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UNCLOS III and the Straits Passage Issue: The Maritime Powers' Perspective on Transit Passage

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INTRODUCTION

Since World War II, there has been a trend toward expanded claims of territorial sea by the nations of the world.[1] This "creeping jurisdiction"[2] has precipitated a growing conflict of interest between the coastal and maritime nations.[3] Expansion of coastal state jurisdiction has been motivated by several factors. First, new technology is making it more feasible for states to economically exploit offshore resources.[4] Consequently, states have made expanded claims of national jurisdiction to ensure that they will have exclusive control of those resources.[5] Second, considerations of national defense have spurred states to claim wider territorial seas in an effort to provide themselves with a security blanket against the presence of foreign military vessels.[6]

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1. R. DUPUY, THE LAW OF THE SEA 14-17 (1974).

2. *See* Frank, *Jumping Ship*, 43 FOREIGN POL'Y 123 (1981). Richard Darman, Vice Chairman of the United States Delegation to the 1977 session of the Third United Nations Conference on the Law of the Sea (UNCLOS III), has claimed that initially, the primary reason the United States desired a new Law of the Sea Conference was to stem the tide of "creeping jurisdiction." Darman, *The Law of the Sea: Rethinking U.S. Interests*, 56 FOREIGN AFF. 373, 375 (1978). Darman cites some persuasive statistics to illustrate the trend of claims to expanded territorial waters by the nations of the world. He writes:

> In the preceding decade, since the close of the first U.N. conference on the Law of the Sea in 1958, the expansionist pattern has become clear. Whereas 54 percent of coastal states claimed territorial seas of three nautical miles or less in 1958, a decade later the number had dropped to 35 percent. In the same period, the number of coastal states claiming territorial extensions of 12 miles or more increased from 18 percent to 43 percent.

Id. For a tabular display of this same trend, see Burke, *Submerged Passage Through Straits: Interpretation of the Proposed Law of the Sea Treaty Text*, 52 WASH. L. REV. 193, 195 n.10 (1977).

3. For a brief discussion of this conflict, see A. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA 15-17 (1981). For a view that conflict between coastal and maritime states has historically been the dominant theme of the Law of the Sea, see Shelton & Rose, *Freedom of Navigation: The Emerging International Regime*, 17 SANTA CLARA L. REV. 523 (1977).

4. *See* A. HOLLICK, *supra* note 3, at 6-9.

5. *Id.* at 10.

6. For a discussion of the role of an expanded territorial sea in offering security against political pressures exerted by offshore naval fleets, see D. BOWETT, THE LAW OF THE SEA 7-9 (1967). One authority cites the emergence of coastal rights as, in part, an

Third, in an age of expanded maritime traffic, the coastal states perceive a need to expand jurisdiction over their offshore waters in order to provide themselves increased regulatory competence in the area of pollution and safety.[7] Fourth, coastal states make expanded jurisdictional claims in an effort to bring larger fishing zones under their exclusive control.[8] The maritime powers, however, see this expanding jurisdiction as a potential threat to unhampered navigation,[9] particularly within the straits.[10]

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historical response against external threats. Smith, *The Politics of Lawmaking: Problems in International Maritime Regulation—Innocent Passage v. Free Passage*, 37 U. PITT. L. REV. 487, 499-501 (1976). Smith states:

> This [concern for security] was to be found in the assertion by the coastal states of a right to protect their territory and their citizens from "attack, invasion, interference and injury." Health had to be protected and so did commerce. The extent to which the protection given the coastal states would be applied was to be measured by the state's power to control the areas of concern.

Id. at 500.

7. Smith, *supra* note 6, at 542. For a discussion of pollution in the straits, see Knight, *The 1971 United States Proposals on the Breadth of the Territorial Sea and Passages Through International Straits*, 51 OR. L. REV. 759, 773-75 (1972).

8. D. BOWETT, *supra* note 6, at 10-12.

9. *See* A. HOLLICK, *supra* note 3, at 253-54.

10. From the beginning of the negotiations at the Third United Nations Conference on the Law of the Sea, the United States made it clear that its acceptance of an expanded territorial sea would be conditioned on resolution of the problem of free passage through the straits. Smith, *supra* note 6, at 532.

Article 37, the transit passage section of the proposed draft of the Third United Nations Conference on the Law of the Sea, defines straits as waters "which are used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone." Third United Nations Conference on the Law of the Sea, U.N. Doc. A/Conf.62/L.78, art. 37 (1981) [hereinafter cited as Draft Convention].

For a comprehensive list of straits affected by the expansion of the territorial sea to 12 miles, see OFFICE OF THE GEOGRAPHER, U.S. DEP'T OF STATE, PUB. NO. 564375, MAP OF WORLD STRAITS AFFECTED BY A 12-MILE TERRITORIAL SEA (1974). Relying on these statistics, Robert E. Osgood compiles a list of 16 straits that could be considered major. He states:

> The strategic importance of straits is a matter of judgment on which experts may differ, but stretching this category to its reasonable maximum would produce, according to information provided by the same chart of the Office of the Geographer, a list of 16: Gibraltar, two Middle Eastern straits (Bab el Mandeb and Hormuz), four Southeast Asian straits (Malacca, Lombok, Sunda and Ombai-Wetar), Western Chosen strait (between South Korea and Japan), five Caribbean straits (Old Bahamas Channel, Dominica, Martinique, Saint Lucia Channel, and Saint Vincent Passage), Dover, Bering, and the Ken-

Traditionally, the nations of the world have claimed a three-mile territorial sea.[11] In the straits this has meant that any strait wider than six miles had a ribbon of high sea waters running through it,[12] ensuring that navigation is not impeded by claims of jurisdiction by coastal states.[13]

The expansion of territorial waters within the straits would mean that many straits that have been international waterways will become subject to national jurisdiction.[14] The maritime powers fear that if the strait states exercised that jurisdiction through the application of regulatory power, the right of free passage would become increasingly jeopardized.[15] Since many of the straits of the world are vital for transit by both commercial and military vessels,[16] the guarantee of continual free passage through them is of supreme concern to the maritime powers.[17]

Under the proposed text of the Draft Convention of the Third United Nations Conference on the Law of the Sea,[18] a twelve-mile ter-

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nedy-Robeson Channels.

Osgood, *U.S. Security Interests in Ocean Law*, 2 OCEAN DEV. & INT'L L. J. 1, 12 (1974).

11. Stevenson, *Who Is to Control the Oceans: U.S. Policy and the 1973 Law of the Sea Conference*, 6 INT'L LAW. 465, 466 (1972).

12. Robertson, *Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea*, 20 VA. J. INT'L L. 801, 804 (1980).

13. More than 100 of the world's largest straits are over six but less than twenty-four miles wide. As long as states along these straits claim only three-mile territorial seas, they will remain international straits containing high-seas corridors. Under a twelve-mile territorial sea, these straits would fall under national jurisdiction and lose their international character. *See* Richardson, *Power, Mobility and the Law of the Sea*, 58 FOREIGN AFF. 902, 905 (1980).

14. *See* McNees, *Freedom of Transit Through International Straits*, 6 MAR. L. & COM. 175, 183 (1975).

15. *Id.* at 183-84.

16. *See* Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77, 81-82 (1980).

17. In the earliest stages of the development of the new treaty on the Law of the Sea, the head of the United States delegation, John R. Stevenson, stated that guarantees of free passage through the world's straits would be necessary elements of any agreement that would be acceptable to the United States. Stevenson, *U.S. Draft Articles on Territorial Sea, Straits, and Fisheries Submitted to U.N. Seabeds Committee*, 65 DEP'T ST. BULL. 261, 263-64 (1971) (statement made during a session of Subcommittee II of the United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction).

