part as follows:

According to the Geneva Convention on the Territorial Sea and the Contiguous Zone of 29 April 1958 to which Finland is a party, it is within the sovereign right of a state to regulate internally the exercise of innocent passage of warships. It is to be deduced from the *travaux préparatoires* of article 22 of the Convention that no agreement was reached in the deliberations on the question regarding the application of the regime on warships and on non-commercial government vessels. There was, however, hardly any intention to establish detailed regulations on non-commercial government vessels in this respect.

Therefore, it is the understanding of the Government of Finland that it is within the sovereign right of the coastal state to give internal regulations on the exercise of innocent passage of these two categories of vessels, these regulations being fully compatible with international law as well as the 1982 Convention on the Law of the Sea. The internal regulations referred to in the Embassy's *note verbale* do not imply that restriction will be imposed on the right of innocent passage itself.

It is the intention of the Government of Finland to continue to apply the present regime on the innocent passage through the Finnish territorial sea. The regime will be reconsidered if in the future changes will emerge in the international regime on innocent passage in the territorial sea.

American Embassy Helsinki telegram 05235, July 14, 1989.

19. Article 10 of Finland's decree number 656/80, of Jan. 1, 1981, *supra* n. 16, amending decree number 185, of Apr. 18, 1963.

20. State Department telegram 174994, *supra* n. 18.

21. Diplomatic Note dated Apr. 5, 1985, from American Embassy Rome. American Embassy Rome telegram 08736, Apr. 5, 1985; State Department telegram 102199, Apr. 4, 1985. Compulsory pilotage was first imposed, for the period Apr. 3 to May 18, 1985, on *all ships* greater than 10,000 tons and for *all ships* greater than 5,000 tons carrying oil or other pollutants. Hydrolant 653/85(53), DMAHTC Washington DC message 021618Z Apr. 1985. The following day that requirement was limited to all *merchant ships* over 10,000 tons, and to *all ships* between 5,000 and 10,000 tons carrying oil or other pollutants. Hydrolant 660/85(53), DMAHTC Washington DC message 031919Z Apr. 1985. Two days later the requirement was again modified to apply only to *merchant ships*. Hydrolant 669/85(53), DMAHTC Washington DC message 051505Z Apr. 1985. This requirement for *merchant ships only* to carry a pilot was continued for merchant ships of 15,000 tons DW and above, and for merchant ships 6,000 tons DW and above carrying pollutants, transiting the Strait of Messina from May 18, 1985 (Hydrolant 948/85(53), DMAHTC Washington DC message 161424Z May 1985), pursuant to Minister of Merchant Marine decree on the Straits of Messina dated May 8, 1985 (published in the *Gazetta Ufficiale* No. 110 of May 11, 1985), an English translation of which may be found in American Embassy Rome telegram 12263, May 15, 1985. On May 16, 1985, the Italian Government replied noting that these provisional measures were designed to decrease the risk of maritime accidents "while waiting for the construction and putting into operation of technical installations to aid navigation in the Straits." American Embassy Rome telegram 12571, May 17, 1985. Such a system went into effect June 1, 1987 (American Embassy Rome telegram 12611, May 26, 1987).

22. Article 20 of Finland's decree number 656/80, of Jan. 1, 1981, *supra* n. 16, amending decree number 185, of Apr. 18, 1963.

23. Diplomatic Note *supra* n. 18.

24. Article 13 of the Law of the Union of Soviet Socialist Republics on the State Frontier of the USSR, Nov. 24, 1982, provided:

Innocent passage through the territorial waters (territorial sea) of the USSR shall be permitted for the purpose of traversing those waters without entering the internal waters of the USSR or for the purpose of proceeding to the internal waters and ports of the USSR or leaving them for the high seas.

Foreign non-military vessels shall enjoy the right of innocent passage through the territorial waters (territorial sea) of the USSR in accordance with the legislation of the USSR and with international treaties concluded by the USSR.

Foreign non-military vessels exercising the right of innocent passage shall follow the customary navigational route or the route recommended by the competent Soviet organs, as well as the sea lanes and traffic separation schemes.

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The master of a foreign non-military vessel which has violated the rules of innocent passage shall be held liable in accordance with Soviet legislation.

Foreign warships and underwater vehicles shall enjoy the right of innocent passage through the territorial waters (territorial sea) of the USSR in accordance with the procedure to be established by the Council of Ministers of the USSR. However, submarines and other underwater vehicles are required to navigate on the surface and show their flag.

U.N., Current Developments in State Practice 99-100; 22 I.L.M. 1059-60 (1983).

25. Article 12 of the Rules for Navigation and Sojourn of Foreign Warships in the Territorial and Internal Waters and Ports of the USSR, ratified by the Council of Ministers decree no. 384 of Apr. 25, 1983, regarding routes and traffic separation schemes, provided:

1. The innocent passage of foreign warships through the territorial waters (territorial sea) of the USSR for the purpose of traversing the territorial waters (territorial sea) of the USSR without entering internal waters and ports of the USSR shall be permitted along routes ordinarily used for international navigation:

in the Baltic Sea: according to the traffic separation systems in the area of the Kypu Peninsula (Hiiuamaa Island) and in the area of the Porkkala Lighthouse;

in the Sea of Okhotsk: according to the traffic separation schemes in the areas of Cape Aniva (Sakhalin Island) and the Fourth Kurile strait (Paramushir and Makanushi Islands);

in the Sea of Japan: according to the traffic separation system in the area of Cape Kril'on (Sakhalin Island).

