An agreement on regimes relating to navigation and overflight through and over maritime areas falling under national jurisdiction of states was an indispensable condition for the adoption of a widely acceptable Convention on the Law of the Sea at the Third United Nations Conference on the Law of the Sea. A resolution of the passage regimes applicable to the territorial sea in general and in straits used for international navigation, as well as passage through archipelagic waters, in particular, through the archipelagic sea lanes, made it possible for the Conference to reach agreement on 12 nautical miles as the maximum breadth of the territorial sea and on the provisions concerning the Exclusive Economic Zone.

The regime for passage through straits used for international navigation was the most contentious issue before the Conference. Very early in the negotiations at the preparatory phase for the Conference, states and groups of states began to stake out their position on a regime on navigation through straits. These positions reflected two major trends. States bordering straits took the position that since straits formed an integral part of the territorial sea there was no reason to separate the question of straits from that of the territorial sea. These States proposed a regime based on the concept of nonsuspendable innocent passage of ships identical in other respects to the regime in other parts of the territorial sea.
Other states, in particular the major maritime powers, proposed separate regimes for territorial sea and for straits used for international navigation. They sought a regime of passage through those straits based on the freedom of navigation of the high seas for ships and freedom of overflight for aircraft under conditions that would safeguard the interests of States bordering straits. In their view, the preservation of the freedom of navigation through international straits was essential in order to maintain the flow of trade and communications and stable and peaceful international relations. For them, the community of interest with regard to international straits was far more vital than simply the right of passage in the territorial sea. They sought a regime which would minimize the possibility of conflict among nations arising from uncertainty as to legal rights and responsibilities. Such uncertainty would occur if a regime for straits used for international navigation could be subjectively interpreted by straits States.

Given the strongly held positions of the two sides, it quickly became apparent to the Conference that the regime to be applied in straits used for international navigation was one of the cardinal issues on which the successful adoption of a convention would depend. The positions were so strongly held that they could not agree to a separate listing from territorial sea of an agenda item for the conference which would simply state “Straits used for international navigation”. When finally an agreement was reached to include a separate item on the agenda it was accompanied by two sub paragraphs: first, “innocent passage” and the second, “other related matters including the right of transit”. Variations on different approaches regarding the regime to be established for straits used for international navigation continued into the Conference and the issue was hotly debated by the two sides.

Despite these differences there was broad agreement that the regime applicable to straits used for international navigation should balance the right of unimpeded navigation for the international community with legitimate interests of States bordering straits. This broad agreement