18. Draft Convention, *supra* note 10. The first session of the Third United Nations Conference on the Law of the Sea met in December 1973 after many years of pre-conference preparation. United States participation at the conference has extended through three previous Administrations, those of Presidents Nixon, Ford and Carter. The Draft Convention is currently under "policy review" by the Reagan Administration, which has reservations concerning the sea-bed portion of the proposed draft. *See* 81

ritorial sea is recognized.[19] This would place all straits under twenty-four miles wide under national jurisdiction.[20]

Presently, international law provides some guarantees of passage through territorial waters under the regime of innocent passage.[21] Innocent passage has been defined as "a right to use the [territorial] waters as a highway between two points outside them . . . . [T]he vessel is allowed to exercise the right as long as it respects the coastal state regulations . . . and does not disturb the tranquility of the coastal state."[22]

The maritime states are dissatisfied with innocent passage.[23] They believe it gives too much discretion to the coastal states in determining whether a given passage is innocent[24] and, consequently, too much power to impede or suspend passage.[25] They believe such a re-

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DEP'T ST. BULL. 48, 48-51 (July 1981) (statement by James L. Malone, Chairman of the United States delegation to UNCLOS III).

For developments concerning efforts to compromise on the last remaining issue (the sea-bed mining issue) at the 1982 UNCLOS III session, see N.Y. Times, Mar. 23, 1982, at A5, col. 1.

19. Draft Convention, *supra* note 10, art. 3.

20. Stevenson, *supra note* 11, at 469.

21. Convention on the Territorial Sea and the Contiguous Zone, *done* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter cited as Territorial Sea Convention].

22. Smith, *supra* note 6, at 504. Under the Draft Convention, innocent passage is defined as "navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters." Draft Convention, *supra* note 10, art. 18(1)(a). There is the added requirement set out in article 18(2) that "[p]assage shall be continuous and expeditious." *Id.* art. 18(2). Article 19(1) states that "[p]assage is innocent as long as it is not prejudicial to the peace, good order or security of the coastal state." *Id.* art. 19(1).

23. *See* Burke, *supra* note 2, at 196. Professor Burke has written that "disquiet" over innocent passage has arisen for three major reasons. He states:

> First, the doctrine of innocent passage established in the 1958 Convention on the Territorial Sea and the Contiguous Zone provides for a wide discretion in the coastal state to determine whether passage is innocent, and this subjectivity in judgment might result in interference with inoffensive passage. Second, aircraft do not enjoy the right of innocent passge. Third, submarines must travel on the surface in order to exercise the right . . . the above aspects of the innocent passage concept make its usefulness questionable . . . in the eyes of the major maritime states, i.e., the United States and the U.S.S.R.

Id.

24. *See* Robertson, *supra* note 12, at 803.

25. *See, e.g.*, Territorial Sea Convention, *supra* note 21, art. 16(1). Article 16(1) states that "[t]he coastal state may take the necessary steps in its territorial sea to prevent passage which is not innocent." *Id.* A number of coastal states have interpreted innocent passage to allow them to prevent passage of certain types of vessels, including

gime is not adequate for safeguarding their interests in regard to free passage through the straits.[26]

It was in response to this conflict between the maritime powers' demand for guarantees of unrestricted passage through the straits and the strait states' demands for regulatory competence over their offshore waters that the concept of transit passage was formulated.[27]

The right of transit passage, as envisioned in the text of the Draft Convention, can be directly traced to a compromise proposal made by the United Kingdom at a stage in the negotiations when progress was at a standstill.[28] This proposal fell short of the expectations of those participants who had hoped for the equivalent of high seas rights

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super-tankers and nuclear-powered vessels, because of the nature of the cargo or because of the vessels' destination. *See* Stevenson, *supra* note 11, at 469.

26. In 1974 the United States representative to UNCLOS III, John Norton Moore, expressed United States opposition to the extension of the innocent passage regime into international straits. He instead called for creation of a regime especially for the straits. Statement by John Norton Moore in a session of Committee II on July 22, 1974, 71 DEP'T ST. BULL. 409, 409-10 (1974). Moore stated:

> The U.S. delegation has stated on numerous occasions the central importance that we attach to a satisfactory treaty regime of unimpeded transit through and over straits used for international navigation. Indeed, for straits bordering as well as states whose ships and aircraft transit such straits, there could not be a successful Law of the Sea Conference unless this question is satisfactorily resolved. The inadequacies of the traditional doctrine of innocent passage—a concept developed not for transit through straits but for passage through a narrow belt of territorial sea—are well known.

Id.

27. For a discussion of the demands and expectations of both the strait and maritime states concerning a new straits regime, see generally Knight, *supra* note 7.

28. The term "transit passage" was introduced by the United Kingdom in a statement released in 1975. *See* Second Committee, Eleventh Meeting, Summary Records, 2 UNCLOS III Off. Rec. 101, U.N. Doc. A/CONF.62/C.2/SR.1-46 (1974) (statement of Mr. Dudgeon (U.K.)). *See also* Robertson, *supra* note 12, at 819. Robertson, in discussing that United Kingdom proposal, stated:

> The United Kingdom introduced the concept of "transit passage" through straits which are used for international navigation and which join two parts of the high seas. The proposal was an honest attempt by the United Kingdom to find a middle ground between the U.S. and Soviet freedom-of-navigation and over-flight proposals on the one hand, and proposals that merely would have tinkered with the doctrine of innocent passage on the other. The introduction of the new term, "transit passage," had the advantage of avoiding the excess baggage carried by the earlier proposals on both sides.

Id.

through the straits, but, arguably, this was never realistic.[29] From the outset, United States negotiators realized that the strait states would have to be given some prescriptive, and possibly some enforcement, competence.[30]

It now appears, for all practical purposes, that the Draft Convention concerning transit passage (and innocent passage) is complete.[31] The transit passage section reveals an obvious effort at compromise between the strait states' demands for regulatory competence over their territorial waters and the maritime powers' demands for a straits regime that would guarantee less restricted passage through the straits than under the innocent passage regime.[32]

This note will evaluate the concept of transit passage as

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29. *See* A. HOLLICK, *supra* note 3, at 293. From the beginning, it was understood that strait state concerns over environmental and traffic safety issues had to be accommodated. For example, it was recognized that the strait states would have to be able to designate corridors for transit of vessels in crowded straits. The maritime powers were interested in keeping these "accommodations" to a minimum, and in achieving resolution of the straits issue in a way ensuring the least restrictive possible transit. *Id.*

30. In 1971, United States representative John Stevenson indicated United States willingness to accommodate legitimate coastal demands, as long as those demands were reasonable and did not threaten the right of free passage. Statement of Mr. Stevenson at the Eighth Meeting of Subcommittee II, Aug. 3, 1971, U.N. Doc. A/AC.138/SC.II/SR.4-23, at 45 (1971). Mr. Stevenson stated:

> Should a vessel conduct any other activities [except transit] that are in violation of coastal State laws and regulations, it would be exceeding the scope of its right, and would be subject to appropriate enforcement action by the coastal State.
>
> When we refer to enforcement of coastal State laws and regulations, we intend to include reasonable traffic safety regulations both for vessels and aircraft. We will, of course, want to approach this question cautiously in order to preserve the basic right of free transit and avoid a situation in which the coastal State has a legal basis for using safety regulations as a way of impairing the right of free transit.

Id.

31. On April 30, 1982 the Third United Nations Conference on the Law of the Sea adopted a treaty to govern the use and exploitation of the seas by a vote of 130-4. The United States, Turkey, Venezuela and Israel voted against the treaty. The Soviet Union, United Kingdom and West Germany were among fourteen states that abstained. Opposition to the treaty stemmed primarily from provisions regulating the mining of manganese nodules from the deep seabed. It is believed that the opposition of major industrialized states will undermine the effectiveness of the treaty. Nossiter, *U.N. Adopts Sea Law; U.S. Votes No*, N.Y. Times, May 1, 1982, at A9, col. 1. For a discussion of the Reagan Administration's decision to re-evaluate and possibly renegotiate the seabed portion of the UNCLOS III treaty, see generally Frank, *supra* note 2.

