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Excessive Maritime Claims
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Chapter XI
International Straits

Legal Regime

Part III of the LOS Convention addresses five different kinds of straits used for international navigation, each with a distinct legal regime:

1. Straits connecting one part of the high seas/EEZ and another part of the high seas/EEZ (Article 37, governed by transit passage).

2. Straits connecting a part of the high seas/EEZ and the territorial sea of a foreign nation (Article 45(1)(b), regulated by nonsuspendable innocent passage).

3. Straits connecting one part of the high seas/EEZ and another part of the high seas/EEZ where the strait is formed by an island of a State bordering the strait and its mainland, if there exists seaward of the island a route through the high seas/EEZ of similar convenience with regard to navigation and hydrographic characteristics (Article 38(1), regulated by nonsuspendable innocent passage).

4. Straits regulated in whole or in part by international conventions (Article 35(c)). The LOS Convention does not alter the legal regime in straits regulated by long-standing international conventions in force specifically relating to such straits.

5. Straits through archipelagic waters governed by archipelagic sea lanes passage (Article 54).

There are a number of straits connecting the high seas/EEZ with claimed historic waters. The validity of those claims is, at best, uncertain.

Transit Passage

Straits used for international navigation through the territorial sea between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone are subject to the legal regime of transit passage.[1] Under international law, the ships and aircraft of all nations, including warships and military aircraft, enjoy the right of unimpeded transit passage through such straits. The great majority of strategically important straits, *e.g.*, Gibraltar, Bab el Mandeb, Hormuz, and Malacca, fall into this category. The transit passage regime also applies to those straits less than six miles wide previously subject to the regime of nonsuspendable innocent passage under the Territorial Sea Convention, *e.g.*, Singapore and Sunda. Transit passage also applies in those straits where the high seas or exclusive economic zone corridor is not of similar convenience with respect to navigational and hydrographical characteristics.[2]

Transit passage is defined as the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit in the

normal modes of operation utilized by ships and aircraft for such passage.[3] This means that submarines are free to transit international straits submerged, since that is their normal mode of operation, and that surface warships may transit in a manner consistent with sound navigational practices and the security of the force, including formation steaming and the launching and recovery of aircraft.[4] All transiting ships and aircraft must proceed without delay; must refrain from the threat or the use of force against the sovereignty, territorial integrity, or political independence of States bordering the strait; and must otherwise refrain from any activities other than those incidental to their normal modes of continuous and expeditious transit.[5]

Transit passage through international straits cannot be suspended by the coastal State for any purpose.[6] This principle of international law also applies to transiting ships (including warships) of nations at peace with the bordering coastal or island nation but involved in armed conflict with another nation. Warships and other targetable vessels of nations in armed conflict with the bordering coastal or island nation may be attacked within that portion of the international strait overlapped by the territorial sea of the belligerent coastal or island nation, as in all high seas areas of the strait.[7]

States bordering international straits overlapped by territorial seas may designate sea lanes and prescribe traffic separation schemes to promote navigational safety. However, such sea lanes and separation schemes must be approved by the competent international organization in accordance with generally accepted international standards. Ships in transit must respect properly designated sea lanes and traffic separation schemes.[8]

The position of the United States on transit passage is well known. For example, in the Proclamation extending the territorial sea of the United States, President Reagan stated:

> 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 and aircraft of all countries enjoy the right of transit passage through international straits.[9]

The Department of State summarized the development of the regime of transit passage in a 1985 telegram to American Embassy Madrid, Spain:

> [The following is provided to aid in an understanding of the regime of transit passage through territorial seas forming certain straits used for international navigation. The crucial nature of the right of passage through straits has led to the development, reflected in Part III of the 1982 LOS Convention, of the concept of so-called transit passage through straits used for international navigation that link a part of the high seas or an EEZ with another part of the high seas or an EEZ. (Frequently, such straits—of which Gibraltar is one of the prime examples—are referred to as "international straits," although there are other types of

international straits that do not link high seas or EEZ on either end. For convenience, the term will be used here.) In international straits, the balancing of coastal and non-coastal state interests has resulted in a regime of transit passage—a regime that is more liberal to flag states than that of innocent passage, the usual regime in a territorial sea. For example, vessels in transit passage are subject to fewer coastal state laws than they would be while in innocent passage, and aircraft may overfly such straits and submarines may navigate them while submerged—neither of which is true for innocent passage. At UNCLOS III, Spain tried, during the last substantive sessions, to amend portions of the Convention provisions that bore upon coastal state rights and duties regarding vessels and aircraft exercising the right of transit passage. None of those proposals was adopted, but the Spanish declarations upon signing revive the principles espoused in the proposals.][10]

In a December 1984 *aide memoire* delivered to Sweden, the United States described the legal regime followed by U.S. warships navigating through international straits:

. . . [W]arships of the United States navigate through territorial seas in straits used for international navigation in accordance with international law as reflected in Part III of the 1982 Convention on the Law of the Sea. As is true of innocent passage in non-straits waters, exercise of the appropriate navigational regime in straits poses no threat to the security of the coastal State and constitutes no violation of its territorial integrity.[11]

It is the position of the United States that transit passage also applies in the approaches to international straits. In a telegram to American Embassy Santiago, Chile, the State Department discussed the rights of navigation through the **Strait of Magellan** and **Beagle Channel**:

The fact that a vessel navigating through [an international strait] (or an aircraft overflying it) would have to traverse an area of Argentine territorial sea is a matter of no legal consequence. It is an extremely rare occurrence for a strait to be so configured that a vessel can enter it without traversing some extent of territorial sea before reaching the headlands. It is, nevertheless, the firm position of the USG that the regime of transit passage applies not only to the territorial seas actually within the strait, but also to those in the approaches to it. The presence of Argentine territorial sea outside the eastern end of the strait no more "blocks" it than does the presence of Chilean territorial sea outside the western end.[12]

The same position was taken in 1988 with regard to the approaches to the **Strait of Hormuz** in a U.S. Navy telegram, which had been coordinated with the Department of State to reflect official U.S. policy:

The geographics of straits vary. The areas of overlapping territorial seas in many cases do not encompass the entire area of the strait in which the transit passage regime applies. The regime applies not only in or over the waters overlapped by territorial seas but also throughout the strait and in its approaches, including areas

> of the territorial sea that are not overlapped. The Strait of Hormuz provides a case in point: although the area of overlap of the territorial seas of Iran and Oman is relatively small, the regime of transit passage applies throughout the strait as well as in its approaches including areas of the Omani and Iranian territorial seas not overlapped by the other.[13]

Other states have recognized the right of transit passage. For example, the right of transit passage was fully recognized in Article 4 of the Treaty of Delimitation between Venezuela and the Netherlands, March 21, 1978;[14] Article VI of the Agreement on the Delimitation of Marine and Submarine Areas, April 18, 1990, between Trinidad and Tobago and Venezuela;[15] and Article 7(6) of the 1978 treaty between Australia and Papua New Guinea concerning the Torres Strait.[16] The right of transit passage of straits is also recognized in Article 5(2) of the 1985 multilateral Treaty of Rarotonga concerning Nuclear Free Zones in the South Pacific,[17] and Article 5(2)(c) of the 1990 Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region.[18] Antigua and Barbuda has also recognized the right of transit passage in article 15A of the Maritime Areas Act, 1982.[19]

Although the term "transit passage" was not used in the statement in connection with extension of the United Kingdom's territorial sea to 12 miles,[20] the "transit passage" regime was applied in a Declaration issued by France and the United Kingdom setting out the governing regime of navigation in the Dover Straits at the time an Agreement was signed on November 2, 1988, establishing a territorial sea boundary in the Straits of Dover.[21] In a speech delivered to the thirteenth annual seminar of the Center for Oceans Law and Policy, Washington, D.C., April 1, 1989, David H. Anderson, Deputy Legal Adviser to the British Foreign Office, commented on the right of transit passage and the **Straits of Dover.**[22] He said that:

> The Declaration represents a significant example of practice by the two coastal states on the Straits of Dover which are also maritime states with worldwide connections. The terms of the Declaration were clearly inspired by Part III of the Convention of 1982. It was issued in the context of a boundary agreement made necessary by extension of the breadth of the territorial sea by both coastal states to 12 miles. In this and other respects the Convention of 1982 is influencing the practice of States in regard to the limits of national jurisdiction. There are now 105 States [119 by July 1994] which have a territorial sea of 12 n. miles - a significant increase since 1982 and including all five Permanent Members of the Security Council. The Convention is also influencing State practice in the matters of innocent passage through the territorial sea and transit passage through straits used for international navigation. Several experiences since 1982 have shown the importance of those rights, e.g. in regard to straits such as Hormuz, Gibraltar, Bab El Mandeb, Sunda and others.

> There are several examples of Declarations about the regime of transit through particular straits used for international navigation, for example the Anglo-French Declaration of 1904 about the Straits of Gibraltar and the statement circulated to the Third UN Conference on the Law of the Sea by Malaysia, Indonesia and Singapore about the Straits of Malacca and the Straits of Singapore. The Anglo-French Declaration of 1988 may be regarded as adding to the body of State practice on the subject of transit passage through straits, taking full account of the outcome of the Third Conference's negotiations on the related issues of the limits of the territorial sea and straits. The Declaration strengthens the position under international law on a world-wide basis. It may serve as a precedent for States bordering other major straits used for international navigation.[23]

In 1992, the UN Secretary-General concluded that the "regime of transit passage has been widely accepted in general terms by the international community and has become part of the practice of States, both of States bordering straits as well as of shipping States."[24]

In February 1993, the Ministry of Foreign Affairs of **Thailand** stated the position of the Royal Thai Government that "according to 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 transit passage in the straits used for international navigation."[25]

Innocent Passage

The regime of innocent passage, rather than transit passage, applies in straits used for international navigation that connect a part of the high seas or an exclusive economic zone with the territorial sea of a coastal State. There may be no suspension of innocent passage through such straits.[26] These so-called "dead-end" straits include Head Harbour Passage leading through the Canadian territorial sea to the United States' Passamaquoddy Bay and the Bahrain-Saudi Arabia Passage.[27]

The regime of non-suspendable innocent passage also applies in those straits such as Messina, between the Italian mainland and Sicily, formed by an island of a State bordering the strait and its mainland, where there exists seaward of the island a route through the high seas or EEZ of similar convenience with regard to navigational and hydrographical convenience.[28]

The United States protested the claim by the former Yugoslavia that it had the right to determine by its laws and regulations which of the straits used for international navigation in its territorial sea will retain the regime of innocent passage "on the basis of article 38, paragraph 1, and article 45, paragraph 1(a), of the [LOS] Convention."[29] The United States noted that the right of Yugoslavia to designate which of the straits in its territorial sea constitute straits within the meaning of Article 38(1):

> is not unqualified and that there must in fact exist, seaward of the island in question, a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

The United States accordingly reserved its rights and those of its nationals in this regard.[30]

International Straits Not Completely Overlapped by Territorial Seas

Ships and aircraft transiting through or above straits used for international navigation which are not completely overlapped by territorial seas and through which there is a high seas or exclusive economic zone corridor suitable for such navigation, enjoy the high seas freedoms of navigation and overflight while operating in and over such a corridor. Accordingly, so long as they remain beyond the territorial sea, all ships and aircraft of all States have the unencumbered right to navigate through and over such waters subject only to due regard for the right of others to do so as well.[31]

"Straits Used for International Navigation"

The International Court of Justice has held that the decisive criterion in identifying international straits is not the volume of traffic flowing through the strait or its relative importance to international navigation, but rather its geographic situation connecting, for example, the parts of the high seas, and the fact of its being "used for international navigation."[32] This geographical approach is reflected in both the Territorial Sea Convention[33] and the 1982 LOS Convention.[34] The United States holds that all straits susceptible of use for international navigation are included within that definition.[35] The geographical definition appears to contemplate a natural and not an artificially constructed canal, such as the Suez Canal. Efforts to define "used for international navigation" with greater specificity have failed.[36]

Navigational Regimes of Particular Straits

The U.S. position on navigation through international straits and its response to excessive claims can best be illustrated by looking at particular international straits. The following examples, however, do not include all straits the United States considers subject to the transit passage or nonsuspendable innocent passage regimes:

Aland

When it signed the 1982 Law of the Sea Convention, Finland declared in part that:

> It is the understanding of the Government of Finland that the exception from the transit passage regime in straits provided for in article 35(c) of the Convention is applicable to the strait between Finland (the Aland islands) and Sweden. Since in

> that strait the passage is regulated in part by a longstanding international convention in force, the present legal regime in that strait will remain unchanged after the entry into force of the Convention.[37]

Sweden made a similar claim when signing the LOS Convention.[38]

In claiming Aland's Hav, the 16 mile wide entrance to the Gulf of Bothnia,[39] as an exception to the transit passage regime, Sweden and Finland relied on the fact that passage in that strait is regulated in part by the Convention relating to the Non-fortification and Neutralization of the Aland Islands.[40] It should be noted that under Article 4.II of this Convention, the territorial sea of the Aland Islands extends only "three marine miles" from the low water line and in no case extends beyond the outer limits of the straight line segments set out in Article 4.I of the Convention. The Convention is therefore not applicable to the remaining waters that form the international strait. The United States, which is not a party to this Convention, has never recognized this strait as falling within Article 35(c) of the Law of the Sea Convention.

Bab el Mandeb

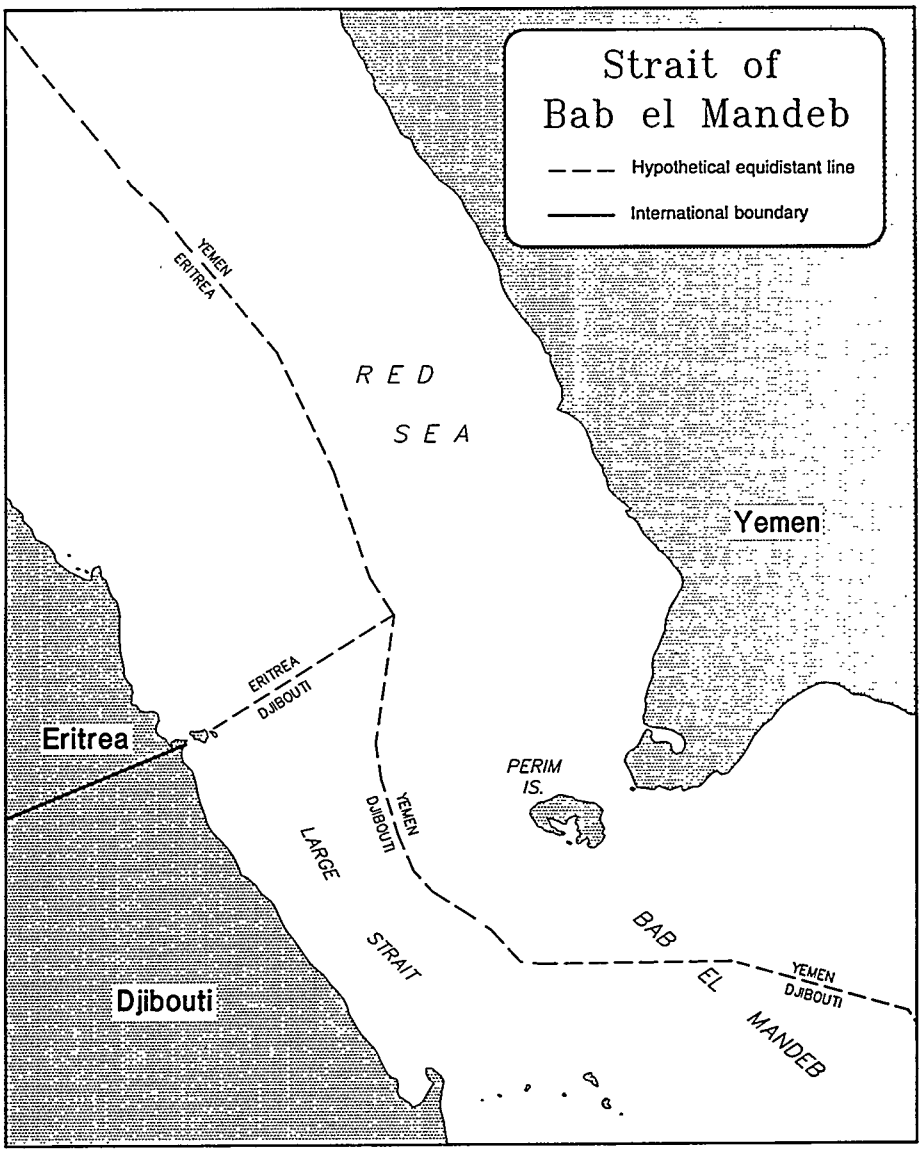
This strategically important strait links the Red Sea and the Suez Canal with the Gulf of Aden and the Arabian Sea (*see* Map 24). It is about 14.5 miles wide at its narrowest part of the passage.[41] When it signed the Law of the Sea Convention, the Yemen Arab Republic declared that warships and warplanes must obtain the prior agreement of the Yemen Arab Republic before passing through or over its "territorial waters," including international straits. The United States Government protested as follows:

> . . . the Government of the Yemen Arab Republic may not legally condition the exercise of the right of transit passage through or over an international strait, such as Bab-el-Mandeb, upon obtaining prior permission. Transit passage is a right that may be exercised by ships of all nations, regardless of type or means of propulsion, as well as by aircraft, both state and civil. While warplanes and other state aircraft normally require prior authorization before overflying another State's territory, authorization is not required for the exercise of the right of straits transit passage under customary law as reflected in article 32 of the Convention.
>
> 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 or to condition the exercise of the right of transit passage by any ships or warplanes upon prior authorization. Accordingly, the United States reserves its rights and those of its nationals in this regard.[42]

Bosporus and Dardanelles

These straits, also known as the Turkish Straits, connect the Aegean Sea and the Black Sea via the Sea of Marmara. The Bosporus connects the Black Sea

Map 24



Names and boundary representation are not necessarily authoritative

with the Sea of Marmara, while the Dardanelles connects the Aegean Sea with the Sea of Marmara. The Bosporus is about 17 miles long and varies in width between one-third and 2 miles. The Dardanelles is about 35 miles long, its width decreases from 4 miles at the Aegean to about 0.7 miles at its narrowest, and its depth varies from 160 to 320 feet. The Sea of Marmara is about 140 miles long.[43]

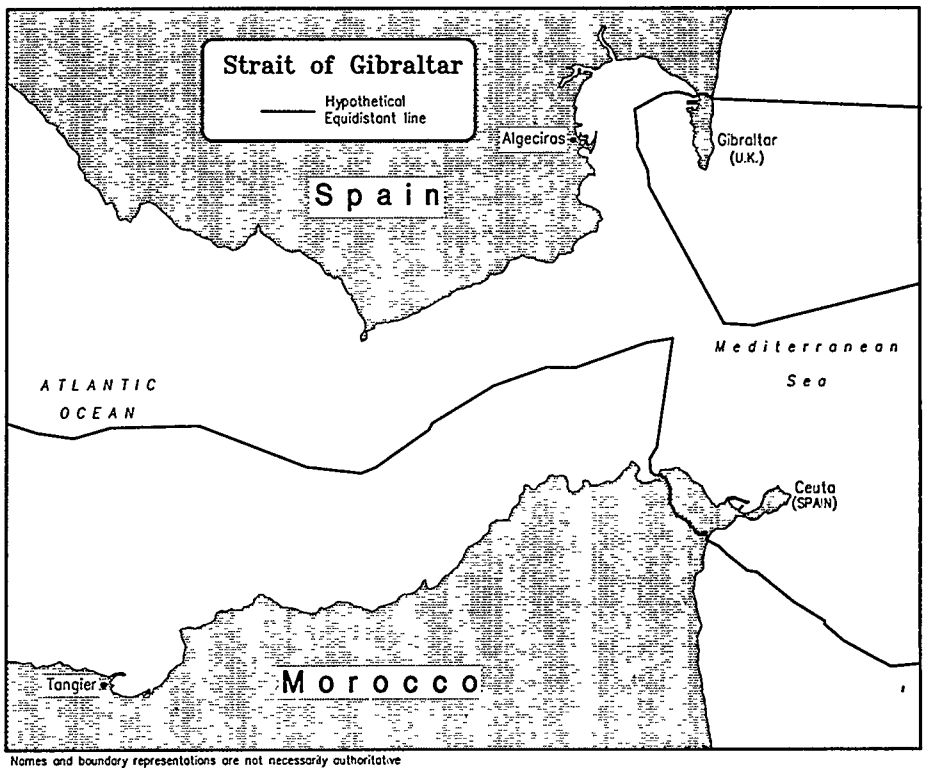
The Turkish Straits are governed by the Montreux Convention of July 20, 1936,[44] and therefore fall under the Article 35(c) exception of the LOS Convention which states that the legal regime of straits regulated in whole or in part by a long-standing international convention in force is not altered by the LOS Convention. Under the Montreux Convention, merchant vessels, whatever their cargo or flag, enjoy complete freedom of transit, day or night. Pilotage and towage are optional. The passage of warships of Black Sea and non-Black Sea States is restricted in different ways depending on the type of warship and whether or not Turkey is a belligerent. There is no right of international overflight of the Turkish Straits.

Gibraltar

This strait connects the Atlantic Ocean to the Mediterranean (*see* Map 25). It is 36 miles long and narrows to less than 8 miles wide at its narrowest point.[45] Upon signing the LOS Convention in 1984, Spain made several claims of coastal State authority over aircraft exercising the right of transit passage over straits used for international navigation and of coastal State pollution control authority over vessels exercising the right of transit passage in straits used for international navigation.[46] The United States protested in 1985 as follows:

> The Government of the United States notes the declaration by the Government of Spain claiming the right of a coastal State to apply to aircraft exercising the right of transit passage coastal state air regulations so long as they do not impede transit passage. The Government of the United States wishes to state its view that this declaration is inconsistent with customary international law as reflected in the 1982 Convention. Civil aircraft exercising the right of transit passage shall observe the rules of the air established by the International Civil Aviation Organization. Those matters as to which a coastal State may properly adopt laws and regulations regarding transit passage do not include air regulations.
>
> The Government of the United States also notes the declaration of the Government of Spain that, with regard to article 39, paragraph 3, the word "normally" is understood to mean "except in cases of *force majeure* or distress." The Government of the United States wishes to point out that state aircraft are not subject to the provisions of the Chicago Convention nor to any rules, including rules of the air, issued under the Convention or by the International Civil Aviation Organization. The Chicago Convention requires only that state aircraft operate at all times with due regard for the safety of navigation of civil aircraft. Article 39, paragraph 3 of the 1982 Law of the Sea Convention is consistent with this principle and leaves to each State the discretion to determine

Map 25



Names and boundary representations are not necessarily authoritative

the circumstances under which its state aircraft will comply with International Civil Aviation Organization rules of the air, when exercising the right of transit passage. Although a state aircraft would not be obliged to comply with such rules in cases of *force majeure* or distress, these are not the only circumstances in which a state aircraft would not be obliged to comply with such rules. In this respect, therefore, the declaration of the Government of Spain is not consonant with the well-established international law reflected in the 1982 Law of the Sea Convention.

The Government of the United States further notes the declaration of the Government of Spain that it considers article 42, paragraph 1 of the 1982 Law of the Sea Convention not to prevent the coastal State from applying to foreign-flag vessels in transit passage coastal State laws and regulations giving effect to generally accepted international regulations for the prevention, reduction and control of pollution. In this regard, the Government of the United States wishes to point out that the coastal State may not apply to vessels exercising the right of transit passage its laws and regulations, except such types of laws and regulations as are enumerated in the 1982 Law of the Sea Convention. The only laws and regulations with respect to the prevention, reduction and control of pollution that may be applied to vessels exercising the right of transit passage are those giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait.

In addition, the Government of the United States notes that the Government of Spain considers article 221 of the 1982 Law of the Sea Convention not to deprive the coastal State of a strait used for international navigation of its powers, recognized in international law, in the case of casualties referred to in that article. The Government of the United States agrees that, in the event of maritime casualties, a coastal State of a strait used for international navigation may, within its territorial sea, take reasonable actions in response to pollution or a threat of pollution that may reasonably be expected to result in major harmful consequences. In this regard however the Government of the United States wishes to point out that such rights of the coastal State do not extend to the impeding or suspending of the right of transit passage through a strait used for international navigation.

. . .

The Government of the United States wishes to inform the Government of Spain that it reserves its rights and those of its nationals with respect to all the matters discussed in this communication. In light of our common interests in maritime issues, the Government of the United States would welcome the opportunity to meet with the Government of Spain in technical discussions on these and related matters.[47]

The referenced Spanish declarations stated:

. . .

2. It is the Spanish Government's interpretation that the regime established in Part III of the Convention is compatible with the right of the coastal State to issue and apply its own air regulations in the air space of the straits used for international navigation so long as this does not impede the transit passage of aircraft.

3. With regard to article 39, paragraph 3, it takes the word "normally" to mean "except in cases of *force majeure* or distress."

4. With regard to article 42, it considers that the provisions of paragraph 1(b) do not prevent it from issuing, in accordance with international law, laws and regulations giving effect to generally accepted international regulations.

. . .

6. It interprets the provisions of article 221 as not depriving the coastal state of a strait used for international navigation of its powers, recognized by international law, to intervene in the case of the casualties referred to in that article.[48]

In conveying the need for this protest, the State Department explained to American Embassy Madrid:

Declarations 2 and 3 are objectionable, because they attempt to impose upon aircraft in general, and state aircraft (military, customs and police aircraft) in particular, obligations that the customary law reflected in the Convention neither imposes nor permits. Declaration number 2 claims the right to require aircraft of other countries exercising the right of transit passage to comply with Spanish regulations so long as such regulations do not have the effect of impeding transit passage. While the coastal State does have an obligation not to impede transit passage, it is also limited in the types of regulations it may impose on such aircraft, whether or not the regulations actually impede transit passage. Declaration number 2 phrases the coastal State's right in this regard too broadly. Declaration number 3 is even more clearly objectionable, because it effectively claims that state aircraft—which are not subject to rules of the air promulgated by the International Civil Aviation Organization (ICAO)—must comply with such rules while engaging in transit passage, unless they are prevented from doing so because they are in distress. This assertion is not only contrary to the language of the 1982 LOS Convention, but also to over 40 years of ICAO practice under the Chicago Convention. Article 39, para. 3 of the 1982 LOS Convention states that state aircraft shall "normally" comply with ICAO rules of the air, preserving the discretion of the aircraft's state of registry. At UNCLOS III, Spain failed in an attempt to have the word "normally" deleted; in consequence, declaration number 3 attempts to do the next best thing.

Declarations 4 and 6 involve coastal State rights regarding pollution control regulation and activities in international straits. Article 42 of the LOS Convention permits coastal States to impose upon vessels exercising the right of transit passage pollution control legislation that gives effect to "applicable international regulations" regarding certain substances, including oil. Spain's declaration number 4

declares that article 42 does not preclude it from also applying to such vessels legislation that gives effect to "generally accepted international regulations." The difference, of course, is that regulations that are "generally accepted" because a number of States are parties to the relevant conventions may not be "applicable" to a particular vessel because its flag State is not a party. The distinction is a real one that appears elsewhere in the Convention, and the fact that article 42 speaks only of the coastal State giving effect to the more limited category of "applicable" international regulations implies rather clearly that the coastal State does not have the right to require transiting vessels to comply with the broader category of "generally accepted international regulations." Declaration number 6 is not, per se, inaccurate, but its implications are such that an observation, if not an objection, must be made. Simply stated, declaration number 6 seeks to clarify the rights of a coastal State to take, within territorial seas forming an international strait, the same sort of pollution prevention and clean-up actions respecting a foreign-flag vessel that it could take even on the high seas, if there were a grave and imminent danger of pollution damage to the coastal State. The United States accepts this position in principle, but must make sure that Spain does not interpret its rights in this regard as extending to the suspension of the right of transit passage for other vessels nor to any right on the part of Spain to require transiting foreign-flag vessels to participate in clean-up operations.[49]

Hormuz

The Strait of Hormuz provides the sole entrance and exit of the Persian Gulf (*see* Map 26). Iran and Oman are the riparian States to the strait.[50] When signing the LOS Convention in 1982, Iran made a declaration stating:

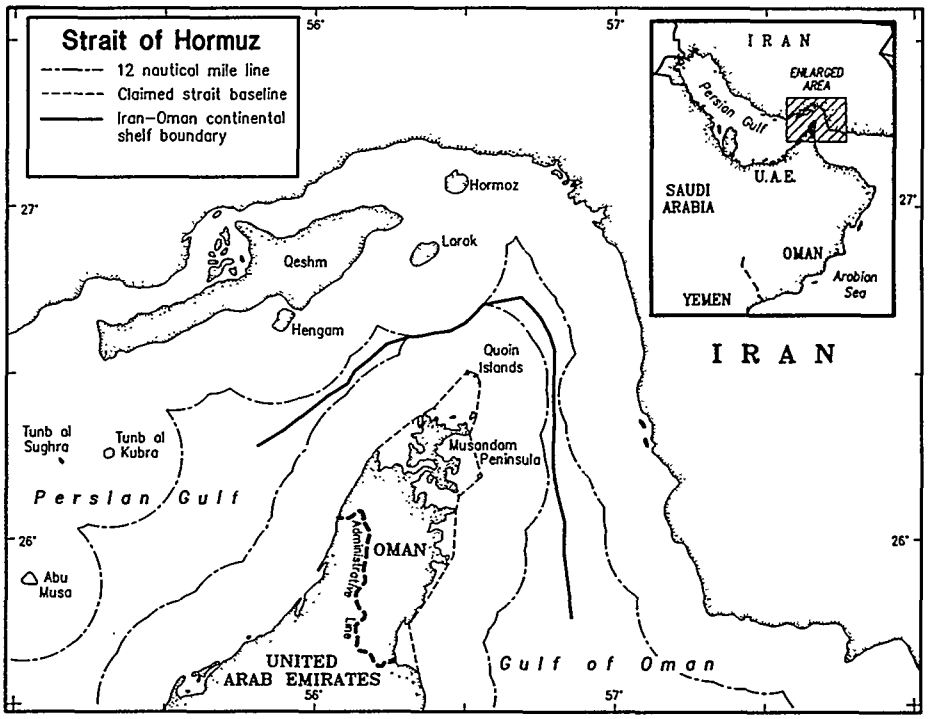
> it seems natural . . . that only States parties to the Law of the Sea Convention shall be entitled to benefit from the contractual rights created therein. The above considerations pertain specifically (but not exclusively) to the following: The right of transit passage through straits used for international navigation.[51]

In response, the United States commented upon the legal status of the right of transit passage of international straits stating:

> A small number of speakers [e.g., Iran, 17 Official Records 106, at para. 69] asserted that . . . transit passage is a "new" right reflected in the Convention adopted by the Conference. To the contrary, long-standing international practice bears out the right of all States to transit straits used for international navigation . . . Moreover, these rights are well established in international law. Continued exercise of these freedoms of navigation and overflight cannot be denied a State without its consent.[52]

The policy of freedom of navigation through the Strait of Hormuz was reiterated by President Reagan on several occasions. At a news conference on February 22, 1984, the following exchange occurred:

Map 26


Strait of Hormuz
12 nautical mile line
Claimed strait baseline
Iran–Oman continental shelf boundary
56°
57°
27°
26°
IRAN
ENLARGED AREA
Persian Gulf
SAUDI ARABIA
U.A.E.
OMAN
YEMEN
Arabian Sea
Hormoz
Larak
Qeshm
Hengam
Quoin Islands
Tunb al Sughra
Tunb al Kubra
Musandam Peninsula
Persian Gulf
OMAN
Administrative Line
Abu Musa
UNITED ARAB EMIRATES
Gulf of Oman

> Q. The war between Iraq and Iran is heating up in a rather perilous way, and I'd like to ask what the depth of your concerns are about the possibility that this war would lead to the closing of the Strait of Hormuz and cut off the supply of oil to Japan, Western Europe, and ourselves, and to what lengths you're prepared to go to keep the strait open.
>
> A. What you have just suggested—Iran, itself, had voiced that threat some time ago, that if Iraq did certain things, they would close the Strait of Hormuz. And I took a stand then and made a statement that there was no way that we—and I'm sure this is true of our allies—could stand by and see that sealane denied to shipping, and particularly, the tankers that are essential to Japan, to our Western allies in Europe, and, to a lesser extent, ourselves. We're not importing as much as they require. But there's no way that we could allow that channel to be closed.
>
> And we've had a naval force for a long time, virtually permanently stationed in the Arabian Sea, and so have some of our allies. But we'll keep that open to shipping.[53]

On April 30, 1987, Iran (via the Algerian Embassy in Washington) delivered a Diplomatic Note concerning the right of transit passage through the Strait of Hormuz in the context of an alleged violation of claimed Iranian territorial waters. On August 17, 1987, the United States asked Algeria to pass the following reply to the Iranian Ministry of Foreign Affairs:

> the United States . . . particularly rejects the assertions that the . . . right of transit passage through straits used for international navigation, as articulated in the [1982 Law of the Sea] Convention, are contractual rights and not codifications of existing customs or established usage. The regimes of . . . transit passage, as reflected in the Convention, are clearly based on customary practice of long standing and reflect the balance of rights and interests among all States, regardless of whether they have signed or ratified the Convention.
>
> . . . . The United States rejects, as well, any claim by Iran of a right to interfere with any vessel's lawful exercise of the right of transit passage in a strait used for international navigation.[54]

Kuril Straits

Etorofu Strait. In response to a Soviet protest of the November 30, 1984, transit by USS *Sterett* and USS *John Young* of the Etorofu Strait separating the Hamemais islands (occupied by the Soviet Union—now Russia—and claimed by Japan), the United States replied in a diplomatic note which read as follows:

> The Embassy of the United States of America refers the USSR Ministry of Foreign Affairs to Ministry of Foreign Affairs Note Number 81/USA of

December 3, 1984 concerning the transit of the Etorofu Strait by vessels of the United States Navy.