24 I.L.M. 1717 (1985).

26. USDAO Moscow telegram 04279, Mar. 13, 1986.

27. American Embassy Moscow telegram 04479, Mar. 17, 1986.

28. State Department telegram 144943, May 8, 1986; American Embassy Moscow telegram 07984, May 12, 1986. Compare the account of this incident, based primarily on news accounts, by Aceves, *Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea*, Nav. War Coll. Rev., at 65-67 (Spring 1993).

29. Rubin, *Innocent Passage in the Black Sea?* Christian Sci. Mon., Mar. 1, 1988, at 14; Carroll, *Murky Mission in the Black Sea*, Wash. Post Nat'l Weekly Ed., March 14-20, 1988, at 25; Carroll, *Black Day on the Black Sea*, Arms Control Today, May 1988, at 14; Arkin, *Spying in the Black Sea*, Bull. of Atomic Scientists, May 1988, at 5.

30. Memorandum to the Assistant Secretary for Public Affairs from Principal Deputy Legal Adviser, May V. Mochary, Apr. 26, 1988, State Department File No. P89 0140-0428. Authoritative public responses include Armitage, *Asserting U.S. Rights On the Black Sea*, Arms Control Today, June 1988, at 13; Schachte, *The Black Sea Challenge*, U.S. Nav. Inst. Proc., at 62 (June 1988); and Grunawalt, *Innocent Passage Rights*, Christian Sci. Mon., Mar. 18, 1988, at 15. See also, Note, *Oceans Law and Superpower Relations: The Bumping of the Yorktown and the Caron in the Black Sea*, 29 Va. J. Int'l L. 713 (1989); Franckx, *Innocent Passage of Warships*, Marine Policy, at 484-90 (Nov. 1990); and Rolph, *Freedom of Navigation and the Black Sea Bumping Incident: How "Innocent" Must Innocent Passage Be?* 135 Mil. L. Rev. 137 (1992).

31. FBIS-SOV-88-030, Feb. 16, 1988, at 5; American Embassy Moscow telegram 03078, Feb. 14, 1988.

32. Diplomatic Note from the American Embassy Moscow to the Soviet Foreign Ministry, delivered Mar. 2, 1988, reported in American Embassy Moscow telegram 05222, Mar. 3, 1988, pursuant to instructions contained in State Department telegram 061663, Feb. 27, 1988. See also the account of this incident in Aceves, *supra* n. 28, at 59 & 67-70.

33. See *supra* text accompanying n. 4 and Appendix 3; Note and Rolph, *supra* n. 30. See also Aceves, *supra* n. 28, at 73-75.

34. Clingan, *Freedom of Navigation in a Post-UNCLOS III Environment*, 46 Law & Contemp. Probs. 107, at 112 & nn.23-27 (1983). Professor Clingan was Vice-Chairman of the U.S. Law of the Sea Delegation. This article was based on a speech he gave on October 30, 1982, at a symposium on the law of the sea at the Duke University School of Law.

35. U.N. Doc. A/CONF.62/L.97.

36. 16 Official Records of the Third U.N. Conference on the Law of the Sea 131, para. 3, U.N. Doc. A/CONF.62/L.85 [hereinafter Official Records].

37. *Id.* at 132, para. 1.

38. *Id.* at 155, para. 35.