32. *See* Shelton & Rose, *supra* note 3, at 532-33. For a detailed history of the negotiating process and the evolution of the compromise that eventually became the proposed transit passage articles, see generally Robertson, *supra* note 12.

presented in the Draft Convention and assess its utility in addressing the strategic and commercial needs of the maritime powers.

Background to UNCLOS III and the Straits-Passage Issue

The First United Nations Conference on the Law of the Sea,[33] which met in 1958, codified the bulk of customary sea law as it existed at that time.[34] It could not agree, however, on a solution to the problem of expanding territorial sea claims, because the coastal and maritime powers could not reach a compromise on a territorial sea limit satisfactory to their perceptions of their own individual policy needs.[35]

The Second United Nations Conference on the Law of the Sea[36] met in 1960 for the purpose of achieving some international consensus on the breadth of the territorial sea.[37] This conference failed in its objective because maritime states favoring a three-mile territorial sea and coastal states wishing to extend coastal jurisdiction could not agree on a compromise.[38]

It should be pointed out that many maritime nations, including the United States, are also coastal states. The problem of representing these conflicting interests often results in inconsistent policies.[39] As a

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33. The First United Nations Conference on the Law of the Sea [hereinafter cited as UNCLOS I] adopted four international conventions: (1) Convention on the Territorial Sea and the Contiguous Zone, *done* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; (2) Convention on the High Seas, *done* April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; (3) Convention on the Continental Shelf, *done* April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; (4) Convention on the Fishing and Conservation of the Living Resources of the High Seas, *done* April 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 599 U.N.T.S. 285. Also negotiated was the Optional Protocol of Signature Concerning Compulsory Settlement of Disputes, *opened for signature* April 29, 1958, 450 U.N.T.S. 169. For a brief history of the Law of the Sea, including the UNCLOS I Conference and the negotiations in the early and middle stages of UNCLOS III, see generally Smith, *supra* note 6.

34. Shelton & Rose, *supra* note 3, at 525.

35. *See* McNees, *supra* note 14, at 181-82.

36. *See generally* Bowett, *The Second United Nations Conference on the Law of the Sea*, 9 INT'L & COMP. L.Q. 415 (1960).

37. *See* Smith, *supra* note 6, at 508.

38. *See* A. HOLLICK, *supra* note 3, at 156-58. Although the Conference could not agree on a compromise on the breadth of the territorial sea, one proposal calling for a six-mile territorial sea plus a six-mile fishing zone narrowly missed passage. *Id.*

39. *See generally id.* Within the United States, there were many divergent forces exerting policy expectations. National security and commercial navigation interests favored a policy restricting the trend toward "creeping jurisdiction." Resource and fishery interests favored the trend toward increased territorial sea and fishery resource zones. For a discussion of the development of United States policy as a result of these conflicting pressures, see generally A. HOLLICK, *supra* note 3.

coastal power, the United States, for one, was in a position to benefit from this "creeping jurisdiction."[40] Certainly it had much to gain by being able to make expanded claims over offshore resources and fisheries.[41] The United States also recognized the need to exercise greater national control over offshore pollution.[42] But as a naval and maritime power, the United States perceived this trend toward expansion as potentially conflicting with traditional rights of free navigation. These latter considerations were considered more important and usually prevailed in policy decisions.[43] The United States was concerned that just as expanded jurisdiction could allow it to exclude others from exploiting its offshore resources and fisheries, that same power could be used by others to exclude it from such activities in other parts of the world.[44]

The greatest concern of the maritime powers, however, was the effect expanded state jurisdiction would have on those straits that were traditionally high seas corridors, but which, under a twelve-mile sea, would become engulfed by the territorial seas of the bordering strait states. This means that in many of the world's most commercially and militarily important straits,[45] where there was once freedom of navigation, there would now exist only the right of innocent passage.[46]

Innocent passage as a regime was tolerable to the maritime powers under the historic three-mile territorial sea, since it affected only a

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40. The proposed draft treaty drawn up by UNCLOS III allows for a 12-mile territorial sea and a 200-mile economic zone. The United States conceded these two items in return for navigational rights. One authority points out that as a coastal state with one of the richest and largest offshore areas, the United States was greatly benefited by its own concessions. Frank, *supra* note 2, at 124-25.

41. *See* A. HOLLICK, *supra* note 3, at 18.

42. *See* Stevenson, *supra* note 11, at 468.

43. *See* A. HOLLICK, *supra* note 3, at 196-239. Hollick describes the formulation of United States policy prior to UNCLOS III, and the reasons why United States policy makers considered navigational and national security interests more important than the United States interests in its role as a coastal state. *Id.*

44. *See* Stevenson, *supra* note 11, at 469.

45. *See* Richardson, *supra* note 13, at 905. Richardson stated:

> All the world's most important straits would be subject to these restrictions (of coastal regulation); for example, the Strait of Gibraltar separating the Atlantic Ocean from the Mediteranean Sea; the links between the Pacific and Indian Oceans, including the Straits of Malacca and Singapore as well as the gateways to the Indonesian archipelago; the Strait of Hormuz at the entrance to the Persian Gulf; and the Bab el Mandeb strait connecting the Indian Ocean to the Red Sea and Suez.

Id.

46. *Id.*

limited amount of water.[47] Yet the three-mile limit is becoming a thing of the past, and a twelve-mile territorial sea is becoming accepted as customary international law.[48] Acceptance of the Draft Convention by most of the nations of the world would demonstrate the general acceptance of the twelve-mile limit.

A twelve-mile territorial area, if recognized within the world's straits, would enclose 116 previously international straits under the innocent passage regime.[49] An innocent passage regime within the straits would not be acceptable to the maritime states.[50] They claim that innocent passage gives too much regulatory competence to the coastal state.[51] As provided by the 1958 Convention of the Territorial Sea and Continguous Zone,[52] the coastal state has wide discretion to determine whether a passage is innocent.[53] This allowance of "subjectivity in judgment might result in interference with inoffensive passage."[54] Second, under innocent passage, aircraft do not enjoy the right of overflight.[55] Third, the innocent passage regime requires submarines to sur-

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47. One authority has stated that the expansion of the territorial sea from three to twelve miles will reduce the area of high seas in the world by 3,000,000 square miles. Pirtle, *Transit Rights and U.S. Security Interests in International Straits: The "Straits Debate" Revisited,* 5 OCEAN DEV. & INT'L L. J. 477, 479 (1978).

48. The overwhelming majority of nations already recognize a 12-mile (or larger) territorial sea. *See* Moore, *supra* note 16, at 86. One writer has noted that the United States is conceding little when it offers to recognize a 12-mile territorial sea, since the 12-mile limit is already recognized as customary international law and the United States itself presently enforces such a de facto limit. *See* Knight, *supra* note 7, at 767-68.

49. Maduro, *Passage Through International Straits: The Prospects Emerging from the Third United Nations Conference on the Law of the Sea,* 12 J. MAR. L. & COM. 65, 69 (1980).

50. The United States regards innocent passage as inadequate to safeguard its interests. *See* Statement by Mr. Stevenson at the Eighth Meeting of Subcommittee II, *supra* note 30, at 45-46. Mr. Stevenson stated:

> [For] example, some States consider "innocence" to be a subjective criterion to be left to the discretion of the coastal State. Some argue that passage of certain types of vessels is inherently non-innocent, or that innocence may depend on the flag, cargo, or destination of a vessel. Under the Territorial Sea Convention, neither aircraft nor submerged submarines have a right of innocent passage.

Id.

51. *See* Moore, *supra* note 16, at 85-86.