The Embassy wishes to state that on November 30, 1984, the USS *Sterett* and the USS *John Young* were, when navigating through the Etorofu Strait, exercising the right of transit passage in accordance with international law. Note 81/USA of December 3, 1984 implies that the right of passage of foreign warships through straits such as Etorofu Strait is limited to innocent passage. The United States Government rejects this implication, since Etorofu Strait is one used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone; the strait is therefore subject to the regime of transit passage.

Moreover, the United States Government rejects the claim of the Soviet Union that it may lawfully restrict transit passage of foreign warships through straits of this type, or innocent passage of foreign warships through the Soviet territorial sea in other coastal areas, to a few specified locations. The regulations referred to in Note 81/USA have the effect of hampering both transit passage and innocent passage and therefore contravene international law.

As regards the claim of the USSR that the waters in question are territorial waters of the USSR, the Ministry of Foreign Affairs is referred to the diplomatic note of the United States Government dated May 23, 1957. In sum, the allegations contained in Note 81/USA of December 3, 1984 are unacceptable, since they have no legal foundation.[55]

Golovnina Strait. In response to a Soviet protest of the June 8, 1986 transit by USS *Francis Hammond* of Golovnina Strait separating two other southern Kuril islands (also occupied by the Soviet Union—now Russia—and claimed by Japan), the United States replied in a diplomatic note which read as follows:

During the incident in question, the USS *Francis Hammond* was exercising the right of transit passage through a strait used for international navigation in accordance with customary international law as reflected in Part III of the 1982 United Nations Convention on the Law of the Sea. The strait involved in this incident — Golovnina Strait — constitutes a strait used for international navigation and is subject to the regime of transit passage. The transit of the USS *Francis Hammond* through the strait was fully consistent with the regime of transit passage, and did not threaten the sovereignty, territorial integrity, or political independence of the Soviet Union. The United States notes the inference in the Ministry's statement [of June 11, 1986] that the innocent passage of foreign warships in the Soviet territorial sea may only be exercised along routes commonly used for international navigation and that, in the vicinity of the Kuril Islands, the only route is that through the fourth Kuril strait. The United States rejects the Ministry's suggestion. The applicable right of passage through straits such as these is the right of transit passage, not the right of innocent passage.

The United States further notes that all states may exercise the right of innocent passage through the territorial sea of other states if such passage is consistent with the definition of that passage, i.e. continuous and expeditious transit for the purpose of traversing the territorial sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or proceeding to or from internal waters on a call at such roadstead or port facility. In any case, the incident in question occurred in the Golovnina Strait, an international strait in which the right of straits transit passage, and not innocent passage, applies. Although an international strait must by definition consist wholly or partly of territorial waters, it is the right of transit passage, and not innocent passage, which applies in those waters unless the exceptions contained in the Law of the Sea Convention articles 38(1) or 45 apply, in which case non-suspendable innocent passage applies.

The United States has at no time acquiesced in the proposition that the fourth Kuril strait constitutes the only route which may be used for international navigation in the vicinity of the Kuriles.

As the Golovnina Strait constitutes an international strait as defined in article 37 of the Law of the Sea Convention, the principal justification for not applying the right of transit passage to it would be that there exists a strait of similar convenience in accordance with the Law of the Sea Convention article 38(1). As article 38(1) provides, that justification can only be invoked if the strait to which transit passage is not to be applied is formed by an island of a state bordering the strait and its mainland. It is the view of the United States that the Golovnina Strait does not constitute such a strait, in that it does not fall between the mainland and an island adjacent thereto. The USSR therefore has no legal basis on which to insist that international navigation pass only through the fourth Kuril strait. Nor does the Golovnina Strait constitute an article 45(1)(b) strait, i.e. a strait between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign state.

The United States further wishes to underscore that a strait used for international navigation derives that status not from coastal state legislation which designates it as such, but rather as a direct result of international maritime patterns which establish state practice. If this were not the case, the very purpose of the customary international legal regime of straits transit passage, providing for automatic, predictable and impartial exercise of international navigation freedoms, would be vitiated. For these reasons the United States does not recognize the validity of the USSR's designation of the fourth Kuril strait as the only Kuril strait for international navigation.

For the above reasons, the United States rejects the June 11 protest of the Soviet Union regarding the transit of USS *Hammond* through the Golovnina Strait and maintains that the transit was a lawful exercise of the customary law right of straits transit passage. Accordingly, it reserves its rights and those of its nationals to continue to exercise that right in the Golovnina Strait, and in all straits used for international navigation.

> In rejecting this protest, the USG notes the fact that notwithstanding the signature by the USSR of the 1982 United Nations Convention on the Law of the Sea and the recognition by the United States that the navigation articles of that Convention are generally reflective of customary international law, the USSR and the U.S. continue to display significant unresolved differences in their interpretation of the law of the sea, particularly the right of innocent passage and straits transit passage. The U.S. Government invites the Government of the USSR to provide a more comprehensive analysis of the legal basis for its assertion of the right to deny transit passage in the international straits between the Kuril islands.[56]

Magellan

The 310 mile long Strait of Magellan connects the Atlantic and Pacific Oceans at the southern tip of South America.[57] Navigation through the Strait of Magellan is governed by article V of the 1881 Boundary Treaty between Argentina and Chile,[58] which states that the Straits are neutralized forever, and free navigation is assured to the flags of all nations. Article 10 of the 1984 Treaty of Peace and Friendship between Argentina and Chile[59] reaffirms that status: ". . . The delimitation agreed upon herein, in no way effects the provisions of the Boundary Treaty of 1881, according to which the Straits of Magellan are perpetually neutralized and freedom of navigation is assured to ships of all flags . . ." In concluding that the Strait of Magellan therefore falls under the Article 35(c) exception of the LOS Convention, the Department of State advised American Embassy Santiago, Chile, that:

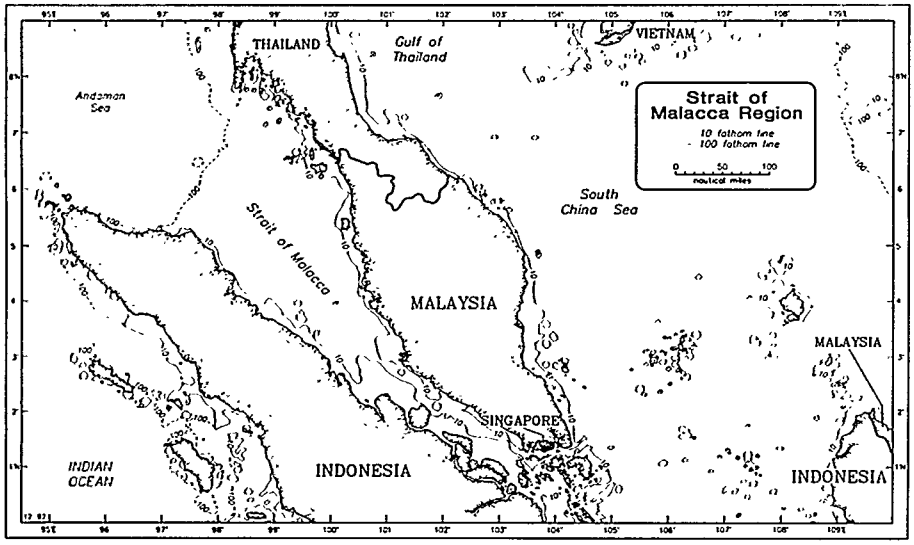
> This long-standing guarantee of free navigation for all vessels [in the 1881 Treaty] has been amply reinforced by practice, including practice recognizing the right of aircraft to overfly. . . . Essentially, the USG position would be that the 1881 Treaty and over a century of practice have imbued the Strait of Magellan with a unique regime of free navigation, including a right of overflight. That regime has been specifically recognized and reaffirmed by both Argentina and Chile in the Beagle Channel Treaty. Hence, the United States and other States may continue to exercise navigational and overflight rights and freedoms in accordance with this long-standing practice.[60]

Malacca and Singapore

The Straits of Malacca and Singapore extend for approximately 600 miles (*see* Map 27). The Strait of Malacca is located between the east coast of the Indonesian island of Sumatra and the west coast of peninsular, or west, Malaysia. The Singapore Strait is located south of the island of Singapore and the southeastern tip of peninsular Malaysia, and north of the Indonesian Rian Islands. The straits provide the shortest sea route between the Indian Ocean (via the Andaman Sea) and the Pacific Ocean (via the South China Sea).

At the broad western entrance to the Strait of Malacca, the littoral coasts of Indonesia and Malaysia are separated by about 200 miles. The strait, however, begins to funnel in a southeasterly direction. At 3°N and south of One Fathom

Map 27


THAILAND
Gulf of Thailand
VIETNAM
Andaman Sea
Strait of Malacca Region
10 fathom line
100 fathom line
0 50 100
nautical miles
South China Sea
Strait of Malacca
MALAYSIA
MALAYSIA
SINGAPORE
INDIAN OCEAN
INDONESIA
INDONESIA

Bank, the territorial seas of Indonesia and Malaysia overlap. The narrowest part of the Strait of Malacca is at the southwestern tip of the Malay Peninsula—8.4 miles wide, and, given the shallow depths, is much narrower for deep draught vessels.

The narrowest breadth of the Singapore Strait is only 3.2 miles and throughout its length is constantly less than 15 miles wide (the combined territorial seas claimed by Indonesia (12 miles) and Singapore (3 miles)). At its eastern outlet into the South China Sea, where it is bounded solely by Malaysia and Indonesia, the sea passage is approximately 11.1 miles wide.

The governing depth of the Strait of Malacca is less than 75 feet, with a tidal range between 4.6 feet at the eastern outlet of the Singapore Strait and 12.5 feet at the western entrance to the Strait of Malacca.[61]

On April 29, 1982, Ambassador James L. Malone, United States Representative to the Third United Nations Conference on the Law of the Sea, submitted a letter to the President of the Conference "confirm[ing] the contents" of a letter dated April 28, 1982, from the Chairman of the Malaysian delegation on behalf of the delegations of Indonesia, Malaysia and Singapore, regarding their statement concerning the purpose and meaning of Article 233 of the LOS Convention in its application to the Straits of Malacca and Singapore. The Malaysian statement reads:

> Following consultations held among the delegations of States concerned, a common understanding regarding the purpose and meaning of article 233 of the draft convention on the law of the sea in its application to the Straits of Malacca and Singapore has been confirmed. This understanding, which takes cognizance of the peculiar geographic and traffic conditions in the Straits, and which recognizes the need to promote safety of navigation and to protect and preserve the marine environment in the Straits, is as follows:
>
> 1. Laws and regulations enacted by States bordering the Straits under article 41, paragraph 1(a) of the convention, refer to laws and regulations relating to traffic separation schemes, including the determination of under keel clearance for the Straits provided in article 41.
>
> 2. Accordingly, a violation of the provisions of resolution A.375(X), by the Inter-Governmental Maritime Consultative Organization adopted on 14 November 1977, whereby the vessels referred to therein shall allow for an under keel clearance of at least 3.5 metres during passage through the Straits of Malacca and Singapore, shall be deemed, in view of the particular geographic and traffic conditions of the Straits, to be a violation within the meaning of article 233. The States bordering the Straits may take appropriate enforcement measures, as provided for in article 233. Such measures may include preventing a vessel violating the required under keel clearance from proceeding. Such action shall not constitute denying, hampering, impairing or suspending the right of transit passage in breach of articles 42, paragraph 2, or 44 of the draft convention.

3. States bordering the Straits may take appropriate enforcement measures in accordance with article 233, against vessels violating the laws and regulations referred to in article 42, paragraph 1(a) and (b) causing or threatening major damage to the marine environment of the Straits.

4. States bordering the Straits shall, in taking the enforcement measures, observe the provision on safeguards in Section 7, Part XII of the draft convention.

5. Articles 42 and 233 do not affect the rights and obligations of States bordering the Straits regarding appropriate enforcement measures with respect to vessels in the Straits not in transit passage.

6. Nothing in the above understanding is intended to impair:

(a) the sovereign immunity of ships and the provisions of article 236 as well as the international responsibility of the flag State in accordance with paragraph 5 of article 42;

(b) the duty of the flag State to take appropriate measures to ensure that its ships comply with article 39, without prejudice to the rights of States bordering the Straits under Parts III and XII of the draft convention and the provisions of paragraphs 1, 2, 3 and 4 of this statement.[62]

The International Maritime Organization has established other rules for vessels navigating the Straits of Malacca and Singapore, including traffic separation schemes at One Fathom Bank and in the Singapore Strait and deep water routes forming part of the eastbound traffic lane of the traffic separation scheme in the Singapore Strait.[63]

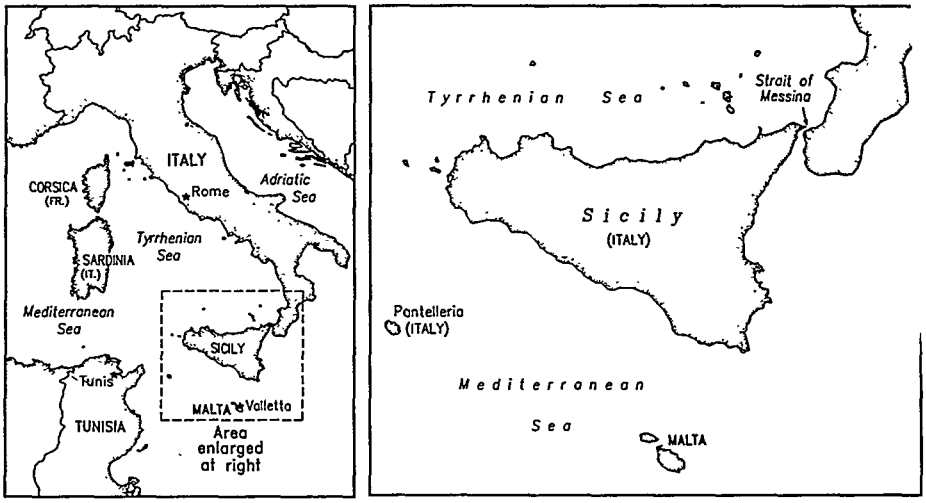
Messina

The Strait of Messina separates the Italian island of Sicily from Italy's mainland (*see* Map 28). This strait is considered an Article 38(1) strait under the terms of the LOS Convention which provides an exemption from the transit passage regime for those straits connecting one part of the high seas/EEZ and another part of the high seas/EEZ where the strait is formed by an island of a State bordering the strait and its mainland and there exists seaward of the island a route through the high seas or EEZ of similar convenience with respect to navigational and hydrographical characteristics.[64]

Effective April 3, 1985, the Government of Italy closed the strait to vessels 10,000 tons and over carrying oil and other pollutants.[65] This action was taken following a collision at sea resulting in an oil spill in the area. The United States submitted a diplomatic note to Italy on April 5, 1985, making the following observations:

Map 28

Strait of Messina



As the Government of the United States understands it, this decree is not intended to apply to warships or other governmental ships on non-commercial service exercising the right of innocent passage.

It is the understanding of the Government of the United States that this prohibition on navigation through the Strait of Messina by specified vessels . . . is intended to give the Government of Italy time in which to formulate proposals for the regulation of maritime traffic in the strait.

The Government of the United States wishes to make clear that the Strait of Messina is a strait used for international navigation, to which, in accordance with customary international law as reflected of the 1982 United Nations Convention on the Law of the Sea, the regime of non-suspendable innocent passage applies. The regime of innocent passage is one that may be exercised by vessels of all States, regardless of type or cargo. By purporting to prohibit navigation through the Strait of Messina by vessels of specified size carrying specified cargo, the Government of Italy appears to be attempting to suspend the right of innocent passage for such vessels, in contravention of long-settled customary and conventional international law. The Government of the United States therefore reserves its rights and those of its nationals in this regard. . . .

The Government of the United States recognizes that, in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea, the coastal state has certain authority to prescribe sea lanes and traffic separation schemes that must be used by vessels exercising the right of innocent passage, especially tankers and other ships carrying dangerous substances. The coastal state does not, of course, have authority respecting areas of the high seas. To the extent that a coastal state has such authority in its territorial sea the Government of the United States notes the important role to be played by the International Maritime Organization in the designation of such sea lanes and the prescription of traffic separation schemes. The Government of the United States notes that the decree announced by the Government of Italy refers to regulation 8 of chapter V of the annex to the International Convention for the Safety of Life at Sea, 1974, which reiterates the importance of the International Maritime Organization in this process.