39. *Id.* at 148, para. 43.
40. *Id.* at 162, para. 122.
41. *Id.*, vol. 17, at 106, para. 70.
42. *Id.* at 123, para. 92.
43. *Id.* at 124, para. 106.
44. *Id.*, vol. 16, at 163, para. 144.
45. *Id.*, at 100, para. 1.
46. *Id.* at 101, para. 20.
47. *Id.*, vol. 17, at 79, para. 200. The United Kingdom continues not to recognize any such requirement for prior notification or authorization. See, e.g., 59 Brit. Y.B. Int'l L. 1988, at 522 (1989); 60 *id.* 1989, at 666 (1990); and 61 *id.* 1990, at 576 (1991).
48. 17 Official Records, at 240, Mar. 9, 1983.
49. *Id.* at 241, May 12, 1983.
50. U.N. Multilateral Treaties Deposited with the Secretary-General, Status as of December 31, 1992, U.N. Doc. ST/LEG/SER.E11, at 770.
51. Quoted in Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 Va. J. Int'l L. 809, at 854 n.159 (1984). Clingan, *An Overview of Second Committee Negotiations in the Law of the Sea Conference*, 63 Ore. L. Rev. 53, at 64-65 (1984) is to the same effect. During the 1988 annual meeting of the American Society of International Law, Ambassador Koh confirmed that point stating that "both the Soviets and their American counterparts insisted at the conference that warships be given equal rights of innocent passage." 82 Proc. Am. Soc. Int'l L. 239-40 (1988).
52. U.N. Doc. A/CONF.62/WS/37, 17 Official Records 243-44. The amendments referred to included documents A/CONF.62/L.97, April 13, 1982 (to amend article 21(1) by inserting a new (b) "navigation of warships including the right to require prior authorization and notification for passage through the territorial sea"), 16 *id.* 217; and A/CONF.62/L.117, April 13, 1982 (to amend article 21, paragraph 1(h) by adding "security" after "immigration"), *id.* at 225.
53. *Supra* n. 4.
54. *Aide memoire* dated December 4, 1984, from American Embassy Stockholm, reported in American Embassy Stockholm telegram 08539, December 10, 1984, pursuant to instructions contained in State Department telegram 355149, December 1, 1984.
55. Of its declaration made in conjunction with deposit of its instrument of ratification of the 1982 Law of the Sea Convention, which may be found in U.N. LOS BULL. Special Issue I, March 1987, at 3, by Diplomatic Note delivered February 26, 1985 by American Embassy Cairo, pursuant to instructions contained in State Department telegram 364687, Dec. 12, 1984. American Embassy Cairo telegram 05527, Feb. 27, 1985.
56. Of article 15 of Decree 185 of April 18, 1963 as amended by Decree Amendment 656/80 of Jan. 1, 1981, by *Note verbale* No. 92 of June 6, 1989 from American Embassy Helsinki, *supra* n. 17.
57. Of section 6(3) of the Maritime Boundaries Act of 1977, which may be found in U.N. Legislative Series, U.N. Doc. ST/LEG/SER. B/19, at 33, by Diplomatic Note dated July 20, 1982 from American Embassy Georgetown, pursuant to instructions contained in State Department telegram 194561, July 14, 1982. American Embassy Georgetown telegram 3242, July 23, 1982.
58. Of section 4(2) of the Territorial Waters Act of 1976, which may be found in U.N. Legislative Series B/19, at 48, by Diplomatic Notes No. 102 dated March 15, 1976 (State Department File No. P77 0009-0012; State Department telegram 058188, 10 March 1976), and Note delivered May 13, 1983, by American Embassy New Delhi, pursuant to instructions contained in State Department telegram 128220, May 9, 1983. American Embassy New Delhi telegram 09947, May 16, 1983.
59. *Supra* n. 15. The Federal Republic of Germany also protested this claim in August 1985.
60. Department of State note dated October 16, 1981, to the Embassy of Malta at Washington, reported in State Department telegrams 335752, Dec. 19, 1981, and 090860, March 28, 1984. The declaration accompanying Malta's deposit of its instrument of ratification of the LOS Convention on May 20, 1993 asserted:

The exercise of the right of innocent passage of warships through the territorial sea of other States should also be perceived to be a peaceful one. Effective and speedy means of communication are easily available, and make the prior notification of the exercise of the right of innocent passage of warships, reasonable and not incompatible with the Convention. Such notification is already required by some States. Malta reserves the right to legislate on this point.

U.N. LOS BULL., No. 23, June 1993, at 6.

61. Of section 4(2) of the Maritime Zones Act of 1977, which may be found in SMITH, EXCLUSIVE ECONOMIC ZONE CLAIMS 288 [hereinafter SMITH, EEZ CLAIMS], by Diplomatic Note No. 83, dated July

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27, 1982 from American Embassy Port Louis, pursuant to instructions contained in State Department telegram 204808, July 23, 1982. American Embassy Port Louis telegram 02502, July 28, 1982.

62. Of section 4(2) of the Maritime Zones Act of 1977, which may be found in U.N. Legislative Series B/19, at 103, by Diplomatic Note No. 37, dated July 8, 1982 from American Embassy Victoria, pursuant to instructions contained in State Department telegram 156775, June 8, 1982. American Embassy Victoria telegram 01170, July 14, 1982.

63. Of article 7(a) of Act 45 of 1977, which may be found in U.N. Legislative Series B/19, at 23, by Diplomatic Note, dated Aug. 2, 1982, from the United States Mission to the United Nations at New York City to PDRY Mission to the United Nations, pursuant to instructions contained in State Department telegram 208006, July 27, 1982.

64. Of its declaration made in conjunction with deposit of its instrument of ratification of the 1982 Law of the Sea Convention, which may be found in U.N. LOS BULL. Special Issue I, at 8, Mar. 1987, by Diplomatic Note No. 062 dated Apr. 22, 1986 (State Department telegram 264932, 22 Aug. 1986, American Embassy Belgrade 07850, Aug. 28, 1986), Note No. 3 dated Jan. 5, 1988 (State Department telegram 007901, Jan. 12, 1988, American Embassy Belgrade telegram 00411, Jan. 14, 1988); and note from American Embassy Belgrade (State Department telegram 292953, Aug. 30, 1990).

65. Of Decree No. 5384 of Feb. 23, 1976, by diplomatic note delivered July 21, 1989 on behalf of the United States by the French Embassy in Tirane, pursuant to instructions contained in State Department telegram 193134 (to Paris), June 17, 1989.