52. Territorial Sea Convention, *supra* note 21.

53. *Id.* art. 16. *See also* Shelton & Rose, *supra* note 3, at 533.

54. Burke, *supra* note 2, at 196. Among the abuses of power the maritime powers fear from the coastal states are the setting of prohibitive fees, the imposition of unreasonable environmental standards and the outright closing of a strait. Darman, *supra* note 2, at 382.

55. Moore, *supra* note 16, at 85.

face in order to exercise the right of passage,[56] making the utility of the regime suspect to the major maritime powers, particularly the United States and the Soviet Union.[57]

Underlying the maritime powers' concern over innocent passage is the fear that the strait states might use their newly-found regulatory competence in a discriminatory or abusive fashion.[58] Many of the straits serve as indispensable conduits for much of the world's oil supply.[59] Also, as innocent passage demands that submarines surface,[60] the superpowers are worried that this would minimize the ability of submarines to navigate undetected, thus making them more vulnerable to attack.[61] Hence, for both commercial and national security reasons, the maritime powers have serious reservations about the ability of an innocent passage regime to protect their particular interests.[62]

The maritime states looked to the treaty-making process to realize their demands and expectations for a new straits regime[63] that would ensure the least restrictive possible transit through the straits.[64] UNCLOS III was convened to resolve many conflicts that were not adequately resolved by the then-current law of the sea.[65] The most urgent

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56. Territorial Sea Convention, *supra* note 21, art. 14(6).

57. *See* Burke, *supra* note 2, at 196.

58. *See* McNees, *supra* note 14, at 183-84. McNees writes:

> [N]o maritime state wishes for its rights of navigation to depend upon the subjective decision of another State as to what affects its "peace, good order and security." The fear is that a State's oil tankers, fishing vessels, warships, research vessels, nuclear-powered ships, or cargo vessels carrying any production competition with a principal export of the coastal State, might at any time be barred as not being in "innocent passage."

Id.

59. *See* Moore, *supra* note 16, at 81. Among the most important "oil" straits are Gibraltar, Bab el Mandeb, Hormuz, and Malacca. Darman, *supra* note 2, at 382.

60. Territorial Sea Convention, *supra* note 21, art. 14(6).

61. Richardson, *supra* note 13, at 905.

62. *See* Shelton & Rose, *supra* note 3, at 533. For a discussion of the view shared by some nations that innocent passage represented a good balance between coastal and maritime interests, see Robertson, *supra* note 12, at 813.

63. *See* Stevenson, *supra* note 11, at 474. *But see* Pirtle, *supra* note 47, at 489. Pirtle voices the view that it is unlikely that strait states would suspend or restrict passage since they too derive benefit from the commerce that flows through straits and would actually be disproportionately harmed by any interference with that commerce. *Id.*

64. Maduro, *supra* note 49, at 69.

65. UNCLOS III was convened to address a spectrum of problems dealing with such law of the sea subjects as the high seas, the continental shelf, the territorial sea, fishing, conservation and pollution. *See* Shelton & Rose, *supra* note 3, at 526.

of those conflicts regarded the expanding jurisdictional claims to the world's seas which threatened to "nationalize" the world's oceans and waterways.[66] Chief among the conference's priorities was the creation of a new, innovative straits regime and a seabed regime.[67] Research has indicated that technology exists or is available on the horizon that would make possible the exploitation of stores of manganese nodules containing nickel, copper, cobalt and manganese which lie on the ocean floor.[68] The major questions to be decided were how, by whom, and for whose benefit these valuable minerals and resources would be exploited.[69] If left unregulated, only the most technologically advanced nations would be able to benefit from these riches.[70]

Even here, the lack of international legal protection was a discouraging factor to potential investors.[71] In addition, the world's less-developed nations contended that since the oceans have long been deemed to belong to all nations, any riches found should be used for the benefit of all nations.[72]

UNCLOS III faced the task of accommodating the many legitimate yet conflicting demands and expectations of the world community into a workable compromise. The maritime powers made it clear from the start that any concessions on their part on the seabed and resource issues would have to be met by reciprocal concessions on the part of other nations on navigational issues.[73]

The questions to be addressed then are to what degree does this

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66. *See* A. HOLLICK, *supra* note 3, at 9-11. Stevenson has stated that the trend toward the partitioning of the oceans represents a challenge to modernize the law of the sea and its institutions in a way adequate to obtain international agreement. Stevenson, *supra* note 11, at 477.

67. A. HOLLICK, *supra* note 3, at 240.

68. *Id.* at 8.

69. *See* Frank, *supra* note 2, at 123-24. For a discussion of the trend toward claims of 200-mile economic zones by the world's nations in an effort to bring more of these resources under their control, see Richardson, *supra* note 13, at 905-06.

70. One authority has recommended that the industrial powers not cooperate in the establishment of the sea-bed authority "Enterprise", claiming it is unwise to set up a sea-bed authority with their own capital and technology, only to see its earnings benefit others. *See* Goldwin, *Locke and the Law of the Sea*, 46 COMMENTARY 49 (1981).

71. *See* Frank, *supra* note 2, at 135.

72. In February 1609, Hugo Grotius enunciated the thesis that the sea could not in fact be occupied. It was intended by nature to be free to all. Smith, *supra* note 6, at 494. For an argument that Grotius' thesis could be easily used to support the contention that the seas are free to all nations to exploit without any moral duty to share the bounty with other nations, see Goldwin, *supra* note 70, at 49.

73. Richardson, *supra* note 13, at 911. Elliot Richardson, chief United States negotiator to UNCLOS III during the Carter Administration, has stated that "its participants have understood from the outset that the accommodation of navigational and resource interests must be at the core of any eventual 'package deal.'" *Id.*

treaty represent an improvement over innocent passage, and to what extent does it protect the interests of the participants in this treaty-making process?

Problem of Interpretation

Considerable debate exists concerning the appropriate means of interpretation to be applied to the transit passage section of the Draft Convention. Important interpretative problems have arisen because of the textual omissions and vagueness that resulted from the effort to achieve a compromise between the interests of the coastal and maritime states.[74] Most of the debate has centered on whether to resort to a textual or contextual approach to interpretation.[75] As there is much

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74. Shelton & Rose, *supra* note 3, at 534. One author, Ann Hollick, has contended that the treaty framers purposely resorted to ambiguous language when faced with strongly-contested issues that could not otherwise be resolved. Hollick states: "[t]he merit of ambiguity is that it leaves it to state practice to determine the evolution of customary law and the interpretation of the treaty." A. HOLLICK, *supra* note 3, at 15.

75. For example, Robertson has endorsed a textual interpretation of the Proposed Draft since there is little formal negotiating history available upon which to base a more contextual interpretation. Robertson, *supra* note 12, at 936-37. Those authorities recommending a textualist approach usually cite "the absence of a formal record of the *travaux*." Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 AM. J. INT'L L. 48, 55-56. The textualists are uncomfortable with an interpretation of the Draft Convention that would rely on "undocumented understandings" to fulfill some of our most important national security and commercial interests. They would have preferred that the framers had put into express writing provisions to safeguard these interests. Reisman, while not a textualist, is also uncomfortable with the contextualist approach in regard to the transit passage articles of the Draft Convention. Reisman states:

> The idea of an "undocumented understanding" among all or even most of *the more than 150 delegations* of the LOS Conference is preposterous, and the lawyer who would believe it, advise reliance on it, or invoke it before a tribunal would be very naive indeed. . . . If the plain and natural meaning of the ICNT text is against these understandings, then they are unlikely to survive changes of government in the strait states, if that long. Why there should be an understanding on something so important at a meeting whose manifest function is to articulate norms on the subject is also puzzling.

Id. at 75.

