Legal and Practical Problems Governing International Straits

Jon M. Van Dyke
Willaim S. Richardson School of Law, University of Hawaii, Manoa

INTRODUCTION

The maritime nations have long insisted that international law protects free passage as a matter of right through international straits, and this position was adopted in Part III (Arts. 34-45) of the 1982 United Nations Convention on the Law of the Sea (LOS Convention). The convention has not been ratified by many of the major maritime powers, but almost all countries have signed it, and it is now in force for the 69-plus nations that have ratified it. Its provisions on transit passage through international straits can be viewed as generally reflective of customary international law. Each strait, however, presents unique geographical and practical considerations, and some straits have historically been governed by unique legal regimes that are unaffected by the LOS Convention’s provisions (Art. 35(c)). It is appropriate therefore to examine the straits individually and to examine common legal and practical problems raised by the regime of transit passage through international straits.

The rules recognized in the LOS Convention do not allow suspension of transit passage (Art. 44) and do not require innocence, but they do impose

1. The author would like to acknowledge with appreciation the assistance of Karl Espaldon, Class of 1996, William S. Richardson School of Law, University of Hawaii, for his assistance with the research on this paper. The paper was presented at the Workshop on the Strait of Malacca, 24-25 January 1995, Malaysian Institute of Maritime Affairs, Kuala Lumpur.
3. Countries that have signed but not yet ratified a treaty are obliged not to defeat the major purposes of the convention (Vienna Convention on the Law of Treaties, 23 May 1969, UN document A/Conf.39/27, Art. 18).
4. Singapore became the 69th country to ratify the treaty, on 17 November 1994.
5. Note the right of nonsuspendable innocent passage provided in Article 45 applicable to the exceptions provided in Articles 38(1) and 45(1)(b), which provide for nonsuspendable innocent passage through the island and mainland in the former case (e.g., Corfu Channel) and between a part of the high seas and an EEZ and the
inter alia the following restrictions on transit passage: (1) transit passage must be solely for the purpose of continuous and expeditious transit (Art. 38[2]); (2) transiting ships must comply with generally accepted international regulations, procedures, and practices for safety at sea (Art. 39[2][a]) and for the prevention, reduction, and control of pollution from ships (Art. 39[2][b]); and (3) ships exercising the right of transit passage must proceed without delay through the strait and must refrain from any threat or use of force (Art. 39[1]).

Article 38(3) of the LOS Convention states explicitly that “[a]ny activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of the Convention.” Any such “non-transit” activity, if undertaken in the territorial waters of a coastal state, would have to comply with the innocent-passage provisions of Articles 17–26 of the convention, and the activity could be prevented if “noninnocent.”

The LOS Convention, furthermore, allows states bordering straits to adopt laws and regulations with respect to “the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait” (Art. 42[1][6]), provided that such laws and regulations are not discriminatory and do not “in their application have the practical effect of denying, hampering or impairing the right of transit passage” (Art. 42[2]) and have been duly publicized (Art. 42[3]). With these governing principles in mind, we may examine the regimes that govern the individual straits and the practical problems that have emerged regarding transit through their waters.

INTERNATIONAL REGIMES GOVERNING STRAITS

The Turkish Straits

The Turkish straits consist of the Dardanelles, which connect the Aegean Sea to the Sea of Marmara, and the Bosporus, which connects the Sea of Marmara to the Black Sea. The total navigable length of the straits from the entrance to the Dardanelles from the Aegean Sea to the exit of the Bosporus to the Black Sea is about 160 miles (257 km).

The Dardanelles are roughly 38 miles (61 km) long with a width ranging from a minimum of 3/4 mile (1.2 km) to a maximum of 4 miles (6.4 km).