66. Of Decree No. 63-403 of October 12, 1963, which may be found in U.N. LOS BULL., No. 2, Dec. 1983, at 1, by American Embassy Algiers Note 72 of Mar. 11, 1964 (enclosure 1 to American Embassy Algiers Airgram A-425), and by *demarche* made Nov. 27, 1982 by American Embassy Tunis (State Department telegram 331958, Nov. 27, 1982; American Embassy Tunis telegram 4743, Nov. 27, 1982).

67. Of article 14(2) of the Territorial Waters Act, 1972, which may be found in SMITH, EEZ CLAIMS at 63, and U.N. LOS: Practice of Archipelagic States 6, by diplomatic note delivered in April 1987, by the United States Embassy Antigua. State Department telegram 129882, April 30, 1987.

68. Of section 3(7) of the Territorial Waters and Maritime Zones Act of 1974, which may be found in U.N. Legislative Series B/19, at 5, by Diplomatic Note delivered Sept. 7, 1982, by American Embassy Dacca, pursuant to instructions contained in State Department telegram 208007, July 22, 1982. American Embassy Dacca telegram 5783, Sept. 10, 1982. Also protested by the Federal Republic of Germany in April 1986.

69. Of section 6(2) of the Territorial Waters Act, 1977-26, which may be found in Supplement to Official Gazette, June 30, 1977, at 1, by Diplomatic Note No. 152, dated June 14, 1982, from American Embassy Bridgetown, pursuant to instructions contained in State Department telegram 116140, June 11, 1982. American Embassy Bridgetown telegram 02993, June 15, 1982.

70. Of its reservation to article 23 on ratification of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, which may be found in U.N., Multilateral Treaties Deposited with the Secretary-General: Status as of Dec. 31, 1992, U.N. Doc. ST/LEG/SER.E/11, Sales No. E.93.V.11 (1993) at 744, by Diplomatic Notes from American Embassy Sofia, dated July 19, 1984 (State Department telegram 211190, July 18, 1984; American Embassy Sofia telegram 2765, July 20, 1984), Dec. 21, 1984 (State Department telegram 369308, 12 Dec. 1984; American Embassy Sofia telegram 4817, Dec. 24, 1984), May 13, 1985 (State Department telegram 140388, May 8, 1985; American Embassy Sofia telegram 1840, May 14, 1985), July 19, 1985 (State Department telegram 218859, July 17, 1985; American Embassy Sofia telegram 4665, Dec. 3, 1985), February 6, 1986 (State Department telegram 380983, Dec. 14, 1985; American Embassy Sofia telegram 544, Feb. 7, 1986), May 9, 1986 (State Department telegram 144703, May 8, 1986; American Embassy Sofia telegram 3109, July 18, 1986), and March 31, 1987 (American Embassy Sofia telegram 1005, May 6, 1987; State Department telegram 80048, March 18, 1987; American Embassy Sofia telegram 1437, April 2, 1987).

Bulgaria asserted that because the Government of the United States did not object to this "so-called" reservation, the Government of the United States is bound by it, and that, in accordance with Bulgaria's statement concerning article 23 of the 1958 Territorial Sea Convention, it claims the authority to grant or deny foreign warships the right to engage in innocent passage through the Bulgarian territorial sea. In response the United States said:

Insofar as that statement constitutes such a claim of authority, it cannot be considered a proper reservation to the 1958 Territorial Sea Convention. Article 14 of that Convention recognizes the right of ships of all states to innocent passage in the territorial sea, and article 15 forbids coastal states to hamper innocent passage. No provision in that convention recognizes any authority of a coastal state to grant or deny innocent passage to a foreign warship. Article 23 merely recognizes the coastal state's authority to require the departure of such a warship in the event that it refuses to comply with coastal state passage regulations that conform with international law.

In customary international law, a "reservation" is a statement made by a state upon, *inter alia*, ratification of a treaty, which "purports to exclude or modify the effect of certain provisions of the treaty in their application to that state." To the extent that the Government of Bulgaria's statement concerning article 23 constitutes a claim of authority to permit or deny foreign warships the right of innocent passage, that statement does not exclude or modify the legal effect of article 23 or other convention provisions. Rather, that statement asserts a wholly new claim of authority and would, if effective, create a new substantive provision to the convention, concerning a right not previously recognized under customary international law. The First United Nations Conference on the Law of the Sea specifically rejected proposed articles that would have allowed coastal states to condition warship innocent passage on prior permission or even prior notification.

The statement of the Government of Bulgaria is not truly a reservation as understood in customary international law. Because it is not a true reservation, it in no way affects the respective rights and duties of the United States and Bulgaria as convention parties, regardless of whether the Government of the United States has or has not objected to it. (As to the need for an objection, the reliance of the Government of Bulgaria on paragraph 1 of article 21 of the 1969 Vienna Convention on the Law of Treaties is misplaced. That convention provides, in article 4, that it does not apply to treaties concluded before its entry into force — for example, the 1958 Territorial Sea Convention and the 1962 statement of Bulgaria regarding that convention.)

Even if the statement concerning article 23 could be considered a reservation as understood in customary international law, it would not be a permissible reservation. To the extent that it claims the right to grant or deny foreign warships the right of innocent passage, the statement of the Government of Bulgaria clearly conflicts with the express terms, object and purpose of the Territorial Sea Convention, which allocated the rights and duties of coastal and non-coastal states in the territorial sea, including guarantee of the right of innocent passage for vessels of all states.