But see Burke, *supra* note 2, at 202-03. Burke rejects a textualist approach and contends that a contextual approach can be based on important features of the negotiating process which are available, including the nature of the issues involved, how they came to be formulated, by whom, what proposals were made by what particular participants, and how these proposals were interpreted by the parties to the treaty-making process. Burke argues that a textualist approach cannot be relied on to accurately reveal the intentions of the parties. He states:

disagreement in the international law community on this point, this note will not limit itself to any one particular theory of interpretation, but will utilize both a textual and a contextual approach in analyzing this agreement.

Issues in Controversy

How well the proposed transit passage regime is perceived to meet the expectations and demands of the maritime powers depends upon the interpretation of the treaty as it applies to two central issues. The first issue is the extent of regulatory competence to be given to the coastal or strait states. The second issue is whether the right of submerged passage for submarines is to be permitted within the straits under transit passage.

Strait State Regulatory Competence

The controversy concerning regulatory competence under the

> There is a loss of plausibility when the interpreter makes no attempt to take into account the issues being negotiated, their origin, the contrasting views and proposals of the principal participants, contemporary interpretations of these proposals, and the formulation of the outcome in relation to these communications among the parties in the negotiations. These factors assist in determining the perspectives of those concerned.

Id. at 202.

Moore agrees with the contention that the formal record is "sketchy." He states, however, that "it is not merely formal *travaux* that the Vienna Convention contemplates as a supplementary means of interpretation but also more generally 'the preparatory work of the treaty and the circumstances of its conclusion.' " Moore, *supra* note 16, at 89. Moore states further: "When the permissable context is thus broadened as it should be, there is a great deal of relevant evidence that must be considered and that strongly supports the interpretations Reisman questions." *Id.*

Professor Myres McDougal, in rejecting the textualist approach states: "It is the grossest, least defensible exercise of arbitrary formalism to arrogate to one particular set of signs—the text of a document—the role of serving as the exclusive index of the parties' shared expectations." M. McDOUGAL, H. LASWELL & J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967). The authors go on to state:

> [T]he effective interpretation of an international agreement is not, and cannot be made, a simple and mechanical routine. The communications which constitute an international agreement, like all other communications, are functions of a larger context, and the realistic identification of the content of these communications must require a systematic, comprehensive examination of all the relevant features of that context.

Id. at 11.

transit passage regime revolves around the questions of who will prescribe regulations; what standards will govern; who will enforce them; and what guarantees for free passage will be given. Answers to these questions will have far-ranging economic and national security consequences for the maritime powers.

One of the great dissatisfactions under the regime of innocent passage was, and is, that the coastal states have been given so much discretion in the application of their regulatory power within the territorial sea.[76] A leading authority has stated that the three major weaknesses of the innocent passage regime under UNCLOS I that made it unacceptable to the maritime and naval powers were: "(1) the lack of precision with respect to interpretation and application of coastal-state rights; (2) the application of the right to only specific forms of transit; and (3) the fact that the right had been withdrawn periodically by coastal states in support of political objectives."[77]

Supporters of the proposed transit passage regime contend that, while it provides for the strait states to maintain their right to prescribe regulations over a variety of activities, many safeguards are built into the system to protect against the hampering or suspension of passage.

The Draft Convention reveals a clear intent to ensure that regulations would be consistent with international law.[78] For example, article 41(1) allows a strait state to "designate sea lanes and prescribe traffic separation schemes for navigation,"[79] but article 41(3) adds that such schemes "must conform to generally accepted international regulations."[80] In addition, article 41(4) provides that any proposals by the strait states concerning the designation or substitution of traffic schemes be referred "to the competent international organization with a view to their adoption."[81] Article 42(1)(b), which grants each strait state regulatory control over "discharge of oil, oily wastes and other noxious substances in the strait,"[82] limits that regulatory power to "giving effect to applicable international regulations."[83] Clearly, the framers did incorporate into the text safeguards against the prescribing

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76. For a lengthy and scholarly discussion concerning authority over the territorial sea, see M. MCDOUGAL & W. T. BURKE, THE PUBLIC ORDER OF THE OCEANS 173-304 (1962).

77. Pirtle, *supra* note 47, at 481.

78. *See infra* text accompanying notes 80-83.

79. Draft Convention, *supra* note 10, art. 41(1).

80. *Id.* art. 41(3).

81. *Id.* art. 41(4).

82. *Id.* art. 42(1)(b).

83. *Id.*

by a strait state of regulations inconsistent with the spirit of international law.

Enforcement is another issue of great importance to the maritime powers. Their greatest fear is that the strait states might try to unilaterally enforce their regulations and, thereby, impede free passage.[84] Reisman believes that article 39 gives regulatory and enforcement competence to the strait states.[85] He reasons that by establishing a set of flag state duties, it must be assumed that the strait states have a corresponding set of rights to enforce those duties.[86] He states:

> The correlative of a duty is a right. Though Article 39 speaks of user duties, it necessarily imports coastal rights. It must be construed as allowing the coastal states a broad prescriptive and applicative competence with regard to transit passage unless we are to assume that the 'duties' are not more than moral imprecations.[87]

As stated above, article 39 does set out a number of "user duties."[88] In addition, there is validity to Reisman's analysis that this necessarily imports "coastal rights." It has been argued, however, that these rights cannot be exercised unilaterally by the strait states to suspend passage, but must be enforced through diplomatic channels and third-party mediation.[89] One particular problem is that the transit pas-

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84. *See* Reisman, *supra* note 75, at 69.

85. *Id.*

86. *Id.*

87. *Id.* Reisman goes on to state: "Because these are legal duties and hence require characteristics that the coastal state must assess, 'transit passage' takes on many of the features of innocent passage." *Id.* at 70.

88. Draft Convention, *supra* note 10, art. 39. Article 39 lists the duties to be observed by ships and aircraft during their passage. These duties include proceeding without delay through or over straits, refraining from the use of force against any strait state, and refraining from activities other than those incident to their normal mode "unless rendered necessary by force majeure or by distress." In addition, they must "comply with generally accepted international regulations and procedures and practices for safety," and for prevention and reduction of pollution. *Id.*

89. Moore agrees that article 39 establishes user duties and "necessarily imports coastal rights," and that a duty infers a correlative right. He does not agree that this gives the strait states a unilateral right of enforcement. Moore, *supra* note 16, at 106. Moore states:

> That the coastal state has rights correlative to the Article 39 flag state duties does not mean that they are unilateral rights to suspend transit passage, and much less that they are of prescriptive and applicative competence. . . .
>
> Counter to the Reisman theory, the whole structure of UNCLOS serves to decouple transit passage rights from flag

sage articles do not expressly state what international organizations the framers contemplated would enforce regulations in the straits.[90] It has been suggested that the strait states may have to enter into additional treaties to acquire authority to enforce certain regulations.[91] This is just another example of the confusion resulting from the failure of the framers to transform their intentions into express language.

The transit passage text is ambiguous on how regulations are to be enforced, but there is strong support for the view that enforcement will not rest with the strait states. Proponents of the treaty point out that nowhere in the transit passage articles is express power given to the strait states to enforce regulations except under one extraordinary situation, the threat "of major environmental damage."[92] In such a case, article 233 will allow the strait state to take "appropriate enforcement measures."[93] The fact that the framers expressly granted enforcement power to the strait states in this instance indicates that where they wanted to give enforcement power to the strait states, they expressly provided for it.[94] Nowhere else in the transit passage section have they done so.[95] Proponents argue that this is indicative of the framers' intentions that no other strait state enforcement power was contemplated.[96]

A comparison of the articles under the innocent passage section with those under the transit passage section supports the view that the drafters had no intention of extending nearly as much regulatory authority to the strait states under the transit passage regime. There is no transit passage equivalent of the innocent passage articles 21 and 22, which give a lengthy and detailed portrayal of the strait states' rights of prescription.[97] Under transit passage, only article 42 imports to give regulatory competence to the strait states and such competence

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> state obligations . . . . That is, they are rights (not merely "moral imprecations") to be pursued through diplomatic channels or, where applicable, third-party dispute settlement, but certainly not unilateral action by the strait state.