The Government of the United States trusts that, in considering what traffic regulations might be appropriate in the Strait of Messina, the Government of Italy will give due weight to all relevant factors, including the acknowledged pre-eminence of the International Maritime Organization. The Government of the United States would be pleased to discuss with the Government of Italy appropriate measures that might be adopted to lessen the risk of environmental damage in the Strait of Messina. The Government of the United States must, however, protest the recently announced decree, which has the unlawful effect of suspending innocent passage for certain types of vessels in a strait through which innocent passage may not be suspended.[66]

Additional information provided to American Embassy Rome for use in delivering the foregoing note included the following:

> The USG [United States Government] understands that the GOI [Government of Italy] has prohibited navigation, for at least 45 days beginning 3 April 1985, through the Strait of Messina by oil tankers and other vessels carrying hazardous substances, if they are over 10,000 tons.
>
> The USG understands that this action may be related to a recent maritime collision and oil spill in the area.
>
> The USG recognizes that some inconvenience to navigation by certain vessels may be an unavoidable result of the presence of oil spilled during this unfortunate incident and the efforts to clean up such oil.
>
> The prohibition appears to be at least a temporary restriction on passage by certain types of vessels until the GOI can reach conclusions regarding long-term controls over navigation by such vessels in the Strait of Messina.
>
> The USG wishes to note that the Strait of Messina is subject to the regime of non-suspendable innocent passage under international law as reflected in both the 1982 LOS Convention and the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.
>
> The USG is of the opinion that this prohibition of passage through the Strait of Messina by the GOI is not an appropriate exercise of the GOI's right to impose upon vessels in innocent passage laws relating to the preservation of the environment and the prevention, control and reduction of pollution. Accordingly, the USG considers that such a prohibition constitutes a suspension of the right of innocent passage by such vessels, in contravention of customary and conventional international law. . . .
>
> The USG recognizes that the GOI may need to protect significant environmental interests from possible pollution damage caused by vessels transiting the Strait of Messina.
>
> The USG strongly urges that, if the GOI considers it necessary to take further steps to regulate tanker traffic through the strait in order to avoid the danger of pollution damage, the GOI should do so in an appropriate multilateral forum, rather than by unlawfully attempting to suspend or interfere with the right of innocent passage.[67]

Northeast Passage

The Northeast Passage is situated in the Arctic Ocean, north of Russia and includes the **Dmitry**, **Laptev** and **Sannikov Straits**.[68] The United States conducted oceanographic surveys of the area during the summers of 1963 and 1964. During the 1963 survey, USCGC *Northwind* (WAGB-382) collected data in the Laptev Sea; during the following summer, USS *Burton Island* (AGB-1) surveyed in the East Siberian Sea. On July 21, 1964, the Soviet Ministry of

Foreign Affairs presented to American Embassy Moscow the following *aide memoire* regarding the *Burton Island* voyage:

> The Chief Administration of the Hydro Meteorological Service of the Council of Ministers, USSR received a communication from the Embassy of the USA on the forthcoming Arctic sailing of the US military ice-breaker Burton Island and the request to transmit to the ship information on hydrometeorological conditions.
>
> Precise information on the Burton Island's route has not been received from the Embassy. In the event that this ship intends to go by the northern seaway route, then it is necessary it take into consideration the following:
>
> The Northern seaway route is situated near the Arctic coast of the USSR. This route, quite distant from international seaways, has been used and is used only by ships belonging to the Soviet Union or chartered in the name of the Northern Seaways, the opening up, equipping, and servicing of which the Soviet side for a period of decades has spent significant funds, and it is considered an important national line of communication of the USSR. It should be noted that the seas, through which the northern seaway route passes, are noted for quite difficult ice and navigational conditions. Mishaps of foreign ships in this line of communications could create for the USSR as well as for a bordering state, a series of complicated problems. Therefore the Soviet Union is especially interested in all that deals with the functioning of the given route.
>
> It should also be kept in mind that the northern seaway route at some points goes through Soviet territorial and internal waters. Specifically, this concerns all straits running west and east in the Karsky Sea, inasmuch as they are overlapped two-fold by Soviet territorial waters, as well as by the Dmitry, Laptev and Sannikov Straits, which unite the Laptev and Eastern Siberian Seas and belong historically to the Soviet Union. Not one of these stated straits, as is known, serves for international navigation. Thus over the waters of these straits the statute for the protection of the state borders of the USSR fully applies, in accordance with which foreign military ships will pass through territorial and enter internal sea waters of the USSR after advance permission of the Government of the USSR, in accordance with stipulated regulations for visiting by Foreign Military ships of territorial and internal sea waters of the USSR published in "Navigation Notifications" (Izvesticheniyakh Moreplavatelyan). In accordance with these regulations the agreement for entry of foreign military vessels is requested through the Ministry of Foreign Affairs USSR not later than 30 days before the proposed entry.
>
> Although the notification of the proposed sailing of the American ice-breaker Burton Island was not received in the fixed period, the Soviet side in this specific case, is ready, as an exception, to give permission for the passing of the vessel Burton Island through the territorial and internal waters of the USSR in the aforementioned Arctic Straits. In this regard it should not be forgotten that the American vessel will fulfill requirements, called for by the regulations for foreign military ships, visiting territorial and internal maritime waters of the USSR and specifically article 16 of the cited regulations. At the same time the need is

emphasized for the strict observance in the future of all instructions of regulations for foreign military vessels visiting territorial and internal maritime waters of the USSR.

Regarding the inquiries of the Embassy on passing to the vessel Burton Island information on the hydrometeorological conditions during its Arctic sailing, the competent Soviet organizations are willing to fulfill this request and transmit the available information. For this, the American side must provide exact data of the schedule and route of the Burton Island, as well as data, necessary for the establishment of radio contacts with it.[69]

On June 22, 1965, the United States replied in writing stating in part:

While the United States is sympathetic with efforts which have been made by the Soviet Union in developing the Northern Seaway Route and appreciates the importance of this waterway to Soviet interests, nevertheless, it cannot admit that these factors have the effect of changing the status of the waters of the route under international law. With respect to the straits of the Karsky Sea described as overlapped by Soviet territorial waters it must be pointed out that there is a right of innocent passage of all ships through straits used for international navigation between two parts of the high seas and that this right cannot be suspended. This is clear from the provisions of the Convention on the Territorial Sea and the Contiguous Zone adopted at Geneva in 1958 to which both the United States and the Soviet Union are parties. In the case of straits comprising high seas as well as territorial waters there is of course an unlimited right of navigation in the high seas areas. . . .

For the reasons indicated the United States must reaffirm its reservation of its rights and those of its nationals in the waters in question whose status it regards as dependent on the principles of international law and not decrees of the coastal state.[70]

Thereafter, *Northwind* conducted its transit during July to September of 1965. On October 27, 1965, the Soviet Union protested in a note which read as follows:

According to information of competent Soviet authorities, U.S. Coast Guard icebreaker, Northwind, during its voyage in the Kara Sea in July-September of this year, conducted there explorations of sea bottom and suboceanic area. This was also reported in the American press.

As is well known, bottom and suboceanic area of the Kara Sea, being in geological respect the direct continuation of the continental part of the USSR, constitutes continental shelf which, pursuant to the 1958 Geneva Convention on the Continental Shelf, is subject to the sovereign rights of the USSR. Said Convention, to which both the USSR and the USA are parties, provides in article 5, paragraph 8, that agreement of the littoral State is required for exploration of the continental shelf.

> Conduct of the above-mentioned explorations of the USSR continental shelf in the Kara Sea, without agreement thereto having been obtained from competent USSR authorities, constituted a violation of the 1958 Continental Shelf Convention.
>
> The Ministry protests against the unlawful conduct by the American ice-breaker of exploration of the Soviet continental shelf in the Kara Sea and expects that the Government of the United States will take the necessary steps to prevent similar actions.[71]

The United States replied in a note, as follows:

> The Ministry's note referring to the voyage of the United States Coast Guard [ice-breaker] *Northwind* in the Kara Sea during July to September of this year charges that the vessel carried on explorations of the seabed of the continental shelf without obtaining the permission required by paragraph 8, Article 5 of the Convention on the Continental Shelf adopted at Geneva in 1958 to which both the United States and the Union of Soviet Socialist Republics are parties.
>
> The Ministry is misinformed. During its voyage of oceanographic exploration in the area the *Northwind* did take a number of core samplings of the seabed. A few of these samplings were taken in the deep which parallels Novaya Zemlya on the east and a more extensive sampling of the sea bottom was done in the deep water north of Novaya Zemlya and east of Zemlya Frantsa Iosifa and also in the deep water west of Severnaya Zemlya. The data collected during this operation will be made available to the Union of Soviet Socialist Republics through the World Data Center System. There was no exploration of the continental shelf in the Kara Sea.
>
> In view of the foregoing the Ministry's protest is rejected as without foundation in fact.[72]

In 1967, the United States planned an Arctic circumnavigation by the U.S. Coast Guard icebreakers *Edisto* and *East Wind*, from August 10 to September 21, 1967. The United States advised the Soviet government of the planned route in a note dated August 14, 1967:

> The Department of State wishes to advise the Embassy of the Union of Soviet Socialist Republics that two United States oceanographic icebreakers will, as in previous years, undertake regular survey operations in the Arctic Ocean in the summer of 1967.
>
> The US Coast Guard icebreakers *Edisto* and *East Wind* will conduct oceanographic research surveys from approximately August 10 to September 21. From a point south of Greenland, the ships will proceed eastward on a track running north of Novaya Zemlya and Severnaya Zemlya into the Laptov Sea, the East

> Siberian Sea and through the Canadian Archipelago before returning to the United States.
>
> As in previous oceanographic surveys of this sort the operations will be conducted entirely in international waters.[73]

The Soviet Union replied on August 25, 1967, with the following note:

> By its *aide-memoire* of August 16, 1967, US Department of State informed the USSR Embassy in Washington of Arctic circumnavigation by US Coast Guard icebreakers "Edisto" and "East Wind," stating that they would proceed eastward along [a] route north of Navaya Zemlya and Severnaya Zemlya.
>
> However, according to information of competent Soviet authorities, above mentioned American icebreakers have entered the Karsky Sea and are proceeding in direction of Vilkitsky Straits, which are territorial waters of the USSR.
>
> In this connection, the Ministry recalls to the Embassy that navigation by any foreign naval vessel through the Straits of Karsky Sea, as well as through Dmitry Leptev and Sannikov Straits, is subject to the Statute on the Protection of the USSR Borders, under which foreign naval vessels shall pass through territorial and internal sea waters of the USSR with prior permission by the Government of the USSR to be requested 30 days in advance of passage contemplated. The position of the Soviet Government on this question was set forth in detail in USSR MFA's *aide-memoirs* of July 2, 1964 and July 26, 1965.[74]

Earlier that day, the American Embassy in Moscow had sent Note No. 340 notifying the Ministry of Foreign Affairs that the icebreakers had been blocked by ice in passing north of Severnaya Zemlya and, to continue circumnavigation, it would be necessary for *Eastwind* and *Edisto* to transit Vilkitsky Straits. On August 28, 1967, the Chief of the American Section Soviet Ministry of Foreign Affairs made an oral *demarche* on the American Deputy Chief of Mission, as reported in a cable to the Department of State:

> Soviet Maritime Fleet had today received communication from U.S. Coast Guard icebreaker "Edisto" in which the Commanding Officer informed Soviet authorities that "Edisto" and "Eastwind" had encountered ice preventing passage to north of Severnaya Zemlya and therefore proposed to effect innocent passage through Vilkitsky straits on or about August 31. Communication from U.S. Coast Guard icebreaker also stated that Soviet Ministry of Foreign Affairs had been advised of proposed transit of straits.
>
> Kornienko said that he felt it necessary to remove any misunderstanding which might exist in this matter. He said that Ministry of Foreign Affairs had not been advised of proposed passage of U.S. icebreakers through straits since notification thirty days in advance of attempted passage through Soviet territorial waters, as is required by pertinent Soviet regulations, had not been received.[75]

The United States responded in a note delivered 7:30 pm local time, August 30, 1967 to the Soviet Ministry of Foreign Affairs, Moscow:

> The Embassy of the United States of America refers to the *aide-memoire* of August 24 of the Ministry of Foreign Affairs of the Union of Soviet Socialist Republics and to the statement by the Ministry's authorized representative on August 28, and, on instructions, strongly protests the position taken by the Soviet Government with regard to the peaceful circumnavigation of the Arctic by the United States Coast Guard icebreakers "Edisto" and "Eastwind."
>
> As the Ministry is aware, the circumnavigation by the "Edisto" and "Eastwind" was undertaken as a part of regular scientific research operations in the Arctic Ocean. The Department of State, as a matter of courtesy, informed the Soviet Government of these operations. Owing to unusually severe ice conditions the icebreakers failed in their efforts to pass north of Severnaya Zemlya and, accordingly, on August 24 Embassy informed the Ministry by note that the vessels would find it necessary to pass through Vilkitsky Straits in order to continue their voyage. Rather than facilitating the accomplishment of this peaceful voyage, the Ministry in its *aide-memoire* of August 24 and particularly in the oral statement of its authorized representative on August 28 has taken the unwarranted position that the proposed passage of the "Edisto" and "Eastwind" would be in violation of Soviet regulations, raising the possibility of action by the Soviet Government to detain the vessels or otherwise interfere with their movement.
>
> These statements and actions of the Soviet Government have created a situation which has left the United States Government with no other feasible course but to cancel the planned circumnavigation. In doing so, however, the United States Government wishes to point out that the Soviet Government bears full responsibility for denying to United States vessels their rights under international law, for frustrating this scientific endeavor and for depriving the international scientific community of research data of considerable significance.
>
> . . .
>
> Furthermore, the Statute on Protection of the USSR State Borders, cited in the Ministry's *aide-memoire* of August 24, cannot have the effect of changing the status of waters under international law and the rights of foreign ships with respect to them. These rights are set forth clearly in the Convention on the Territorial Sea and the Contiguous Zone of April 29, 1958, to which the Soviet Union is a party. The United States Government wishes to remind the Soviet Government, as it has on previous occasions, that there is a right of innocent passage for all ships, warships included, through straits used for international navigation between two parts of the high seas, whether or not, as in the case of the Vilkitsky Straits, they are described by the Soviet Government as being overlapped by territorial waters, and that there is an unlimited right of navigation in the high seas areas of straits comprising both high seas and territorial seas.

Moreover, since the Ministry in its *aide-memoire* of August 24 has referred to the Dmitry Laptev and Sannikov Straits, although they are not involved in the present case, the United States Government wishes to reiterate its position, stated most recently in its *aide-memoire* of June 22, 1965, that it is not aware of any basis for the Soviet claims to these waters.

The United States Government wishes to emphasize that it regards the conduct of the Soviet Government in frustrating this scientific expedition as contrary both to international law and to the spirit of international scientific cooperation to which the Soviet Government has frequently professed its support. Actions such as these cannot help but hinder the cause of developing international understanding and the improvement of relations between our two countries.[76]

On August 31, 1967, the State Department spokesman summarized the situation, as follows:

On August 16 the U.S. Coast Guard announced that the 269-foot Coast Guard ice-breakers *Edisto* and *Eastwind* planned an 8,000 mile circumnavigation of the Arctic Ocean conducting scientific research en route. Their itinerary called for them to travel north of the Soviet islands of Novaya Zemlya, Severnaya Zemlya, and the New Siberian Islands.

The planned course was entirely on the high seas and, therefore, the voyage did not require any previous clearance with Soviet authorities. Nevertheless, the Soviet Government was officially informed of these plans just prior to the public announcement.

However, heavy ice conditions made it impossible for the vessels to proceed north of Severnaya Zemlya. On August 24 our Embassy in Moscow notified the Soviet Ministry of Foreign Affairs of this situation and stated it would be necessary for the two vessels to pass through Vilkitsky Straits south of Severnaya Zemlya in order to complete their journey.

In response the Soviet Ministry of Foreign Affairs made a statement to our Embassy that the straits constituted Soviet territorial waters.

On August 28, as a result of a routine message from the icebreakers to the Soviet Ministry of the Maritime Fleet, the Soviet Ministry of Foreign Affairs reaffirmed its declaration of August 24 and made it clear that the Soviet Government would claim that passage of the ships through the Vilkitsky Straits would be a violation of Soviet frontiers.

Under these circumstances the United States considered it advisable to cancel the proposed circumnavigation. The *Edisto* has now been ordered to proceed directly to Baffin Bay, and the *Eastwind* was ordered to remain in the area of the Kara and Barents Seas for about a month to conduct further oceanographic research.