State Department telegram 140388, May 8, 1985. See text accompanying n. 102 *infra* for Bulgaria's withdrawal of this claim.

71. Of section 9(a) of the Territorial Sea and Maritime Zones Act of 1977, which may be found in U.N. Legislative Series B/19, at 9, by Diplomatic Note delivered Aug. 6, 1982, from American Embassy Rangoon, pursuant to instructions contained in State Department telegram 196007, July 15, 1982. American Embassy Rangoon telegram 32243, Aug. 9, 1982. Also protested by the United Kingdom in 1993.

72. Of article 5 of Decree Law 126/77, which may be found in U.N. Baselines: National Legislation 99, and SMITH, EEZ CLAIMS, at 96, by Diplomatic Notes 95 and 147 dated July 21, 1989. State Department telegram 193415, June 18, 1989; American Embassy Praia telegram 02186, Aug. 27, 1990.

73. Of article 6 of the Law on the Territorial Sea and the Contiguous Zone of Feb. 25, 1992, which may be found in U.N. LOS BULL., No. 21, Aug. 1992, at 25, by an oral *demarche* delivered Aug. 26, 1992 in Beijing.

74. Of Ordinance 49/77 of Dec. 20, 1977, by Diplomatic Note No. 191 delivered Dec. 15, 1987, from American Embassy Brazzaville, pursuant to instructions contained in State Department telegram 382072, Dec. 10, 1987. American Embassy Brazzaville telegram 0520, Feb. 26, 1988.

75. Of article 38(3) of the Regulation of June 15, 1982, which may be found in U.N. Legislative Series, U.N. Doc. ST/LEG/SER.B/18, at 20, by *note verbale* delivered Nov. 3, 1986. State Department telegram 311721, Oct. 3, 1986; State Department telegram 345715, Nov. 4, 1986. Following German unification on October 3, 1990, Germany has not maintained this claim.

76. Of article 6(2) of the Territorial Waters Act No. 17 of 1978, which may be found in 7 NEW DIRECTIONS IN THE LAW OF THE SEA 33 (1980), by Diplomatic Note No. 004, dated July 21, 1982, from American Embassy Bridgetown (pursuant to instructions contained in State Department telegram 200855, July 20, 1982; American Embassy Bridgetown telegram 03658, July 23, 1982), and by American Embassy Bridgetown *demarche* on Feb. 24, 1986 (*reported in* American Embassy Bridgetown telegram 00522, Feb. 25, 1986, pursuant to instruction contained in State Department telegram 03681, Jan. 30, 1986).

77. Of its statement on signature of the 1982 Law of the Sea Convention, which may be found in Office of the Special Representative of the Secretary-General for the Law of the Sea. The Law of the Sea: Status of the United Nations Convention on the Law of the Sea 18 (U.N. Sales No. E.84.V.5, 1985), by the United States Statement in Right of Reply of Mar. 8, 1983, 17 Official Records 244, U.N. Doc. A/CONF.62/WS/37; by State Department diplomatic note to the Algerian Embassy in Washington, dated Aug. 17, 1987, State Department File No. P87 0098-1262; and by the United States Mission to the United Nations Diplomatic Note 3503/437, Jan. 11, 1994, to the Secretary-General of the United Nations, Limit in the Seas No. 114 (1994).

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78. Of section 1 of Act 32/76, which may be found in U.N. Legislative Series B/19, at 135, by Diplomatic Note delivered Aug. 2, 1982, by American Embassy Colombo Consular Agent in Male, pursuant to instructions contained in State Department telegram 150666, June 2, 1982. American Embassy Colombo telegram 4672, Aug. 6, 1982.

79. Of Oman's Notice of June 1, 1982, which may be found in U.N. Current Developments I, at 80-81, by American Embassy Muscat Note No. 0606 of Aug. 12, 1991. State Department telegram 187028, June 9, 1990; American Embassy Muscat telegram 03528 of Aug. 13, 1991.

80. Of section 3(2) of the Territorial Waters and Maritime Zones Act of 1976, which may be found in U.N. Legislative Series B/19, at 86, by Diplomatic Note No. 694 dated June 8, 1982, from American Embassy Islamabad, pursuant to instructions contained in State Department telegram 155385, June 7, 1982. American Embassy Islamabad telegram 09069, June 14, 1982.

81. Of Press Release No. 7 of Sept. 23, 1968, by Diplomatic Note 169, dated Mar. 10, 1969, from American Embassy Manila, State Department File No. POL 33-4 PHIL.

82. Of Ministry of Defense Order dated Mar. 29, 1957, Polish Journal of Law No. 19 of 1957, Item 96, by inquiries in May and June 1989 by American Embassy Warsaw. State Department telegram 174663, June 2, 1989; American Embassy Warsaw telegram 8369, June 21, 1989.