Id. at 106-07.

90. Shelton & Rose, *supra* note 3, at 536.

91. *Id.*

92. Draft Convention, *supra* note 10, art. 233. The Draft Convention states: "[I]f a foreign ship other than those referred to in section 10 has committed a violation of 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, the States bordering the straits may take appropriate enforcement measures . . . ." *Id.*

93. *Id.*

94. *See* Moore, *supra* note 16, at 104.

95. *See* Draft Convention, *supra* note 10, arts. 34-44.

96. *See* Moore, *supra* note 16, at 104.

97. Draft Convention, *supra* note 10, arts. 21-22.

is limited to four instances.[98] First, under article 42(1)(a), strait states may enact laws regulating the "safety of navigation and the regulation of marine traffic as provided in article 41."[99] Second, under article 42(1)(b), regulations may be passed for "[t]he prevention, reduction and control of pollution."[100] Third, "[w]ith respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear" may be regulated under article 42(1)(c).[101] Fourth, the strait state is allowed to prescribe regulations concerning "[t]he taking on board or putting overboard of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary regulations of states bordering straits."[102] These are the only instances where express regulatory competence is granted under transit passage. The far fewer instances of express extension of prescriptive competence to the strait states under transit passage and the greater safeguards against abuse appear to represent a serious effort on the part of the framers to meet some of the maritime powers' demands for an improved straits regime.[103]

An examination of article 25 of the innocent passage section provides, by way of comparison, one example of the improvement the transit passage regime represents to the maritime powers. Under article 25(1), the coastal state "may take the necessary steps in its territorial sea to prevent passge which is not innocent."[104] Article 25(3) provides that the "coastal state may, without discrimination amongst foreign ships suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises."[105] There is no equivalent to article 25 under transit passage allowing the strait states such power to take unilateral steps to enforce laws and regulations. Nor is there any equivalent under transit passage to article 30 of the innocent passage section that permits the coastal state to require a warship to leave its territorial waters where that "warship does not comply with the laws and regulations of the coastal state concerning passage through its territorial sea and disregards any request for compliance which is made to it."[106] One can argue that if the fram-

98. *Id.* art. 42.
99. *Id.* art. 42(1)(a).
100. *Id.* art. 42(1)(b).
101. *Id.* art. 42(1)(c).
102. *Id.* art. 42(1)(d).
103. *See* Robertson, *supra* note 12, at 851.
104. Draft Convention, *supra* note 10, art. 25(1).
105. *Id.* art. 25(3).
106. *Id.* art. 30.

ers wanted the strait states to have the same enforcement powers under transit passage that they would have under innocent passage, the framers would have expressly granted such powers.[107]

As previously stated, only article 42 imports to give prescriptive competence to the strait states.[108] Proponents of the transit passage regime state that even this narrow competence is qualified by other articles that constrain the strait state from effectively impeding or blocking transit.[109] The maritime powers are concerned that the strait states may exercise their narrow prescriptive competence to promulgate regulations that would have the practical effect of making "passage burdensome or impossible."[110]

Among the safeguards against such a possibility of hampered or suspended passage is article 38(1), which provides: "all ships and aircraft enjoy the right of transit passage, which shall not be impeded . . . ."[111] This article would make it very difficult for a strait state to ban any type of vessel from its waters. The use of the word "all" appears to make the article include every type of vessel.[112] The maritime powers' apprehensions that the passage of supertankers, warships and submarines might be impeded should be partially alleviated by this article.[113] Article 42(2) directly meets those concerns by stating: "Such laws and regulations shall not discriminate in form or in fact amongst foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage . . . ."[114] Robertson states that article 42(2) "ensures that the principle of nondiscrimination among foreign ships must be respected in all coastal-state regulations for transit passage."[115]

Finally, article 44 expressly meets the maritime powers' apprehensions by stating that "[s]tates bordering straits shall not hamper transit passage . . . . There shall be no suspension of transit passage."[116]

Moore contends that there are adequate safeguards under transit

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107. *See* Moore, *supra* note 16, at 102-05.

108. Draft Convention, *supra* note 10, art. 42.

109. *Id.* arts. 38(1), 42(2), 44. *See infra* text accompanying notes 111-17.

110. *See* Robertson, *supra* note 12, at 838. He states: "it is not likely that impediments to free transit would be imposed by a flat prohibition of passage. Rather, States would act as they have in connection with innocent passage through the territorial sea—by using the power to regulate to make passage burdensome or impossible. *Id.*

111. Draft Convention, *supra* note 10, art. 38(1).

112. Robertson, *supra* note 12, at 838.

113. *See id.*

114. Draft Convention, *supra* note 10, art. 42(2).

115. Robertson, *supra* note 12, at 839.

116. Draft Convention, *supra* note 10, art. 44.

passage to protect the maritime powers' interests concerning unrestricted navigation: "As a result of both the narrowness of coastal state regulatory competence and the strong safeguard provisions of the UNCLOS text, coastal states are not given authority to suspend or hamper submerged transit, overflight, or other essential components of the transit passage regime."[117]

Although a reading of the text supports the view that prescriptive competence would be very narrow under transit passage and that strait state enforcement power would be limited to the exception of article 233, the bottom line on any textual reading leaves ambiguity on many key issues. The absence of clear and unambiguous language creates the danger that the treaty's provisions might later be interpreted contrary to the maritime powers' vital interests.[118]

Treaty adherents maintain that a more contextual approach to treaty interpretation would clarify possible ambiguities by resorting to sources other than the text, such as the negotiating history and the stated intentions of the parties to the treaty-making process.[119] They claim such an approach will reveal that the expectations of the maritime states have been substantially satisfied by the transit passage regime.[120]

The coastal states' regulatory competence covering a broad variety of activities was one of the maritime powers' chief criticisms of the innocent passage regime.[121] There is much reason to believe that the maritime powers would not have gone along with the concept of transit passage if it vested any significant amount of prescriptive or applicative competence in the strait states.[122] John Norton Moore, acting as United States representative to UNCLOS III in 1973, made United States intentions clear: "In view of the importance of straits used for international navigation, any regime for such straits which depended upon a set of criteria that could be subjectively interpreted by straits states would sow the seeds of future conflict and undercut a major goal

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117. Moore, *supra* note 16, at 106.

118. *See* Reisman, *supra* note 75, at 76. Reisman argues that there are two kinds of ambiguities, yours and the other fellow's. It is his fear that in the case of the Proposed Draft, the other fellow's version would prevail. *Id.*

119. Moore, *supra* note 16, at 87-90.

120. *See id.* Moore contends that either a contextual or textual interpretation of the Proposed Text will reveal that the transit passage regime is adequate to meet the needs of the maritime powers. *Id.*

121. *See* Shelton & Rose, *supra* note 3, at 530-33.

122. Moore, *supra* note 16, at 108. For a view that the transit passage regime does not adequately protect the legitimate needs of the strait states in regulating their offshore waters, see Maduro, *supra* note 49, at 73.

of the Conference."[123]

The importance the United States ascribes to having unrestricted use of the world's waterways was stated forcefully by Secretary of State Kissinger in 1975, when he declared that the United States would "not join in an agreement which leaves any uncertainty about the right to use world communication routes without interference."[124] Any regime allowing the strait states great subjective discretion in the prescription and application of regulations would not have been acceptable to the United States and other maritime powers.[125] Any interpretation recognizing such strait state competence is inconsistent with the intent of the parties to this treaty.[126]

It is not unusual for an international legal regime to allow a nation to prescribe regulations without giving it the power to unilaterally enforce them.[127] Such a design is consistent with practices of customary international law.[128]

A final problem that must be discussed is the possibility that a strait state could bypass the restrictions on its applicative power under the transit passage regime by simply declaring a passage non-transit, just as a passage can be deemed non-innocent under innocent passage.[129] Reisman has indicated that this could be done if a passage violated any of the flagship duties cited in article 39(1).[130] Reisman claims that once a passage is deemed by the strait state to be in violation of article 39(1), it can be declared to no longer be a transit passage and thereby is not entitled to the appropriate safeguards.[131] For example,

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123. Statement by John Norton Moore, United States representative to the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, April 2, 1973, USUN Press Release No. 32(73), at 2 (April 3, 1973).