> On August 30 our Embassy in Moscow sent a note strongly protesting the Soviet position. The note pointed out that Soviet law cannot have the effect of changing the status of international waters and the rights of foreign ships with respect to them. These rights are set forth clearly in the Convention on the Territorial Sea and the Contiguous Zone of April 29, 1958, to which the Soviet Union is a party.
>
> There is a right of innocent passage for all ships, through straits used for international navigation between two parts of the high seas, whether or not, as in the case of the Vilkitsky Straits, they are described by the Soviet Union as being overlapped by territorial waters, and there is an unlimited right of navigation in the high seas of straits comprising both high seas and territorial waters. Clearly, the Soviet Government, by denying to U.S. vessels their rights under international law, has acted to frustrate a useful scientific endeavor and thus to deprive the international scientific community of research data of considerable significance.[77]

Northwest Passage

The United States and Canada have a long-standing dispute over the legal status of the waters of the Northwest Passage between Davis Strait/Baffin Bay and the Beaufort Sea (*see* Map 29). The United States considers the passage a strait used for international navigation subject to the transit passage regime under existing international law. Canada considers these waters to be Canadian and that special coastal State controls can be applied to the passage, including requirements for prior authorization of the transit of all non-Canadian vessels and for compliance by such vessels with detailed Canadian regulations.[78]

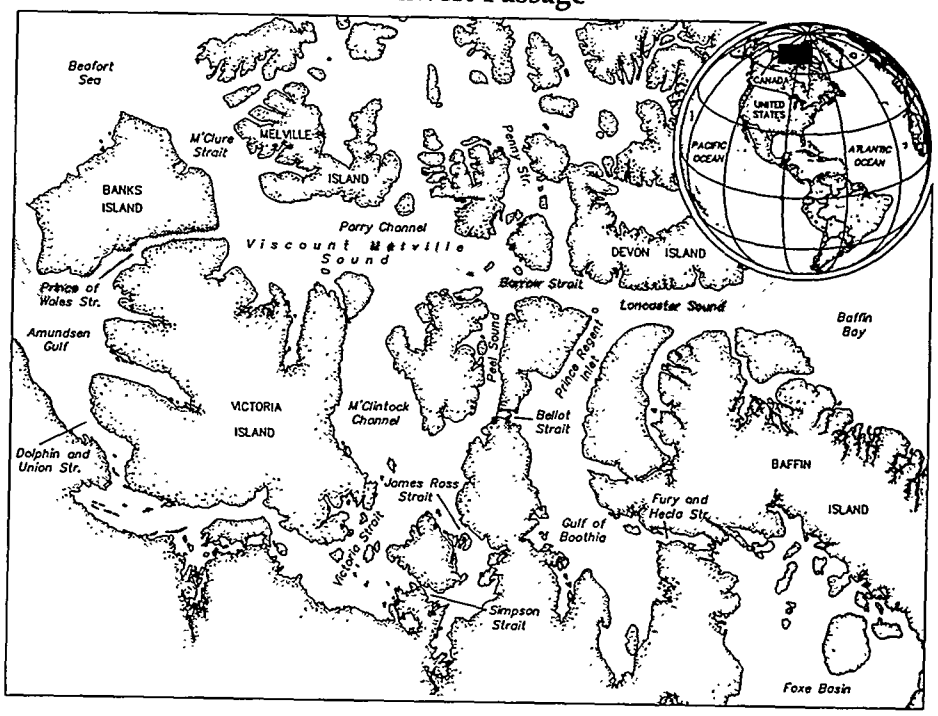
U.S. Coast Guard Cutters transited the Northwest Passage in 1952 and 1957. In 1969, the SS *Manhattan*, accompanied by the U.S. Coast Guard icebreakers *North Wind* and *Staten Island*, transited this Passage without having received prior Canadian authorization. Following the SS *Manhattan* transit, in 1970, Canada enacted its Arctic Waters Pollution Prevention Act to address the fragile Arctic environment and to prevent potential damage by vessel-source pollution. In the same year, the United States protested the validity of the law, because of its unlawful interference with navigational rights and freedoms.[79]

Transit by USCG Icebreaker Polar Sea, August 1985. In 1985, several diplomatic notes were exchanged regarding an upcoming transit of the Northwest Passage by the U.S. Coast Guard icebreaker *Polar Sea*. On May 21, 1985 American Embassy Ottawa informed the Canadian Department of External Affairs of the planned transit of the United States Coast Guard Cutter *Polar Sea* in a *demarche* using guidance provided by the Department of State. Extracts of this guidance follow:

> The United States Coast Guard is preparing its summer schedule for icebreaker operations in Arctic waters.

Map 29

The Northwest Passage



Operational requirements are such that a west coast based icebreaker, the *Polar Sea*, will transit the Panama Canal in order to reach the US east coast and thereafter perform icebreaking duties in the vicinity of Thule, Greenland.

Upon completion of its duties in the Thule area, the *Polar Sea* will need to return to the US west coast, both to be able to participate in testing pursuant to the Volpe-Jamieson Agreement and, subsequently, to conduct operations in Antarctic waters.

The limited time available requires the movement from the Thule area to the US west coast to be made by navigating through the Northwest Passage. That voyage will occur in August of this year.

So that the Canadian government can share in the benefits of this transit, the US Coast Guard will issue to the Canadian Coast Guard an invitation to provide on-board participants.

The United States considers that this transit by the icebreaker *Polar Sea* will be an exercise of navigational rights and freedoms not requiring prior notification. The United States appreciates that Canada may not share this position.

The United States believes that it is in the mutual interests of Canada and the United States that this unique opportunity for cooperation not be lost because of possible disagreements over the relevant juridical regime.

The United States believes that the two countries should agree to disagree on the legal issues and concentrate on practical matters.

The United States desires to raise this matter with the Government of Canada now, so that we can each begin to make arrangements for Canadian participation in the transit.

The United States considers that this discussion with the Government of Canada in the forthcoming invitation to participate in the transit is not inconsistent with its juridical position regarding the Northwest Passage and believes that the Government of Canada would consider its participation in the transit not to be inconsistent with its juridical position.

. . .

The United States looks forward to the opportunity to have the Canadian Coast Guard participate in a voyage that will have significant benefits for both our countries.[80]

On June 11, 1985, Canada replied in a diplomatic note restating its position that the waters of the Northwest Passage were Canadian internal waters, as follows:

. . . refer to the notification of the proposed transit of the Northwest Passage by the United States Coast Guard icebreaker *Polar Sea* in August of this year, as conveyed to the Department of External Affairs by the United States Embassy in Ottawa on May 21, 1985.

The Government of Canada welcomes the United States offer to proceed with this project on a cooperative basis and to provide the opportunity for Canadian participation in the voyage.

The waters of the Arctic Archipelago, including the Northwest Passage, are internal waters of Canada and fall within Canadian sovereignty. Canada, of course, is committed to facilitating navigation through these waters and is prepared to work toward this objective in the spirit of cooperation that has long characterized the relationship between the Canadian and United States Coast Guards. This is the spirit that also underlies the Volpe-Jamieson Agreement, and the Government of Canada welcomes the United States reference to this accord as a factor to be taken into account in considering the United States proposal.

The Canadian authorities are prepared to consider any form of cooperation with the United States authorities regarding the proposed voyage, including on-board participation by Canadian representatives. The United States authorities will understand, however, the Canadian Government's concern to ensure that the Arctic waters adjacent to the mainland and islands of the Canadian Arctic are navigated in a manner that takes cognizance of Canada's responsibility for the interests of the Inuit and other inhabitants of the Canadian Arctic and the preservation of the peculiar ecological balance that now exists in the water, ice and land areas of the Canadian Arctic.

Given the unique geographical and ecological features of the area, the impact of any voyage, particularly any adverse environmental consequences, will affect the territory of Canada and of no other country. Such voyages are by their very nature extraordinary occurrences and must be carefully planned and coordinated to ensure protection of the environment and other related vital interests. Even a voyage that is free from incidents causing environmental damage can have other negative effects on the Arctic ecology and on the interest of the inhabitants of the area.

. . .

The Government of Canada looks forward to receiving from the United States authorities more information with respect of the timing and routing of the proposed voyage, as well as the specifications of the *Polar Sea*. Canada would welcome an early opportunity to consult with the United States on all matters related to the voyage.[81]

The United States replied as follows:

The United States notes the Canadian statement that the waters of the Arctic archipelago, including the Northwest Passage, are internal waters of Canada and

fall within Canadian sovereignty. As the Government of Canada is aware, the United States does not share this view. For this reason, although the United States is pleased to invite Canadian participation in the transit, it has not sought the permission of the Government of Canada, nor has it given Canada notification of the fact of the transit.

The United States shares the desire of the Government of Canada that the transit be facilitated in the spirit of cooperation that has long characterized the relationship between our two Coast Guards. The United States is therefore pleased at the positive response of the Government of Canada to the Embassy's advice of May 21, 1985, that an invitation would be issued for Canadian participation in the transit. As part of that invitation, the United States Coast Guard has already informed the Canadian Coast Guard regarding the timing and routing of the transit.

The Government of Canada can be assured that the transit will be conducted in a manner that will pose no danger to the environment or ecology in the vicinity of the Northwest Passage. The Canadian Coast Guard is fully aware of the capabilities, including the specifications, of the icebreaker *Polar Sea*.

. . .

The United States considers that this transit, and the preparations for it, in no way prejudices the juridical position of either side regarding the Northwest Passage, and it understands that the Government of Canada shares that view.[82]

On July 31, 1985, Canada responded in a note, as follows:

The Government of Canada has noted with deep regret that the United States remains unwilling, as it has been for many years, to accept that the waters of the Arctic archipelago, including the Northwest Passage, are internal waters of Canada and fall within Canadian sovereignty. The Government of Canada must accordingly reaffirm its determination to maintain the status of these waters as an integral part of Canadian territory, which has never been and never can be assimilated to the regime of high seas or the regime of international straits. Canadian sovereignty in respect to Canada's Arctic waters has been and remains well established in fact and law, and the voyage of the *Polar Sea* can in no way affect that situation. In this regard, the Government of Canada indeed shares the view of the United States, communicated in the State Department's Note No. 222 of June 24, 1985 that "the transit, and the preparations for it, in no way prejudice the juridical position of either side regarding the Northwest Passage."

The Government of Canada has also noted the cooperative approach proposed by the United States regarding the voyage of the *Polar Sea* and is prepared to follow such an approach on the basis of a clear understanding as to the non-prejudicial nature of the voyage. In particular, the Government of Canada has welcomed the consultations held both at the diplomatic level and between the United States Coast Guard and the Canadian Coast Guard, and the information and assurances

provided in relation to the *Polar Sea* itself and the arrangements for its voyage, always without prejudice to the legal position of either government.

This information and these assurances have satisfied the Government of Canada that appropriate measures have been taken by or under the authority of the Government of the United States to ensure that the *Polar Sea* substantially complies with required standards for navigation in the waters of the Arctic archipelago and that in all other respects reasonable precautions have been taken to reduce the danger of pollution arising from this voyage. Accordingly, the Embassy is now in a position to notify the United States that, in the exercise of Canadian sovereignty over the Northwest Passage, the Government of Canada is pleased to consent of the proposed transit, and that, on the basis of the information and assurances provided, and in conformity with subsection 12(2) of the Arctic Waters Pollution Prevention Act, it is also pleased to issue an order exempting the *Polar Sea* from the application of Canadian regulations under subsection 12(1) of the said Act. The relevant Order-in-Council will be issued on Thursday, August 1, 1985.

The Government of Canada is also pleased to accept the United States invitation to participate in the voyage of the *Polar Sea*. Arrangements for such participation will be made between the Canadian Coast Guard and the United States Coast Guard. In addition, the Government of Canada wishes to inform the United States that Canadian agencies will be monitoring the progress of the voyage and will be prepared to render appropriate assistance as required.[83]

The *Polar Sea* departed Thule, Greenland on August 1 enroute Lancaster Sound. Canadian guests embarked at Resolute, Northwest Territories, near the eastern end of the Northwest Passage and debarked at Tuktoyaktuk, near the western end. The ship transited through Lancaster Sound, Barrow Strait, Viscount Melville Sound and exited the Northwest Passage through Prince of Wales Strait and Amundson Gulf. The transit of the Passage was completed on August 11, 1985. No operational difficulties were encountered during the transit.[84]

Agreement on Arctic Cooperation. On January 11, 1988, an Agreement on Arctic Cooperation was signed in Ottawa by Secretary of State George P. Shultz and Canadian Secretary of State for External Affairs Joe Clark. This agreement sets forth the terms for cooperation by the United States and Canadian Governments in coordinating research in the Arctic marine environment during icebreaker voyages and in facilitating safe, effective icebreaker navigation off their Arctic coasts. The agreement, which does not affect the rights of passage by other warships or by commercial vessels, reads as follows:

1. The Government of the United States of America and the Government of Canada recognize the particular interests and responsibilities of their two countries as neighbouring states in the Arctic.

2. The Government of Canada and the Government of the United States also recognize that it is desirable to cooperate in order to advance their shared interests in Arctic development and security. They affirm that navigation and resource development in the Arctic must not adversely affect the unique environment of the region and the well-being of its inhabitants.

3. In recognition of the close and friendly relations between their two countries, the uniqueness of ice-covered maritime areas, the opportunity to increase their knowledge of the marine environment of the Arctic through research conducted during icebreaker voyages, and their shared interest in safe, effective icebreaker navigation off their Arctic coasts:

– The Government of the United States and the Government of Canada undertake to facilitate navigation by their icebreakers in their respective Arctic waters and to develop cooperative procedures for this purpose;

– The Government of Canada and the Government of the United States agree to take advantage of their icebreaker navigation to develop and share research information, in accordance with generally accepted principles of international law, in order to advance their understanding of the marine environment of the area;

– The Government of the United States pledges that all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of the Government of Canada.

4. Nothing in this agreement of cooperative endeavour between Arctic neighbors and friends nor any practice thereunder affects the respective positions of the Governments of the United States and of Canada on the Law of the Sea in this or other maritime areas or their respective positions regarding third parties.

5. This Agreement shall enter into force upon signature. It may be terminated at any time by three months' written notice given by one Government to the other.[85]

During a joint press conference following the signing of this agreement, Secretary Shultz said that he agreed with Secretary Clark's answer to a reporter's question whether the agreement puts the sovereignty question "in limbo for all time." Secretary Clark had said:

> This agreement is a particular, practical step that leaves the differing views of Canada and the United States on the question of sovereignty intact. The United States has its view, we have a different view. They have not accepted ours. We have not accepted theirs. But we have come to a pragmatic agreement by which the United States will undertake to seek Canadian permission before any voyage of an icebreaker goes through these waters.

In response to a question asking under what circumstances Canada would deny permission to an American icebreaker to go through Arctic waters, Secretary Clark said in part:

> I can't answer a hypothetical question of that kind, . . . but the point is we have the power, if we decide, not to agree to a request to transit. . . . We have the Arctic Waters Pollution Prevention Act, which covers a lot of the problems that might arise. There are agreements within NATO that cover a lot of other problems that could arise. There was a hole in the arrangements and we think we have found a pragmatic way to respond to that particular problem. . . .

In response to a question asking whether the United States would be prepared to recognize Canada's claim to the Arctic waters, "if U.S. military vessels and submarines were given free access to these waters in times of crises," Secretary Shultz said "the answer to your question is no."[86]

Transit of the USCG Icebreaker Polar Star, October 1988. The first request by the United States under the 1988 Agreement was made in October 1988 in a note which read as follows:

> As provided by the terms of that Agreement, the Government of the United States hereby requests the consent of the Government of Canada for the United States Coast Guard Cutter "Polar Star", a polar class icebreaker, to navigate within waters covered by the Agreement, and to conduct marine scientific research during such navigation. Any information developed would be shared with the Government of Canada, as envisioned by the Agreement on Arctic Cooperation.
>
> On September 28, while immediately north of Point Barrow, the "Polar Star" responded to a call from the master of the Canadian Coast Guard icebreaker "Martha L. Black," to assist the Canadian icebreaker "Pierre Radisson" and "Martha L. Black," in accord with the spirit of cooperation embodied in the Agreement on Arctic Cooperation. The "Polar Star," which was then enroute from Point Barrow, Alaska, to Seattle, Washington, rendezvoused with the nearby Canadian icebreakers to assist them in their transit to Victoria, British Columbia. Unusually heavy ice caused the "Pierre Radisson" and the "Martha L. Black" to abandon their operational plan and to proceed east toward Saint John's, Newfoundland, via the Northwest Passage.
>
> After having rendered assistance to the Canadian icebreakers through October 1, which required it to change its own operational plans, the "Polar Star" now finds itself compelled by heavy ice conditions, adverse winds and engineering casualties to proceed east through the waters of the Northwest Passage in order to exit the Arctic, as did the Canadian icebreakers.
>
> The Government of the United States would welcome the presence of a Canadian scientist and an officer of the Canadian Coast Guard on board the "Polar Star" and would also be pleased if a Canadian Coast Guard vessel were to choose

to accompany the "Polar Star" during its navigation and conduct of marine scientific research in the Northwest Passage.

"Polar Star" will operate in a manner consistent with the pollution control standards and other standards of the Arctic Waters Pollution Prevention Act and other relevant Canadian laws and regulations. Costs incurred as a result of a discharge from the vessel, including containment, clean-up and disposal costs incurred by the United States or Canada and any damage that is an actual result, will be the responsibility of the United States Government, in accordance with international law.