83. Of its declaration made in conjunction with its signature of the 1982 Law of the Sea Convention, which may be found in U.N. LOS BULL., No. 1, Sept. 1983, at 18, and of Decree No. 39 of Jan. 21, 1956, which may be found in French in U.N. Legislative Series, U.N. Doc. ST/LEG/Ser.B/6, at 239, by Diplomatic Note No. 262 dated Aug. 1, 1989 from American Embassy Bucharest. State Department telegram 218441, July 11, 1989; American Embassy Sofia telegram 06294, Aug. 3, 1989. Romania replied:

The right to adopt such measures is in full agreement with articles 19 and 25 of the Convention, as is stipulated in the declaration of the President of the UN Conference on the Law of the Sea, presented in the plenary meeting of the Conference on April 26, 1982.

The amendment referring to article 21 of the Convention presented at the Conference by Romania and other countries was aimed, as it is shown in the declaration of the President, to clarify the text of the Draft Convention. The countries which co-authored the amendment expressing their agreement not to insist on asking for its being put to a vote, reasserted, at the same time, that "their decision does not touch the rights of littoral states to adopt measures to safeguard their security interests, in accordance with articles 19 and 25 of the Draft Convention."

This agreement was included in the above-mentioned President's declaration.

Consequently, the declaration made by the Socialist Republic of Romania on December 10, 1982, on the occasion of signing the UN Convention on the Law of the Sea is in accordance with the final agreement and which was included in the declaration of the Conference President of April 26, 1982, and it is perfectly valid in international law. That is why the objections raised by the Government of the United States on the content of this declaration are unacceptable.

American Embassy Bucharest telegram 07689, Sept. 18, 1989.

84. Of article 10 of the Territorial Sea and Ports Law No. 37 of Sept. 10, 1972, which may be found in 7 NEW DIRECTIONS IN THE LAW OF THE SEA 59 (1980), by Diplomatic Note delivered Aug. 28, 1982, by American Embassy Mogadishu. State Department telegram 231502, Aug. 18, 1982; American Embassy Mogadishu telegram 6215, Aug. 29, 1982.

85. Protest directed at section 3(1) of the Maritime Zones Law No. 22 of 1976, which may be found in U.N. Legislative Series B/19, at 120, by Diplomatic Note No. 317 dated Sept. 12, 1986, from American Embassy Colombo, *supra* n. 13. The Ministry of Foreign Affairs replied:

The provisions of the Maritime Zones Law relating to the requirement of prior consent of the Government for passage of warships in Sri Lanka's territorial waters, is consistent with the present state of international law on this question. The 1982 Convention on the Law of the Sea recognizes that special rules are applicable to foreign warships as distinct from other ships and warships are treated separately in the Convention. The provisions of the Convention also specifically require the conformity of warships with the laws and regulations of the coastal state.

Sri Lanka MFA Note No. L/POL/22 dated Dec. 9, 1986, *supra* n. 14. This requirement was also protested by the EC in May 1987.

86. Of article 8(3) of the Territorial Waters and Continental Shelf Act of 1970, which may be found in U.N., Legislative Series B/16, at 33, by Diplomatic Note delivered June 6, 1989, by American Embassy

Khartoum. State Department telegram 174664, June 2, 1989; American Embassy Khartoum telegram 06535, June 7, 1989.

87. Of article 12 of Legal Decree No. 304, Dec. 28, 1963, which may be found in *Limits in the Seas* No. 53, Syria: Straight Baselines (1973), by Diplomatic Note delivered Nov. 21, 1989, by American Embassy Damascus. State Department telegram 337081, Oct. 20, 1989; American Embassy Damascus telegram 03212, Aug. 23, 1990.

88. Of Decree issued Mar. 17, 1980 on the regulations for foreign ships operating in the maritime zones of the Socialist Republic of Vietnam, which may be found in IV FBIS Asia & Pacific, March 19, 1980, at K2, by *aide memoire* dated Aug. 24, 1982, from the United States Mission to the United Nations at New York City to SRV Mission to the United Nations, pursuant to instructions contained in State Department telegram 232901, Aug. 19, 1982. U.S. Mission to the United Nations, New York telegram 03590, Nov. 23, 1982. Also protested by the Federal Republic of Germany in October 1985.

89. Of its declaration made in conjunction with its signature of the 1982 Law of the Sea Convention, which may be found in U.N. LOS BULL., No. 1, September 1983, at 18, by Diplomatic Note No. 449 dated Oct. 6, 1986, from American Embassy Sanaa. State Department telegram 312052, Oct. 3, 1986; American Embassy Sanaa telegram 06770, Oct. 6, 1986.

90. Department of State note dated Oct. 16, 1981, to the Embassy of Malta at Washington, reported in State Department telegrams 335752, Dec. 19, 1981, and 090860, Mar. 28, 1984. In a March 20, 1984, telegram to the Department (84 Valetta 00596), American Embassy Valetta reported that no implementing regulations had been promulgated. The Maltese Act No. XXVIII of 1981 may be found in U.N. Doc. LE 113 (3-3), November 16, 1981. The Declaration accompanying Malta's instrument of ratification of the LOS Convention included the statement that "Legislation and regulations concerning the passage of ships through Malta's territorial sea are compatible with the provisions of the Convention. At the same time, the right is reserved to develop further this legislation in conformity with the Convention as may be required." U.N. LOS BULL., No. 23, June 1993, at 7.