124. Address by Henry A. Kissinger, Secretary of State, before the American Bar Association Annual Convention, Montreal, Canada, Dept. of State Press Release No. 408, at 5 (August 11, 1975).

125. *See* A. HOLLICK, *supra* note 3, at 235-36.

126. Moore, *supra* note 16, at 108.

127. *Id.* at 104.

128. *Id.* He writes:

> Indeed, a "flag state obligation" approach, which creates obligations but not direct rights of enforcement in other states, is a principal underpinning of the 1958 Geneva Convention on the High Seas. Not surprisingly, this result is again consistent with the use of the phrase "freedom of navigation" in the straits chapter taken from that convention.

Id.

129. Reisman, *supra* note 75, at 70.

130. *Id.*

131. *Id.*

such a passage would no longer be entitled to the assurances of article 44, which states that nations bordering straits shall not hamper or suspend passage.[132]

This interpretation has been criticized as being unfounded by John Norton Moore, who states that the flagship duties imposed by article 39 do not conversely give the strait states a unilateral right to suspend passage.[133] Instead, he argues, the strait states' recourse will be through "normal diplomatic (and if available, judicial) channels."[134]

Moore perceives this conception of non-transit as a misguided effort to impose the logic of innocent passage upon transit passage.[135] Such an imposition is contrary to the whole spirit of transit passage, which was an effort to negotiate a regime ensuring unsuspended passage. If the framers intended the strait states to have the power to declare a passage "non-transit," they would have expressly provided for it[136] as they did under article 25 for innocent passage, allowing a coastal state to declare a passage non-innocent.[137]

Burke agrees with Reisman that the strait states may be able to declare a passage "non-transit" but contends that this can be done only on a case-by-case basis.[138] While this possibility of a "non-transit" declaration is recognized by two distinguished international law authorites, it is unlikely that negotiators would allow a "loop hole" to exist that could undo all the other safeguards and guarantees they negotiated for to protect the maritime powers' vital interests in free navigation of the straits. Hopefully, further clarification from the UNCLOS III conference will be forthcoming. Otherwise, the framers might find

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132. Draft Convention, *supra* note 10, art. 44.

133. Moore, *supra* note 16, at 103.

134. *Id.*

135. *Id.*

136. *See id.* at 103-04. Moore makes the point that the inclusion and cross-referencing of article 233 allowing a strait state to suspend passage in instance of the threat "of major environmental damage" would make no sense if the strait state already had that power under article 39. *Id.*

137. Draft Convention, *supra* note 10, art. 25.

138. Burke, *supra* note 2, at 211. Burke has agreed in part with the non-transit theory:

> Of course a vessel which engages in an activity that is not an exercise of transit passage can be excluded from passage and the Text provides for this possibility in Article 37(3). But this coastal competence is limited to specific transits because the coastal state cannot suspend transit passage. The singular purpose of this anti-suspension provision in Article 42 is to confine coastal state competence to assessments of individual instances of passage.

Id.

they have negotiated for a new straits regime that may turn out to be the old regime in disguise.

Nevertheless, the transit passage proposal is a good faith effort at compromise between the strait states' need for regulatory competence and the maritime powers' need for free and unrestricted passage. The overall result is a regime more sympathetic to the needs of the maritime powers.

Submerged Passage

An issue of great importance to the maritime powers is whether the proposed transit passage text secures the right of submerged passage for submarines operating in the affected straits.

Michael Reisman has argued that the answer to this question has implications for the survival of mankind.[139] He claims that the right of submerged passage is an indispensable element in the world's nuclear deterrence system.[140] Since nuclear submarines are the arm of the triad most likely to survive a first-strike nuclear attack, they represent the greatest deterrent against any nation making such an attack.[141] But the nuclear submarines' ability to survive a first strike and deliver a retaliatory blow is in large part dependent on their ability to navigate undetected.[142] Since submerged passage is relatively undetected passage, the superpowers (and the world in general) have a vital interest in securing that right under the transit passage regime.[143]

Under the regime of innocent passage, submerged passage is not allowed.[144] Submarines are required to surface while transiting through territorial waters.[145] This was a major reason for the maritime powers' dissatisfaction with the innocent passage regime.[146] A twelve-mile terri-

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139. *See* Reisman, *supra* note 75, at 48.

140. *Id.*

141. Knight states the United States argument as such: "[s]ince our second-strike capability is vested essentially in our Polaris/Poseidon fleet, the mobility and undetectability of that fleet must be maintained at all costs. Requiring vessels of the Polaris/Poseidon fleet to surface when passing through international straits creates an unacceptable exposure." Knight, *supra* note 7, at 778.

142. *See* Reisman, *supra* note 75, at 52. *See also* Pirtle, *supra* note 47, at 488.

143. Reisman, *supra* note 75, at 48-49. Reisman argues that it is in the common interest of all nations to maintain the nuclear deterrence system. It is a "pre-requisite to general survival." *Id.* For the view that the Soviet Union, with the world's largest submarine fleet, shares United States concerns on the straits issue, see Smith, *supra* note 6, at 534.

144. Draft Convention, *supra* note 10, art. 20.

145. *Id.*

146. *See* Burke, *supra note* 2, at 196.

torial sea in the straits would be acceptable to the maritime powers only under a new regime ensuring submerged passage.[147]

Surprisingly, the final text of the transit passage articles does not expressly provide for the right of submerged passage. This has led to the claim that such a right may not be protected.[148] On the other hand, it is important to note that such a right is not expressly prohibited, as under innocent passage.[149]

Authorities who maintain that transit passage does include a right of submerged passage point invariably to article 38(2), which reads in part: "Transit passage means the exercise in accordance with this Part of the freedom of navigation . . . ."[150] Their contention is that the phrase "freedom of navigation" in international law has always included the right of submerged passage.[151]

Burke states that article 38(2) assures a right of submerged passage by expressly associating the transit passage regime with the traditional right of the high seas.[152] He argues that it is an "eminently reasonable interpretation . . . to construe the term 'freedom of navigation' as embracing submerged passage, especially in light of the fact that mention of this freedom is unaccompanied by any restrictions which would suggest that only surface transit was intended."[153]

Even though the right of transit passage includes a reference to "freedom of navigation," it has been argued that there are so many qualifications under the transit passage regime that it is obvious that the phrase is being used in a different context than it would be used in reference to the open seas.[154] In the transit passage context, it follows

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147. *See* Moore, *supra* note 16, at 100.

148. Reisman, *supra* note 75, at 71.

149. Draft Convention, *supra* note 10, art. 20. It reads: "In the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag." *Id.*

150. *Id.* art. 38(2).

151. Moore, *supra* note 16, at 98. Moore states:

> The existing 1958 Geneva Convention on the High Seas and the high seas chapter of the ICNT both speak only of "freedom of navigation." They do not spell out a right of submerged transit beyond use of that phrase. Yet such rights on the high seas are understood by all to include the right of submerged transit.

Id.