In view of the necessity for prompt action by the "Polar Star" due to deteriorating weather conditions, the Government of the United States requests a prompt reply to its request for the consent of the Government to the "Polar Star's" navigation of waters covered by the Agreement on Arctic Cooperation.[87]

The Canadian reply, received the same day, read in part:

The Department [of External Affairs] notes the assurance provided by the Embassy that the "Polar Star" will operate in a manner consistent with the pollution control standards and other provisions of the Arctic Waters Pollution Prevention Act and other relevant Canadian laws and regulations and that costs incurred as a result of a discharge from the vessel, including containment, clean-up and disposal costs incurred by the United States or Canada and any damage that is an actual result will be the responsibility of the United States Government in accordance with international law.

The Department has the honour to inform the Embassy that the Government of Canada consents to the "Polar Star's" navigation within waters covered by the Agreement.

The Department has the further honour to inform the Embassy that the Government of Canada also consents to the conduct of marine scientific research during such navigation. The Department notes that the information obtained in such research will be shared as envisioned in the Arctic Cooperation Agreement.

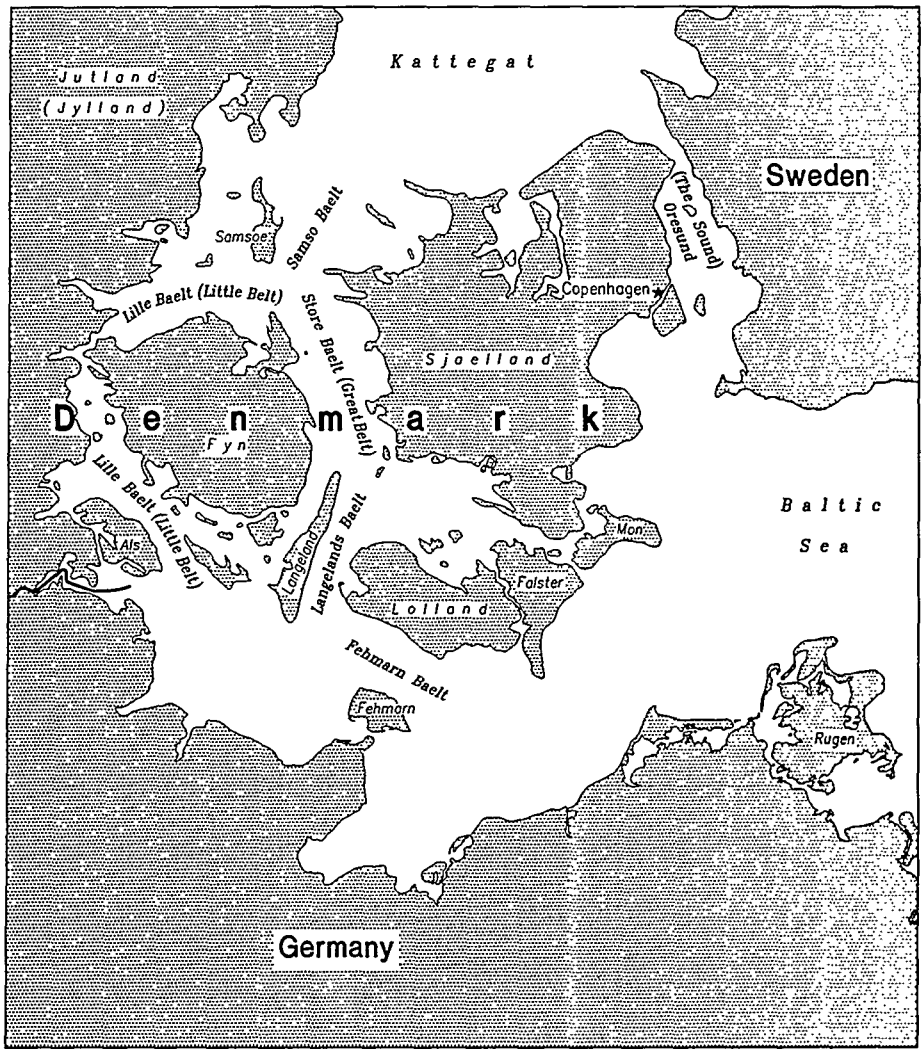
The Department is pleased to inform the Embassy that the Canadian Government has scheduled the Canadian Coast Guard icebreaker "John A. MacDonald" to accompany the "Polar Star" during its navigation in the Northwest Passage. Canadian authorities will also be pleased to make available an officer of the Canadian Coast Guard to be on board the "Polar Star" during this journey.[88]

The Oresund and the Belts

The Baltic Straits include the Little Belt, the Great Belt and the Sound (Oresund) (*see* Map 30). The Sound is the shortest passage between the Baltic Sea and the Kattegat and the North Sea. It is 2.2 miles wide at its narrowest

Map 30

Danish Straits



Names and boundary representations are not necessarily authoritative

point, but its depth is insufficient for deep draught vessels. The sole deep water channel runs through the 10 mile-wide Great Belt.[89] These straits are governed in part by two treaties, the Treaty for the Redemption of the Sound Dues, Copenhagen, of March 14, 1857,[90] granting free passage of the Sound and Belts for all flags on April 1, 1857, and the U.S.-Danish Convention on Discontinuance of Sound Dues, April 11, 1857,[91] guaranteeing forever "the free and unencumbered navigation of American vessels through the Sound and the Belts".

When it signed the LOS Convention, Sweden declared in part that:

> It is the understanding of the Government of Sweden that the exception from the transit regime in straits provided for in Article 35(c) of the Convention is applicable to the strait between Sweden and Denmark (Oresund) . . . Since in [this strait] the passage is regulated in whole or in part by a long-standing international convention in force, the present legal regime in [this strait] will remain unchanged after the entry into force of the Convention.[92]

Warships were never subject to payment of the so-called "Sound Dues," and thus it can be argued that no part of these "long-standing international conventions" are applicable to them.[93] The U.S. view is that warships and state aircraft traverse the Oresund and the Belts based either under the customary right of transit passage or under the conventional right of "free and unencumbered navigation," since transit passage is a more restrictive regime than freedom of navigation guaranteed in the 1857 Conventions.[94] The result is the same: an international right of transit independent of coastal State interference. Both Denmark and Sweden (Oresund), however, maintain that warships and state aircraft that transit the Baltic Straits are subject to coastal State restrictions. They argue that the "longstanding international conventions" apply, as "modified" by longstanding domestic legislation.[95] The United States does not agree that LOS Convention Article 35(c) navigation regimes may be unilaterally restricted.

In 1991, Finland instituted proceedings in the International Court of Justice against Denmark in respect of a dispute concerning passage through the Great Belt. The dispute arose from Denmark's intention to construct a 65 meter high fixed bridge across the sole deep water route between the Baltic and the North Sea (Route T in the Great Belt), thereby preventing the passage of oil drilling rigs constructed by Finland in its shipyards from being towed in their vertical position under the bridge en route to the North Sea, contrary to international law. Interim measures were denied.[96] Shortly before arguments on the merits were scheduled to be heard, the two governments reached a settlement of the dispute, in which Denmark was to pay approximately $16 million to Finland and Finland was to withdraw its case from the Court.[97]

In a speech presented to the 26th Law of the Sea Institute Annual Conference in Genoa, Italy on June 22, 1992, the Department of Defense Representative

for Ocean Policy Affairs, RADM William L. Schachte, Jr., JAGC, USN, stated the view of the United States that "the transit passage articles [of the LOS Convention] would clearly prohibit the unfettered, unilateral construction of a bridge across a strait used for international navigation". He stated that the United States "does not believe that customary international law permits a State unilaterally and without prior international approval to construct a fixed bridge over an international strait which in many instances is the sole practical deep water route available." To unify state practice, RADM Schachte, on behalf of the United States, proposed that "all future construction plans for bridges over international straits be submitted to the International Maritime Organization" after providing actual notice of the proposal well in advance to the IMO. States would then be given the opportunity to communicate their views to the proposing straits State which would be obliged to seek to accommodate such views. Finally, the straits State could only proceed with actual construction upon determination by the IMO that the proposal conforms to the established IMO guidelines and standards (which are yet to be developed and adopted by the IMO). The United States, however, would not apply this prospective procedure to the proposed bridge over the Great Belt.[98]

Sunda and Lombok

Sunda Strait, located between the Indonesian islands of Sumatra and Java, provides the major sea link between the Indian Ocean and the Java Sea (*see* Map 20). It is approximately 50 miles long, and at its narrowest point is 13.8 miles wide. Sangian Island separates the 2.4 mile wide western channel and the 3.7 mile wide eastern channel. Sunda's governing depth is about 100 feet but is not considered suitable for submerged passage given the hydrographic characteristics of its northern exit and the extent of its commercial use.

Lombok Strait is located between the islands of Bali and Lombok. It is the main alternate route for ships travelling between the Indian Ocean and the East Asian Sea. Its navigational width is 11 miles; the length of the passage from the entrance to the Lombok Strait to the exit of the Strait of Malacca is 620 miles. Its depth provides the most suitable alternate route for deep draught vessels to the Malacca and Singapore Straits.[99]

In 1988, Indonesia reportedly closed these straits for a period of time. The U.S. reaction was described in a letter to a lecturer at the Faculty of Law, University of Sydney, Australia, in part as follows:

> The United States was not notified by Indonesia of the closure of the Straits of Lombok and Sunda but, on learning that Indonesia may have ordered its Navy to close those straits for naval exercises and might be conducting naval exercises in a manner that hampered international transit rights, expressed its concern to the appropriate Indonesian governmental officials.

> The United States is of the view that interference with the right of straits transit passage or archipelagic sea lanes passage would violate international law as reflected in the 1982 Law of the Sea Convention and the commitments Indonesia made that its practice regarding the archipelagic claim was now fully consistent therewith, on which basis the United States was able in 1986 to be the first maritime nation to recognize Indonesia's archipelagic claim.
>
> Indonesian archipelagic sea lanes and air routes have not been proposed by Indonesia, acted upon by the competent international organizations or designated by Indonesia in accordance with procedures described in article 53 of the LOS Convention. All normal international passage routes through the archipelago are subject to the regime of archipelagic sea lanes passage in any event. The fundamental rules for archipelagic sea lanes passage and transit passage are the same. No nation may, consistent with international law, prohibit passage of foreign vessels or aircraft or act in a manner that interferes with straits transit or archipelagic sea lanes passage. See articles 44 and 54 of the 1982 Law of the Sea Convention which reflect the customary international law on point.
>
> Applying the objective criteria set forth in Parts III and IV of the LOS Convention, it is clear that Lombok, Sunda and Malacca are unquestionably "straits used for international navigation" and, therefore, are subject to the straits transit regime, while Lombok and Sunda also qualify as "normal passage routes used for international navigation or overflight" and thus are subject to the regime of archipelagic sea lanes passage.
>
> The United States cannot accept either express closure of the straits or conduct that has the effect of denying navigation and overflight rights. While it is perfectly reasonable for an archipelagic state to conduct naval exercises in its straits, it may not carry out those exercises in a way that closes the straits, either expressly or constructively, that creates a threat to the safety of users of the straits, or that hampers the right of navigation and overflight through the straits or archipelagic sea lanes.[100]

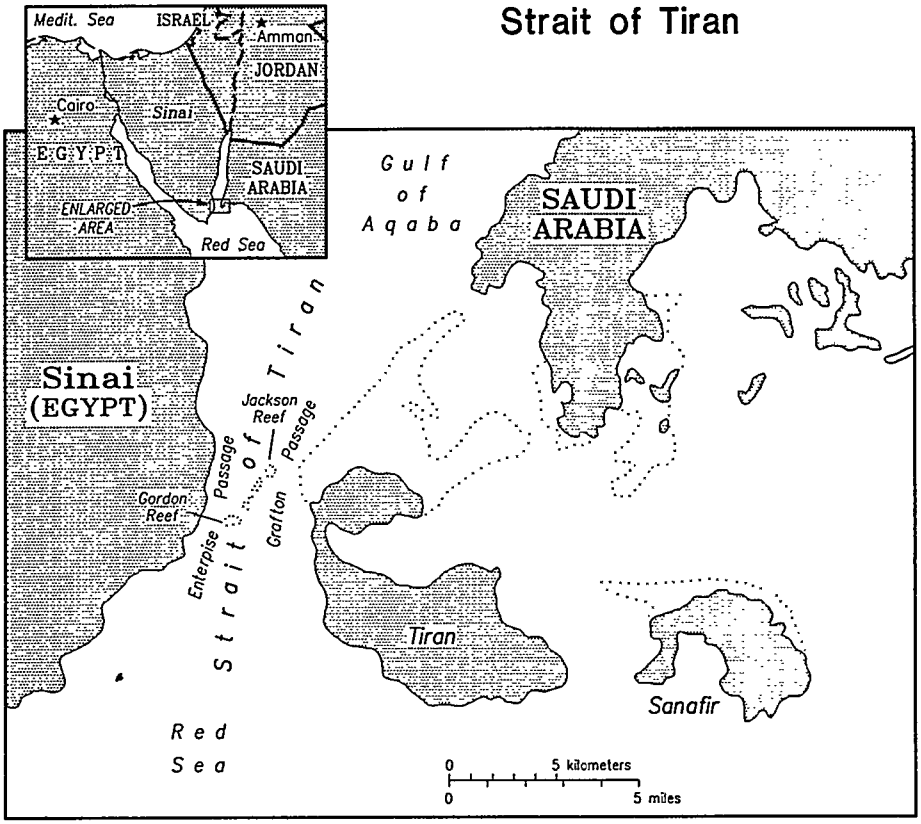
Tiran

The three mile wide Strait of Tiran connects the 98 mile long Gulf of Aqaba with the Red Sea (*see* Map 31).[101] Article V(2) of the Treaty of Peace between Egypt and Israel provides:

> The Parties consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight. The Parties will respect each other's right to navigation and overflight for access to either country through the Strait of Tiran and the Gulf of Aqaba.[102]

When asked about the effect of the proposed LOS Convention on the regime of navigation and overflight in this strait and the Gulf of Aqaba, a U.S. official replied:

Map 31


Strait of Tiran
Medit. Sea
ISRAEL
Amman
JORDAN
Cairo
Sinai
EGYPT
SAUDI ARABIA
ENLARGED AREA
Red Sea
Gulf of Aqaba
SAUDI ARABIA
Sinai (EGYPT)
Strait of Tiran
Jackson Reef
Passage
Gordon Reef
Enterprise Passage
Grafton
Tiran
Sanafir
Red Sea
0 5 kilometers
0 5 miles

> The U.S. fully supports the continuing applicability and force of freedom of navigation and overflight for the Strait of Tiran and the Gulf of Aqaba as set out in the peace treaty between Egypt and Israel. In the U.S. view, the treaty of peace is fully compatible with the LOS Convention and will continue to prevail. The conclusion of the LOS Convention will not affect these provisions in any way.[103]

On August 23, 1983, Egypt declared upon ratification of the 1982 LOS Convention:

> The provisions of the 1979 Peace Treaty between Egypt and Israel concerning passage through the Strait of Tiran and the Gulf of Aqaba come within the framework of the general regime of waters forming straits referred to in Part III of the Convention, wherein it is stipulated that the general regime shall not affect the legal status of waters forming straits and shall include certain obligations with regard to security and the maintenance of order in the State bordering the strait.[104]

On December 11, 1984, Israel submitted a statement to the U.N. Secretary-General which stated:

> The concerns of the Government of Israel, with regard to the law of the sea, relate principally to ensuring maximum freedom of navigation and overflight everywhere and particularly through straits used for international navigation.
>
> In this regard, the Government of Israel states that the regime of navigation and overflight, confirmed by the 1979 Treaty of Peace between Israel and Egypt, in which the Strait of Tiran and the Gulf of Aqaba are considered by the Parties to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight, is applicable to the said areas. Moreover, being fully compatible with the United Nations Convention on the Law of the Sea, the regime of the Peace Treaty will continue to prevail and to be applicable to the said areas.
>
> It is the understanding of the Government of Israel that the declaration of the Arab Republic of Egypt in this regard, upon its ratification of the [said] Convention, is consonant with the above declaration.[105]

United Kingdom Straits

The United Kingdom has asserted the legal regimes applicable in some of the international straits in its waters. The transit passage regime is considered to be applicable in the **Strait of Dover**, the **North Channel** between Scotland and Northern Ireland, and the **Fair Isle Gap** between the Shetlands and Orkneys.[106] The "transit passage" regime was used in a Declaration issued by France and Great Britain setting out the governing regime of navigation in the Dover Straits in conjunction with the signature on November 2, 1988 of an Agreement

establishing a territorial sea boundary in the Straits of Dover.[107] In 1987, the United Kingdom recognized the right of foreign aircraft to exercise the right of transit passage over the Straits of Dover, the North Channel and the Fair Isle Channel between the Shetland and Orkney Islands.[108]

The regime of (non-suspendable) innocent passage is said to apply in other United Kingdom straits used for international navigation, such as the **Pentland Firth** south of Orkney and the passage between the Scilly Isles and the mainland of Cornwall.[109]