Articles 14 and 15 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, concerning enforcement and penalties for violating coastal State regulations, are developed in articles 17-20 and 24 of the 1982 LOS Convention. The LOS Convention also provides, in article 27(5), that "except as provided in Part XII [marine pollution, see article 230] or with respect to violations of laws and regulations adopted in accordance with Part V [EEZ, see article 73], the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters." Article 230(2) of the LOS Convention provides that "monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels in the territorial sea, except in the case of a wilful and serious act of pollution in the territorial sea."

91. American Embassy Copenhagen Diplomatic Note No. 061, July 12, 1991, delivered pursuant to instructions contained in State Department telegram 223707, July 9, 1991; American Embassy Copenhagen telegram 04829, July 17, 1991, protesting section 3(4) of Ordinance no. 73 of 27 Feb. 1976, which may be found in U.N. Legislative Series B/19, at 143, requiring advance permission for simultaneous passage of more than three warships through the Danish territorial sea, except prior notice is required for passage through the Great Belt, Samsø Belt or the Sound. On Oct. 3, 1991 the Danish Ministry of Foreign Affairs replied by *note verbale* JT.2, File No. 119.N.2/3/f/1, which stated that:

The rules contained in that ordinance are not contrary to customary international law or international convention binding upon Denmark.

The conditions for exercising innocent passage in the territorial sea for foreign warships have never been laid down authoritatively in international law. The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone does not in its relevant provisions specifically address this question.

The same applies to the 1982 U.N. Convention on the Law of the Sea which in its relevant provision on innocent passage in the territorial sea, states that "ships of all States" enjoy the right of innocent passage using the same wording as the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.

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Furthermore all Diplomatic Missions accredited to Denmark were officially notified about the Ordinance by Circular Note of 4 March 1976. Before this NATO Allies were informed about the contents of the Ordinance in the NATO Council at its meeting of 25 February 1976. It must be pointed out that neither the notification nor the NATO briefing gave rise to a reaction by the United States.

American Embassy Copenhagen telegram 07435, Oct. 24, 1991.

92. *Aide memoire* from the United States Mission to the United Nations at New York to the Socialist Republic of Vietnam Mission dated Aug. 24, 1982, State Department telegram 232902, Aug. 19, 1982, U.S. Mission to the United Nations telegram 03590, Nov. 23, 1982. The Federal Republic of Germany also protested this claim in October 1985.

93. American Embassy Belgrade Diplomatic Note No. 062 dated Aug. 22, 1986 (State Department telegram 264932, Aug. 22, 1986; American Embassy Belgrade telegram 7850, Aug. 28, 1986) protesting Yugoslavia's statement deposited with its instrument of ratification of the 1982 LOS Convention dated Mar. 6, 1986; and by American Embassy Belgrade Note no. 003 of Jan. 5, 1988 (State Department telegram 007901, Jan. 12, 1988; American Embassy Belgrade telegram 00411, Jan. 14, 1988), protesting article 20(1) of the Law of the Coastal Sea and Continental Shelf of the Socialist Federal Republic of Yugoslavia, published July 25, 1987, and reprinted in U.N. LOSBULL., No. 18, at 18. The same limitation was contained in article 14 of the Law of the Coastal Sea, the Contiguous Zone and the Continental Shelf of the Socialist Federal Republic of Yugoslavia, published May 12, 1965, and reproduced in U.N. Legislative Series B/15, at 189, and in 1 NEW DIRECTIONS IN THE LAW OF THE SEA 36. Yugoslavia's declaration made in conjunction with deposit of its instrument of ratification of the 1982 Law of the Sea Convention may be found in U.N. LOS BULL., Special Issue I, Mar. 1987, at 8.

94. U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations* (NWP 9 (Rev. A)/FMFM 1-10), para. 2.1.2.1 (1989). Compare the 1982 LOS Convention, articles 21(1), 22(2) & 23. Under article 23 of the 1982 LOS Convention, foreign nuclear powered ships and ships carrying nuclear or other inherently dangerous or noxious substances exercising the right of innocent passage must "carry documents and observe special precautionary measures established for such ships by international agreements," such as chapter VIII of the 1974 International Convention for the Safety of Life at Sea, 32 U.S.T. 275-77, 287-91, T.I.A.S. No. 9700 (nuclear passenger ship and nuclear cargo ship safety certificates). These provisions of the 1974 SOLAS are specifically *not* applicable to warships.

United States Public Law 93-513, establishes the following policy regarding claims arising out of the operation of U.S. nuclear powered warships:

It is the policy of the United States that it will pay claims or judgments for bodily injury, death, or damage to or loss of real or personal property proven to have resulted from a nuclear incident involving the nuclear reactor of a United States warship: *Provided*, That the injury, death, damage, or loss was not caused by the act of an armed force engaged in combat or as a result of civil insurrection. The President may authorize, under such terms and conditions as he may direct, the payment of such claims or judgments from any contingency funds available to the Government or may certify such claims or judgments to the Congress for appropriation of the necessary funds.