Notes

1. LOS Convention, article 37.
2. *See* LOS Convention, article 36.
3. LOS Convention, articles 38(2) & 39(1)(c); Moore, *The Regime of Straits and The Third United Nations Conference on the Law of the Sea*, 74 Am. J. Int'l L. 77, 95-102 (1980); 1 O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 331-37 (1982). *Compare* article 53(3) which defines the parallel concept of archipelagic sea lanes passage as "the exercise . . . of the rights of navigation and overflight *in the normal mode* solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone." The emphasized words do not appear in article 38(2), but rather in the plural in article 39(1)(c); article 39 also applies *mutatis mutandis* to archipelagic sea lanes passage.
4. U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, NWP 9 (Rev. A.)/FMFM 1-10 (1989) [hereinafter NWP 9 (Rev. A)], para. 2.3.3.1.
5. LOS Convention, article 39(1).
6. LOS Convention, article 44.
7. U.S. Department of the Navy, *Annotated Supplement to The Commander's Handbook on the Law of Naval Operations*, NWP 9 (Rev. A.)/FMFM 1-10 (1989) [hereinafter NWP 9 (Rev. A) ANN. SUPP.], para. 2.3.3.1 & n.42.
8. LOS Convention, articles 41(1) & 41(3). The International Maritime Organization is the proper international organization.
9. Presidential Proclamation No. 5928, Dec. 27, 1988, Appendix 3.
10. State Department telegram 202135, July 2, 1985. The Spanish declarations are discussed below, this Chapter, beginning at text accompanying n. 46. Under the 1958 Territorial Sea Convention, international straits overlapped by territorial seas were subject to a regime providing only nonsuspendable innocent surface passage. Territorial Sea Convention, articles 14 & 16(4).
11. *Aide memoire* delivered Dec. 4, 1984, from American Embassy Stockholm. State Department telegram 355149, Dec. 1, 1984; American Embassy Stockholm telegram 08539, Dec. 10, 1984.
12. State Department telegram 375513, Dec. 21, 1984, para. 5.
13. Navy JAG, Alexandria VA, naval message 061630Z June 1988.
14. An English translation of this treaty is set out in Annex 2 to Limits in the Seas No. 105, Colombia - Dominican Republic & Netherlands (Netherlands Antilles) - Venezuela: Maritime Boundaries.
15. U.N. LOS BULL., No. 19, Oct. 1991, at 24; U.N. LOS: Practice of Archipelagic States 247.
16. Treaty Between the Independent State of Papua New Guinea and Australia concerning Sovereignty and Maritime Boundaries in the areas between the two countries, including the area known as Torres Strait, and related matters, signed at Sydney, Dec. 18, 1978, 18 I.L.M. 291 (1979); U.N. LOS: Practice of Archipelagic States 185.
17. South Pacific Nuclear Free Zone Treaty, 24 I.L.M. 1442 (1985).
18. Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 1990. S. Treaty Doc. 103-5, at 8.
19. U.N. LOS: Practice of Archipelagic States 161.
20. Reportedly to preclude any implication of incorporation by reference of the entire straits regime, 37 Int'l & Comp. L.Q. 415 (1988).
21. UK White Paper, France No. 1, Cm. 557 (1989); FCO Press Release No. 100, Nov. 2, 1988; *reprinted in* 59 Brit. Y. B. Int'l L. 524-25 (1988); U.N. LOS BULL., No. 14, Dec. 1989, at 14; U.N., Current Developments No. II, at 263; and Nandan & Anderson, *Straits Used For International Navigation: A Commentary*

on Part III of the United Nations Convention on the Law of the Sea 1982, 60 Brit. Y. B. Int'l L. 159, 170 n. 34 (1989). *See also* n. 107 *infra*.

22. *See* CYUYVERS, THE STRAITS OF DOVER (1986).

23. Footnotes omitted. The Malaysia-Indonesia-Singapore statements and addenda may be found in U.N. Doc. A/CONF.62/L.145, 16 Official Records of the Third U.N. Conference on the Law of the Sea 250-53 [hereinafter Official Records]. On the 1904 Anglo-French Declaration, *see* n. 46 *infra*.

24. U.N. Doc. A/47/512, Nov. 5, 1992, para. 23, at 8.

25. U.N. GA Doc. A/48/90, Feb. 22, 1993, *reprinted in* U.N. LOS BULL., No. 23, June 1993, at 108.

26. LOS Convention, article 45.

27. 1975 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 432 [hereinafter DIGEST] ("the view of the United States Government is that vessels proceeding to or departing from United States ports through the waters of Head Harbour Passage enjoy the right of innocent passage under international law. This right is not subject to unreasonable or arbitrary interference or suspension."); Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 Am. J. Int'l L. 77, 112 (1980).

28. LOS Convention, article 38(1). For a list of such straits, *see* OFFSHORE CONSULTANTS, INC., NAVIGATIONAL RESTRICTIONS WITHIN THE NEW LOS CONTEXT: GEOGRAPHICAL IMPLICATIONS FOR THE UNITED STATES Table 8, following page 161 (L.M. Alexander, ed. Final Report under Defense Supply Service Contract 903-84-C-0276, Dec. 1986) [hereinafter ALEXANDER, NAVIGATIONAL RESTRICTIONS]. The United Kingdom claims the regime of nonsuspendable innocent passage applies to the Pentland Firth south of Orkney and the passage between the Scilly Isles and the mainland of Cornwall. 484 H.L. Hansard, col. 382, Feb. 5, 1987.

29. U.N. Current Developments No. II, at 94.

30. American Embassy Belgrade Diplomatic Note No. 062 dated Aug. 22, 1986, State Department telegram 264932, Aug. 22, 1986; American Embassy Belgrade telegram 00674, Jan. 23, 1987. The Yugoslavian Foreign Ministry reply, in its Note no. 194 dated Jan. 23, 1987, read as follows:

> Transit passage through straits used for international navigation is a new navigation regime agreed upon for the first time at the Third United Nations Conference on the Law of the Sea and introduced in the United Nations Convention on the Law of the Sea. The transformation of the provisions that form that regime into customary international law will be a complex and gradual process which will, like in other fields of international law, take place in accordance with the principles most precisely determined by the International Court of Justice in the case of the Delimitation of the Continental Shelf in the North Sea in 1969.
>
> The purpose of the regime of transit passage is to enable foreign ships passing through straits used for international navigation between a part of the high seas or exclusive economic zone and another part of the high seas or exclusive economic zone not to navigate under the more strict and restrictive regime of innocent passage.
>
> Yugoslavia's statement concerning the rules of the United Nations Convention on the Law of the Sea in transit passage is not designed to prevent the exercise of the right of transit passage. It relates only to situations when there are more than one strait with the same navigational conditions.
>
> Yugoslavia is not the only country which made the statement on transit passage.

31. LOS Convention, article 36.

32. *Corfu Channel Case*, 1949 I.C.J. Rep. 4, 28.

33. Article 16(4).

34. Articles 34(1), 36 & 45.

35. Grunawalt, *United States Policy on International Straits*, 18 Ocean Dev. & Int'l L. J. 445, 456 (1987).

36. ALEXANDER, NAVIGATIONAL RESTRICTIONS 153-54.

37. 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 14 (1985).

38. *Id.* at 26.

39. *See* ALEXANDERSSON, THE BALTIC STRAITS 69 (1982).

40. Geneva, Oct. 20, 1921, 9 L.N.T.S. 211. Article 5 of the Convention provides "The prohibition to send warships into [the waters of the Aland Islands] or to station them there shall not prejudice the freedom of innocent passage through the territorial waters. Such passage shall continue to be governed by the international rules and usage in force." The parties to this Convention include Denmark, Estonia, Finland,

Germany, Italy, Latvia, Poland, Sweden, and the United Kingdom. The Oresund and the Belts are discussed below, this chapter.

41. *See* LAPIDOTH, THE RED SEA AND THE GULF OF ADEN 130-49 (1982).

42. Diplomatic Note No. 449 dated Oct. 6, 1986, delivered by American Embassy Sanaa, pursuant to instructions contained in State Department telegram 312052, Oct. 3, 1986. American Embassy Sanaa telegram 06770, Oct. 6, 1986. The Yemeni declaration of Dec. 10, 1982, may be found in U.N., Status of the United Nations Convention on the Law of the Sea 29. *See also* 1979 DIGEST 1724.

43. *See* 2 BRUEL, INTERNATIONAL STRAITS 252-55 (1947); ROZAKIS, THE TURKISH STRAITS (1987); and Note by Turkey; Navigational and Environmental Safety in the Turkish Straits, I.M.O. doc. MSC/62/INF.10, Mar. 26, 1993.

44. 173 L.N.T.S. 213, 31 Am. J. Int'l L. Supp. 4. *See* BRUEL, INTERNATIONAL STRAITS 252-426.

45. *See* TRUVER, THE STRAIT OF GIBRALTAR AND THE MEDITERRANEAN (1980) and 2 BRUEL, INTERNATIONAL STRAITS 116-99.

46. While it may be noted that free passage of the Straits of Gibraltar was agreed to in a series of agreements between France, Spain and Great Britain in the early 20th Century, neither Spain nor Morocco have asserted the Article 35(c) exception applies. Article VII of the Declaration between the United Kingdom and France respecting Egypt and Morocco, London, Apr. 8, 1904, 195 Parry's T.S. 198, acceded to by Spain in the Declaration of Paris, Oct. 3, 1904, 196 Parry's T.S. 353; Declarations on Entente on Mediterranean Affairs, Paris, May 16, 1907, 204 Parry's T.S. 176 (France and Spain) and London, May 16, 1907, 204 Parry's T.S. 179 (United Kingdom and Spain); and article 6 of the France-Spain Convention concerning Morocco, Madrid, Nov. 27, 1912, 217 Parry's T.S. 288.

47. Diplomatic Note No. 806 dated Aug. 14, 1985, delivered by American Embassy Madrid, State Department telegram 202135, July 2, 1985; American Embassy Madrid telegram 05509, Apr. 28, 1989.

48. The Spanish declaration of Apr. 12, 1984, may be found in U.N., Status of the United Nations Convention on the Law of the Sea 25, U.N. Sales No. E85.V.5 (1985) and U.N. Multilateral Treaties Deposited with the Secretary-General, Status as of Dec. 31, 1992, at 772-73.

49. State Department telegram 202135, *supra* n. 47, paras. 6 & 7.

50. *See* RAMAZANI, THE PERSIAN GULF AND THE STRAIT OF HORMUZ (1979).

51. The statement of Iran accompanying its signature of the Law of the Sea Convention on Dec. 10, 1982, may be found in U.N., Status of the United Nations Convention on the Law of the Sea 18.

52. U.N. Doc. A/CONF.62/WS/37, 17 Official Records 244. The statement of Iran accompanying its signature of the Law of the Sea Convention on Dec. 10, 1982, was also protested in a Diplomatic Note to the Embassy of Algeria dated Aug. 17, 1987, State Department File No. P87-0098-1262.

53. I Public Papers of the Presidents: Ronald Reagan 1984, at 251. President Reagan expressed essentially the same commitment on a number of occasions thereafter, in an address before the Center for Strategic and International Studies, Apr. 6, 1984, (*id.*, at 481), in a radio address to the nation, Sept. 21, 1985 (*id.*, 1985 Bk. II, at 1125), and in statements on Jan. 23, Feb. 25, and May 30, 1987 (*id.* 1987 Bk. I, at 46, 181, 581-82). *See further* 1980 DIGEST 625-26.

54. Diplomatic Note to the Embassy of the Democratic and Popular Republic of Algeria dated Aug. 17, 1987, State Department File No. P87 0098-1261; Algerian Embassy at Washington Diplomatic Note No. D.E/4.87, dated Apr. 30, 1987, State Department File No. P87 0063-0052.

55. Diplomatic Note No. 1, dated Jan. 2, 1985, delivered by American Embassy Moscow, State Department telegram 381259, Dec. 29, 1984. The Soviet Note MFA No. 81/USA read as follows:

> On November 30, 1984, vessels of the U.S. Navy—the cruiser "Sterett" and the destroyer "J. Young"—violated the state boundary of the USSR in the Strait of Friza (Kuril Islands). The vessels in question crossed the boundaries of the territorial waters of the USSR at 07:15 (Moscow time) at a point with coordinates Lat. 45 degrees 26.9 minutes N, Long. 149 degrees 14.6 minutes E and departed them at 08:07 at a point Lat. 45 degrees 30 minutes N. Long. 149 degrees 4.2 minutes E.
>
> The American side knows well that peaceful passage of foreign military vessels through the territorial waters of the USSR for the purpose of traversing them without incursion into inner waters and ports is permitted in accordance with the Rules of Navigation and Passage Through the Territorial Waters (Territorial Sea), Inner Waters and Ports of the USSR by Foreign Military Vessels, which is published every year in the Notice to Mariners Edition No. 1, on the routes commonly used by international shipping. In the area of the Kuril Islands there is such a route passing through the fourth Kuril Strait.
>
> Therefore, it is completely obvious that the actions of the U.S. Navy vessels bore a premeditated and provocative character.

> This is not the first instance of such violations in the recent past to be brought to the attention of the American side.
>
> The MFA of the USSR protests the new violation by American military vessels of the state boundaries of the USSR and insists that the American side take effective measures to exclude repetition of such incidents in the future.

Diplomatic Note No. 81/USA from the Ministry of Foreign Affairs, Moscow, Dec. 3, 1984, American Embassy Moscow telegram 15281, Dec. 3, 1984. In rejecting the U.S. note of Jan. 2, 1985 in Note No. 11/USA delivered Mar. 14, 1985, the Ministry of Foreign Affairs stood by its Note No. 81/USA of Dec. 3, 1984, American Embassy Moscow telegram 03262, Mar. 15, 1985.

The U.S. Note dated May 23, 1957, referred to in the U.S. Note of Jan. 2, 1985 rejects the Soviet claim of right to possession of the Kuril islands and may be found in 3 WHITEMAN, DIGEST OF INTERNATIONAL LAW 581-83. The State Department's instructions to the Embassy noted that:

> The term "Friza Strait" is an objectionable term to the USG. "Etorofu Strait" is our preferred formulation. For the record also, the USG refers to the islands immediately to the southwest of the Etorofu Strait by their given names, i.e. Etorofu, Kunashiri, Shikotan, and the Hamomais (vice Little Kuriles or Southern Kuriles).

The instructions also stated that "the principles expressed [in this note] regarding innocent passage of warships are applicable to the November 23 [1984] exercise of innocent passage in the Black Sea by the USS *Spruance* and *Coontz*." State Department telegram 381250, Dec. 29, 1984, para. 5.

The Soviet legislation may be found in translation in 24 I.L.M. 1717 (1985). *See* Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, 81 Am. J. Int'l L. 331 (1987), and Neubauer, *The Right of Innocent Passage for Warships in the Territorial Sea: A Response to the Soviet Union*, Nav. War Coll. Rev., Spring 1988, at 49.

56. Diplomatic note delivered July 18, 1986, by the American Embassy Moscow, State Department telegram 220023, July 14, 1986; American Embassy Moscow telegram 12330, July 18, 1986. The Soviet statement of June 11, 1986 read as follows:

> On June 8 of this year at 0555 Moscow time the USN frigate "Hammond" violated the state border of the USSR in the region of the Kuril islands, passing from the Sea of Okhotsk to the Pacific Ocean through Soviet territorial waters between the islands Raykoke and Matua (the Golovnina strait). At this time the frigate demonstratively disregarded the warning signals from the Soviet cruiser *Minsk* concerning the violation of the borders.
>
> The American side has already repeatedly asserted that peaceful passage by foreign military vessels through the territorial waters of the USSR with the aim of their intersection is permitted along routes used commonly for international navigation. There is such a route in the region of the Kuril Islands, passing through the fourth Kuril strait.
>
> Therefore, it is completely obvious that the action of the frigate *Hammond* takes on a premeditated and provocational character.
>
> The USSR MFA protests on the occasion of the violation by a vessel of the USN of the USSR state border and demands that the American side adopt, at last, appropriate measures to prevent similar occurrences at odds with the demands of the laws and regulations of the USSR, relating to the regime of Soviet territorial waters.
>
> It should be clear that continuing violation of the Soviet state border by American military vessels can have the most serious consequences, responsibility for which would lie entirely and completely with the U.S.

Note verbale from the Ministry of Foreign Affairs, Moscow, June 11, 1986, American Embassy Moscow telegram 09922, June 11, 1986. For the results of the negotiations which followed this incident, and another in the Black Sea in February 1988, *see* Chapter X, n. 4 and accompanying text. The 1983 Soviet Rules were amended effective Sept. 23, 1989, to eliminate the attempt to restrict innocent passage of warships to five named "routes ordinarily used for international navigation."

57. *See* 2 BRUEL, INTERNATIONAL STRAITS 200-51 and MORRIS, THE STRAIT OF MAGELLAN (1989).

58. Signed Jul. 23, 1881, 82 Brit. Foreign & State Papers 1103, 159 Parry's T.S. 45.

59. Signed Nov. 29, 1984, 24 I.L.M., 11, 13 (1985).

60. State Department telegram 375513, Dec. 21, 1984, paras. 4 & 5.

61. LEIFER, MALACCA, SINGAPORE AND INDONESIAN STRAITS 52-56 (1978). Navigational difficulties are described at 56-62. *See also* the Report of the I.M.O. Working Group on the Malacca Strait Area, I.M.O. doc. MSC/62/INF.3, at 6-8 (1993).

62. U.N. Doc. A.CONF.62/L.145/Add.5, 16 Official Records 251. Add. 1 - 8, *id.* at 251-53, contain the confirmations of Indonesia, Singapore, France, the United Kingdom, the United States, Japan, Australia and the Federal Republic of Germany, respectively.

63. *See* I.M.O., Ships' Routeing Part B Section V (traffic separation schemes), Section III (deep water routes), and Part F (associated rules) (6th ed. 1991).

64. LOS Convention, article 38(1).

65. Italian Minister of Merchant Marine decree, Temporary Prohibition in the Straits of Messina for a Category of Ships, dated Mar. 27, 1985 (published in Gazzetta Ufficiale No. 76, Mar. 29, 1985, p. 2408), an English translation of which may be found in American Embassy Rome telegram 08480, Apr. 3, 1985.

66. Diplomatic Note delivered Apr. 5, 1985, from American Embassy Rome, State Department telegram 102199, Apr. 4, 1985; American Embassy Rome telegram 08736, Apr. 5, 1985.

67. *Id.* para. 4. *See also supra* Chapter X for other U.S. objections to requirements for compulsory pilotage of warships. This 45-day prohibition was revised by Article 6 of Minister of Merchant Marine decree dated May 8, 1985 (published in the Gazzetta Ufficiale no. 110, May 11, 1985, an English translation of which may be found in American Embassy Rome telegram 12263, May 15, 1985), effective May 15, 1985, to apply to vessels 50,000 tons and above carrying oil products or other substances hazardous to the environment. On May 15, 1985, the Italian Ministry of Foreign Affairs replied in a *note verbale* in relevant part, as follows:

> As may be noted from the text of the May 8, 1985 decree . . . , the measures decided with the intent of decreasing the risk of maritime accidents are designated as "provisional" while waiting for the construction and putting into operation of technical installations to aid navigation in the Straits.
>
> The provisional measures established with the decree in question appeared indispensable to save the marine environment and to guarantee the safety of the coasts of the zone of interest and of the inhabitants of the shore. Therefore, these measures cannot be regarded as directed toward the limitation of the right of innocent passage through the straits, as defined by the rules of international law in force, but rather as the temporary regulation of it with the aim of achieving goals of safeguarding the environment and the safety of the coasts as provided by other instruments of international law and especially by the IMO Convention quoted in the Preamble of the Decree.
>
> It must be also noted that for this specific case there is an alternate route of similar suitability (through the Sicily Channel) and that some oil companies (especially AGIP and ESSO) have limited themselves by excluding from passage through the Messina Straits their own oil tankers over 50,000 tons.
>
> From the reading of the May 8, 1985, decree it can be concluded that the decree itself concerns solely merchant ships and it is therefore clear that it is not to be applied to warships, and according to art. 3 of the November 2, 1973 London Convention for the Prevention of Pollution from Ships, is not to be applied to auxiliary warships or other ships belonging to a state or operated by such state on non-commercial service.

Informal English translation set out in American Embassy Rome telegram 12571, May 17, 1985. A new automated control system for navigation in the Strait of Messina went into effect June 1, 1987. American Embassy Rome telegram 12611, May 26, 1987.

68. *See* BUTLER, NORTHEAST ARCTIC PASSAGE (1978).

69. *Aide memoire* from the Soviet Ministry of Foreign Affairs to American Embassy Moscow, dated July 21, 1964, American Embassy Moscow telegram 17002, July 21, 1964.

70. American Embassy, Moscow *aide memoire* dated June 22, 1965, State Department File No. POL 33 R. The Soviet side, in an *aide memoire* to American Embassy Moscow on July 26, 1965, confirmed its position contained in its *aide memoire* of July 21, 1964, American Embassy Moscow telegram 18098, July 26, 1964.

71. Soviet Ministry of Foreign Affairs Note 45/USA dated Oct. 27, 1965, to American Embassy Moscow, American Embassy Moscow telegram 23048, Oct. 28, 1965.

72. American Embassy Moscow Note delivered in Nov. 1965 pursuant to State telegram 14083, Nov. 26, 1965, File POL 33-6 US-USSR.

73. Department of State Note dated Aug. 14, 1967 to the Soviet Embassy in Washington, State Department File No. SCI 31 US.

74. Soviet Ministry of Foreign Affairs *aide memoire* to American Embassy Moscow dated Aug. 24, 1967, American Embassy Moscow telegram 754, Aug. 25, 1967.

75. American Embassy Moscow telegram 811, Aug. 28, 1967, State Department File SCI 31 US.

76. State Department telegram 029187, Aug. 30, 1967, State Department File SCI 31 US; American Embassy Moscow telegram 841, Aug. 30, 1967.

77. DEP'T ST. BULL., No. 1473, Sept. 18, 1967, at 362. *See further*, Franckz, *Non-Soviet Shipping in the Northeast Passage, and the Legal Status of Proliv Vil'kitskogo*, Polar Record, vol. 24, no. 151, pp. 269-76 (1988); Butler, *Soviet Concepts of Innocent Passage*, 7 Harv. Int'l L. J. 113-14 (1965); BUTLER, NORTHEAST ARCTIC PASSAGE 86 (1978); Ackley, *The Soviet Navy's Role in Foreign Policy*, Nav. War Coll. Rev., at 53-55 (May 1972); Pharand, *Soviet Union Warns United States Against Use of Northeast Passage*, 62 Am. J. Int'l L. 927-35 (1968); and Pharand, *Innocent Passage in the Arctic*, 1968 Can. Y.B. Int'l L. 3, 15-41.

78. *See* Rothwell, *The Canadian-U.S. Northwest Passage: A Reassessment*, 26 Cornell Int'l L.J. 331 (1993), Pharand, *Canada's Sovereignty over the North West Passage*, 10 Mich J. Int'l L. 653 (1989) and PHARAND, THE NORTHWEST PASSAGE ARCTIC STRAITS (1984). The Canadian claim is also discussed in Pullen, *What Price Canadian Sovereignty?*, U.S. Nav. Inst. Proc. 66 (Sept. 1987) wherein Captain Pullen, Canadian Navy (retired), establishes that the Northwest Passage is the sea route that links the Atlantic and Pacific Oceans north of America, and lists the 36 transits of the Passage from 1906 to 1987. The United Kingdom has stated that it does not recognize Canadian sovereignty over all of the waters of the Canadian Arctic archipelago. 58 Brit. Y.B. Int'l L. 1987, at 586 (1988).

79. In 1970, the United Kingdom reserved its rights in connection with the 1970 Canadian Act. 55 Brit. Y.B. Int'l L. 1984, at 553 (1985). The United States continues to object to the application of the law in so far as it purports to apply to sovereign immune vessels. The United States believes that internationally agreed standards should be developed to replace many of its unilateral provisions. However, the United States considers that U.S. commercial vessels are subject to the law. The United States has agreed to consult with Canada in the development of standards and operational procedures to facilitate commercial navigation in the Arctic.

The Arctic Waters Pollution Prevention Control Act preceded the Third U.N. Conference on the Law of the Sea (UNCLOS III) and the LOS Convention's non-seabed articles which the United States considers to be reflective of customary international law. During UNCLOS III, collaboration among the United States, Canada and the USSR resulted in the so-called "ice-covered areas Article," article 234, developed primarily to address satisfactorily the Canadian Arctic environmental concerns. Article 234 recognizes more extensive coastal State rights with respect to prescriptive and enforcement competence in vessel-source pollution prevention and control in areas of the EEZ that are usually ice-covered than may be exerted in other areas of the EEZ. Article 234, however, does not specifically deal with straits; thus it leaves open the issue whether or not the Northwest Passage constitutes a strait used for international navigation. Furthermore, article 234 does not apply to sovereign immune vessels. *See also* Chapter XV, text accompanying nn. 38-40 *infra*.

Over the years, Canada has argued that the waters of the Canadian Arctic are internal waters, territorial waters, or a mixture thereof. *See*, for example., Canadian External Affairs Legal Bureau briefing of May 21, 1987, in 1987 Can. Y.B. Int'l L. 406, and Legal Bureau paper dated Mar. 29, 1988, in 1988 *id.* 314. The Canadian public clearly regards the area as integral with and indistinguishable from the sovereign continental mainland areas of Canada. On the other hand, the United States has firmly taken the position that the Northwest Passage waters are not internal and that they are subject to the non-suspendable navigational regime of transit passage. The United States believes they form a strait used for international navigation between one area of the high seas and another.

80. State Department telegram 151842, May 17, 1985; American Embassy Ottawa telegram 03785, May 21, 1985. *See also* Canadian Secretary of State for External Affairs Joe Clark's letter to the editor of *Maclean's*, Apr. 28, 1986, at 4. The "Volpe-Jamieson Agreement" of June 18, 1970, a memorandum of understanding between the U.S. Department of Transportation and the Canadian Ministry of Transport concerning research and development cooperation in transportation, is not printed.

81. Canadian Embassy Washington DC Note No. 331, dated June 11, 1985, to the State Department, Department of State File No. P85 0118 0711/0714. *See also* Pharand, *Canada's Sovereignty over the Newly Enclosed Arctic Waters*, 1987 Can. Y.B. Int'l L. 325, at 326.

82. American Embassy Ottawa Note No. 222 of June 24, 1985, Department of State File No. P85 0118 0711/0714. *See also* Pharand, *supra* n. 81, at 326.

83. Canadian Embassy, Washington, DC, Note No. 433, dated July 31, 1985, Department of State File No. P85 0118-0711. *See also* the Statement of Canadian Secretary of State For External Affairs, Joe Clark, in the Canadian *House of Commons Debates*, Sept. 10, 1985, at 6462, *Statement Series 85/49, excerpted in* 1986 Can. Y.B. Int'l L. 417 and 24 I.L.M., 1724 (1985).

84. *See supra* Chapter IV regarding the Canadian Order-in-Council of September 10, 1985, establishing straight baselines around the outer perimeter of the Canadian arctic islands, effective January 1, 1986, which followed the public reaction in Canada to the transit of the *Polar Sea.*

85. T.I.A.S. No. 11565, 28 I.L.M. 142 (1989), summarized in 82 Am. J. Int'l L. 340-41 (1988).

86. Joint Press Conference, Jan. 11, 1988, Department of State Press Release No. 3, Jan. 14, 1988. *See also* Canadian *House of Commons Debates*, Jan. 18, 1988, pp. 11998-99, *excerpted in* 1988 Can. Y.B. Int'l L. 350, and Canadian External Affairs Legal Bureau paper dated Mar. 29, 1988, *in* 1988 Can. Y.B. Int'l L. 315. Negotiation of this agreement is discussed in Howson, *Breaking the Ice: The Canadian-American Dispute over the Arctic's Northwest Passage*, 26 Colum. J. Transnat'l L. 337 (1988).

87. American Embassy Ottawa Note No. 425, dated Oct. 10, 1988, Department of State File No. P88 0129-0576, 28 Int'l Legal Mat'ls 144, 83 Am. J. Int'l L. 64 (1989).

88. Department of State File No. P88 0129-0576, 28 I.L.M. 145. The *Polar Star* completed its transit of the Passage on October 20, 1988, accompanied by the Canadian cutter *John A. MacDonald* as far as Baffin Bay. The *Polar Star* transited the Northwest Passage from east to west in August 1989; the *Polar Sea* transited from east to west in September 1990. Both transits occurred pursuant to virtually identical notes exchanged in accordance with this agreement.

89. *See* ALEXANDERSSON, THE BALTIC STRAITS 63-69 (1982) and 2. BRUEL, INTERNATIONAL STRAITS: A TREATISE ON INTERNATIONAL LAW, 11-115 (1947).

90. 116 Perry's T.S. 357, 47 Brit. Foreign & State Papers 24.

91. 11 Stat. 719, T.S. 67, 7 Miller 519, 7 Bevans 11, Articles I and III.

92. 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 26 (1985).

93. 7 Miller 524-86; 2 BRUEL, *supra* n. 89, at 41 & 84 (the 1857 Conventions apply only to merchant ships).

94. *Compare* the view of Bruel that the 1857 treaties only abolish extraordinary rights leaving the straits to be governed in the future by the general rules of international law. 2 BRUEL, *supra* n. 89, at 45 & 95.

95. ALEXANDERSSON, *supra* n. 89, at 82-86 & 89.

96. 1991 I.C.J. Rep. 12.

97. 1992 I.C.J. Rep. 348 (order removing case from the general list). *See also* 32 I.L.M. 101 (1993).

98. Schachte, *International Straits and Navigational Freedoms*, 23 Ocean Dev. & Int'l L. 179, at 193-94 (1993).

99. LEIFER, *supra* n. 61, at 76-81.

100. David H. Small, Assistant Legal Adviser for Oceans and International Environmental and Scientific Affairs, letter dated Apr. 4, 1989, Department of State File No. P89 0049-2112, *quoted in* 83 Am. J. Int'l L. 559-61 (1989). The closure was also protested by Japan, Spain (for the EC), and the Federal Republic of Germany in 1989, and by Australia on October 10, 1988. 12 Aust. Y.B. Int'l L. 382-83 (1992); Treves, 223 Recueil des Cours 134 (1990-4). *See* Rothwell, *The Indonesian Straits Incident: Transit or ASLP?*, Marine Policy at 491-506 (Nov. 1990) and Lowry, *Why Indonesia Closed the Strait in September 1988*, 16 Studies in Conflict and Terrorism 171 (1993).

101. *See* LAPIDOTH, THE RED SEA AND THE GULF OF ADEN 119-27 & 172-83 (1982).

102. Mar. 26, 1979, 1979 DIGEST 1691, 18 I.L.M. 362 (1979). For an earlier analysis of access to the ports in the Gulf of Aqaba by the Department's Special Adviser on Geography (Boggs), *see* 5 Department of State, FOREIGN RELATIONS OF THE UNITED STATES 1951, *The Near East and Africa* 585-88 (1982).

103. Assistant Secretary of State James L. Malone, Special Representative of the President to the Law of the Sea Conference, at a January 29, 1982 press conference at the State Department, *reprinted in* 128 Cong. Rec. S4089, Apr. 27, 1982. This statement was quoted in full by Ambassador Shabti Rosenne as part of the Israeli delegation's statement at the final session of UNCLOS III in December 1982, 17 Official Records 84, para. 20. *See also* 1980 DIGEST 624.

104. U.N. Law of the Sea Bulletin, No. 3, Mar. 1984, at 14. *Compare* Lapidoth, *The Strait of Tiran, the Gulf of Aqaba, and the 1979 Treaty of Peace Between Egypt and Israel*, 77 Am. J. Int'l L. 84 (1983) *with* el Baradei, *The Egyptian-Israeli Peace Treaty and Access to the Gulf of Aqaba: A New Legal Regime*, 76 Am. J. Int'l L. 532 (1982). *See also* 1980 DIGEST 623-25.

105. U.N. Multilateral Treaties Deposited with the Secretary-General: Status as of Dec. 31, 1992, U.N. Doc. ST/LEG/SER.E/11, at 776 (1993).

106. 484 H.L. Hansard (6th ser.), col. 382, Feb. 5, 1987; 58 Brit. Y.B. Int'l L. 1987, at 600 (1988); *aide memoire* from the British Embassy, Washington, DC, May 26, 1987, Department of State File No. P87 0069-0487.

107. UK White Paper, France No. 1, Cm. 557 (1989); FCO Press Release No. 100, Nov. 2, 1988, 59 Brit. Y.B. Int'l L. 1988, at 525 (1989); U.N. LOS BULL., No. 14, Dec. 1989, at 14:

The existence of a specific régime of navigation in straits is generally accepted in the current state of international law. The need for such a régime is particularly clear in straits, such as the Straits of Dover, used for international navigation and linking two parts of the high seas or economic zones in the absence of any other route of similar convenience with respect to navigation.

In consequence, the two Governments recognize rights of unimpeded transit passage for merchant vessels, state vessels and, in particular, warships following their normal mode of navigation, as well as the right of overflight for aircraft, in the Straits of Dover. It is understood that, in accordance with the principles governing this régime under the rules of international law, such passage will be exercised in a continuous and expeditious manner.

The two Governments will continue to co-operate closely, both bilaterally and through the International Maritime organization, in the interests of ensuring the safety of navigation in the Straits of Dover, as well as on the southern North Sea and the Channel. In particular, the traffic separation scheme in the Straits of Dover will not be affected by the entry into force of the Agreement.

With due regard to the interests of the coastal States the two Governments will also take, in accordance with international agreements in force and generally accepted rules and regulations, measures necessary in order to prevent, reduce and control pollution of the marine environment by vessels.

108. 60 Brit. Y.B. Int'l L. 1989, at 668-69 (1990).
109. 484 H.L. Hansard (6th ser.), col. 382, Feb. 5, 1987.