88 Stat. 1611, codified in 42 U.S.C. §2211.

The safety record of United States nuclear powered warships is outstanding. There has never been a nuclear accident in the 40 year history of the program. This program currently includes 107 operating nuclear powered warships and 151 operating reactors, significantly larger than the U.S. commercial nuclear program. Since 1955, U.S. Navy nuclear powered warships have steamed over 96 million miles and amassed over 4300 reactor-years of operating experience. These ships have visited more than 150 ports in over 50 foreign countries and dependencies. Department of the Navy White Paper "The Safety of Operations of U.S. Nuclear-Powered Warships" (Oct. 1993).

Australia's policy on access of foreign nuclear powered and nuclear weapons capable warships, based in part on the foregoing, appears in 77 Aust. Y.B. Int'l L. 243-47 (1991).

95. Article 8 of Act No. 45 of 1977 concerning the territorial sea, exclusive economic zone, continental shelf and other marine areas, a translation of which may be found in U.N. Legislative Series B/19, at 21-26.

96. Diplomatic Note, dated August 2, 1982, from the United States Mission to the United Nations at New York to PDRY Mission to the United Nations, *supra* n. 63.

97. Article 3(3) of Pakistan's Territorial Waters and Maritime Zones Act, 1976, which may be found in U.N. Legislative Series B/19, at 86, protested by Diplomatic Note No. 694 dated June 8, 1982, delivered by American Embassy Islamabad, *supra* n. 80.

A similar declaration accompanying Malta's deposit of its instrument of ratification of the LOS Convention on May 20, 1993 states that "Malta is also of the view that such a notification requirement is needed in respect

of nuclear-powered ships or ships carrying nuclear or other inherently dangerous or noxious substances." U.N. LOS BULL., No. 23, June 1993, at 7.

98. Article VII of Law No. 52/AN/78 of January 9, 1979, which may be found in SMITH, EEZ CLAIMS, at 112, was protested by Diplomatic Note dated May 22, 1989, from American Embassy Djibouti. State Department telegram 100762, Mar. 31, 1989; American Embassy Djibouti telegram 1481, June 1, 1989.

99. The Yemeni declaration, which may be found in Office of the Special Representative of the Secretary-General for the Law of the Sea, The Law of the Sea: Status of the United Nations Convention on the Law of the Sea, U.N. Sales No. E.85.V.5, at 29 (1985), was protested by Diplomatic Note No. 449 dated October 6, 1986, from American Embassy Sanaa, *supra* n. 89.

100. State Department telegram 364687, Dec. 12, 1984, para. 11; American Embassy Cairo telegram 05527, Feb. 27, 1985. The Egyptian declaration may be found in Office of the Special Representative of the Secretary-General for the Law of the Sea, The Law of the Sea: Status of the United Nations Convention on the Law of the Sea, at 35.

101. Diplomatic Note No. 0606 dated Aug. 12, 1991 and delivered Aug. 13, 1991 by American Embassy Muscat, pursuant to instructions contained in State Department telegram 187028, June 9, 1990. American Embassy Muscat telegram 03528, Aug. 13, 1991. Oman's declarations made upon deposit of its instrument of ratification may be found in U.N. LOS BULL., No. 14, Dec. 1989, at 8-9.

102. DEP'T ST. BULL., Nov. 1989, at 26; 84 Am. J. Int'l L. 239-42 (1990); Appendix 4.

103. U.N. Current Developments in State Practice No. II, at 7.

104. Diplomatic Note delivered Dec. 4, 1979, by American Embassy Ankara. American Embassy Ankara telegram 08743, Dec. 4, 1979; State Department telegram 287083, Nov. 2, 1979. The United Kingdom had made a similar protest by its note no. 67 of October 1, 1979. American Embassy Ankara telegram 7818, Oct. 22, 1979; American Embassy Ankara telegram 8008, Oct. 26, 1979.

105. Turkish Embassy letter 780-144 dated May 2, 1985, State Department File No. P92 0098-0747.

106. *Note verbale* dated Feb. 18, 1988, from the Haitian Ministry of the Interior, Decentralization, the General Police Force and the Civil Service, communicated to the United Nations by letter dated Feb. 29, 1988, and reproduced in U.N. LOS BULL., No. 11, July 1988, at 13.

107. American Embassy Port au Prince diplomatic note delivered Aug. 1, 1989, pursuant to instructions contained in State Department telegram 229980, July 20, 1989. American Embassy Port au Prince telegram 05277, Aug. 7, 1989.

108. 28 I.L.M. 649 (1989), entered into force May 5, 1992. The States party as of Dec. 28, 1992 are listed in 32 I.L.M. 276 (1993).

109. Sen. Treaty Doc. 102-5, 102d Cong., 1st Sess. (1991), at VI.

110. U.N. Doc. ST/LEG/SER.E/11, Multilateral Treaties Deposited with the Secretary-General as of Dec. 31, 1992, at 832-33 (U.N. Sales No. E.93.V.77, 1993).

111. Cong. Rec. S12292, Aug. 11, 1992. The Administration had sought such an understanding (Letter of Submittal, *supra* n. 109, at VI), and the Senate Foreign Relations Committee concurred. Sen. Exec. Rep. 102-36, 102d Cong., 2d Sess., May 22, 1992, at 17. Deposit of the United States instrument of ratification, which was signed on Oct. 17, 1992, awaits enactment of the necessary implementing legislation. See Sen. Exec. Rep. 102-36, at 15-16.