152. Burke, *supra* note 2, at 205.

153. *Id.*

154. H. Knight, Analysis of the "Revised Single Negotiating Text" and the Question of the Right of Submerged Transit Through International Straits (Aug. 1, 1976) (unpublished memorandum on file with the Washington Law Review).

that no right of submerged passage should be implied.[155]

Burke agrees that "freedom of navigation" in article 37(2) is being used in a different context than it would be used in reference to the open seas.[156] He states that the framers "did not mean to carry over and to protect the whole panorama of operational practices protected by freedom of navigation in its traditional usage."[157] He does believe, however, that one of the practices preserved under the transit passage version of "freedom of navigation" is submerged passage, and that the negotiating history supports this view.[158]

Submerged submarines should have no problem meeting the various criteria for transit passage.[159] For example, article 39(1)(c) states that ships and aircraft during their passage should "refrain from any activities other than those incident to their normal mode of continuous and expeditious transit."[160] A submerged submarine would seem to have no problem complying with this article. As Burke points out, the article "contemplates vehicles which differ in their method of movement insofar as they operate in their 'normal mode.' "[161] The framers must have had submarines in mind when they drafted such an article, since submerged is certainly the "normal mode" for a submarine.[162]

There is not, however, total consensus on this point. Reisman claims that the meaning of the phrase "normal mode" could vary according "to such factors as type of channel, density of traffic, safety factors, nature of mission, rules of the road, and so on. What may be normal in internal or territorial waters would be 'abnormal' on the high seas, and so on."[163] Therefore, submarines could be required to surface when a strait state determines that submerged is not the "normal

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155. Reisman, *supra* note 75, at 70.

156. Burke, *supra* note 2, at 207.

157. *Id.*

158. *Id.*

159. *See infra* notes 160-62 and accompanying text.

160. Draft Convention, *supra* note 10, art. 39(1)(c).

161. Burke, *supra* note 2, at 212.

162. Moore, *supra* note 16, at 81. John Norton Moore has written that:

> Modern nuclear submarines run safest "in their normal mode," that is, submerged, and it is a mode for which they are designed. On the surface they are less maneuverable, their systems for avoiding collision work less well, they are difficult to see even with good visibility, they present only a small and possibly misleading radar target for other shipping seeking to avoid them, and they must travel in an area of higher density of shipping with consequent increased risk of collision.

Id.

163. Reisman, *supra* note 75, at 71.

mode" of transit in a given situation.[164]

Another requirement of transit passage that submerged submarines would seem to easily meet is that of "continuous and expeditious transit" called for by article 38(2).[165] Submarines travel most expeditiously and efficiently in the submerged mode.[166]

Since there is no express prohibition of submerged passage under transit passage, can a permission be inferred from that absence of prohibition? Reisman points out that since there is no requirement for submarines to surface, unlike the requirement of article 20[167] in the innocent passage regime, it is possible to infer a permission to remain submerged.[168] But what might be inferred and what will be inferred are two different items. In a world where international agreements tend to be interpreted "strictly and textually," the failure of the maritime states' negotiators to demand explicit inclusion of those understandings vital to their own interests is dismaying.[169]

When confronted with both a lack of clear language in the text and ambiguity, the Vienna Convention would mandate an examination of the negotiating history and the preparatory work to the treaty to help supplement the text.[170]

Maritime power treaty supporters state that negotiators understood transit passage to include the right of submerged passage.[171] Moore, relying on his own experience as the United States representative to UNCLOS III, states emphatically that the intent of the parties was undeniable on this point, that the right of submerged passage was understood by all participants to be included under the transit passage regime, and that it was understood further that any treaty not includ-

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164. *See id.* at 70-71.

165. Draft Convention, *supra* note 10, art. 38(2).

166. Moore, *supra* note 16, at 81.

167. Draft Convention, *supra* note 10, art. 20.

168. Reisman, *supra* note 75, at 71.

169. *Id.*

170. Vienna Convention on the Law of Treaties, *opened for signature* May 22, 1969, arts. 31-32, U.N. Doc. A/CONF. 39/27, *reprinted in* 8 I.L.M. 679 (1969); *Accord* Robertson, *supra* note 12, at 845-46.

171. *See* Burke, *supra* note 2, at 205. Burke states:

> Each of these delegations questioned the need for, and desirability of, submerged passage for submarines. The comments, questions, and proposals advanced by these delegations [Sri Lanka, Egypt, Peru and Spain] are virtually impossible to explain unless they understood that submerged passage was intended to be included in the concept of "freedom of navigation" in straits.

Id.

ing such a right was unacceptable to the United States.[172]

An examination of the negotiating history reveals that even those who opposed the idea of submerged passage accepted the fact that it existed under transit passage.[173]

There is agreement among those who were most directly involved in the negotiating process that transit passage includes the right of submerged passage.[174] The failure of the negotiators to have this expressly stated, however, leaves open the possibility that this textual ambiguity may be interpreted in the future to deny submerged passage.[175] Certainly it would have been more consistent with the general interest of the maritime states to have had the right of submerged passage expressly provided for, but at this late point in the negotiations, any effort to renegotiate may be perceived by other nations as a delaying tactic on the part of the United States and other maritime powers.[176]

A textual reading of the transit passage articles does not flatly rule out the right of submerged passage, and a contextualist approach generally supports the contention that such a right was understood to be incorporated by the parties to the treaty-making process.[177] On this basis, the maritime powers can probably be assured that the right of transit passage will be protected under the Draft Convention.

CONCLUSION

Any overall analysis of the proposed transit passage regime must address itself to several questions: Does the regime satisfy the basic demands of the maritime powers? Does it represent any improvement over innocent passage? What are the alternatives?

Clearly, the maritime powers could not expect any straits regime to satisfy all their demands. The strait states had expectations that also had to be considered, especially in the area of traffic safety and

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172. Moore, *supra* note 16, at 102.

173. In fact, early proposals to require submarines to surface under the transit passage regime were rejected by the negotiators. *Id.* at 101. *See also* Oxman, *The Third United Nations Conference on the Law of the Sea: The 1977 New York Session*, 72 AM. J. INT'L L. 57, 64 (1978).

174. *See* Moore, *supra* note 16, at 102.

175. For a discussion of ambiguties in legal agreements, see Reisman, *supra* note 75, at 75.

176. There is already great dissatisfaction in the world community over the Reagan Administration's decision to delay United States approval of the UNCLOS III treaty pending a policy review. The Administration's reservations center around the seabed issue. *See* Frank, *supra* note 2, at 121-23.

177. Burke, *supra* note 2, at 203-09.

environmental pollution.[178] Since the expectations of the maritime powers and the strait states were in conflict[179] on many issues, a process of compromise was resorted to in formulating a transit passage regime. It would be both shortsighted and unreasonable for the maritime powers to expect a straits regime that conceded to all their demands at the expense of the strait states' interests.[180]

Unless the expectations of all parties to a written agreement are at least in part satisfied, there is no incentive for them to ratify it.[181] Only when all parties perceive some satisfaction of their demands and expectations will an agreement be recognized as authoritative law. Only an agreement representing some generally recognized consensus of values will provide the certainty and stability essential to ensure that the maritime powers' vital interests will be protected.[182]

The regime of transit passage represents a compromise that emerged from a long process of negotiation. It would appear to be a substantial improvement over the innocent passage regime insofar as it meets the expectations of the maritime powers. In the absence of ratification of the UNCLOS III Treaty, however, the maritime powers would be confronted with innocent passage in the straits.

Any suggestion by the maritime powers at this point to substantially rewrite the transit passage section would seriously alienate the strait states. The treaty is ready for approval by the whole convention.[183] Therefore, while it would be in the maritime powers' interest to

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178. The coastal states incorporated many interests into their demands during the treaty-making process. According to two commentators:

> The RSNT (Proposed Draft) attempts to resolve the conflicting interests of maritime states and coastal states. The interests which coastal states have sought to further in the RSNT include exploitation and management of resources in the sea and seabed contiguous to their shores, and extension of their territorial sea in order to regulate a greater portion of offshore foreign maritime activity such as naval exercises, surveillance, and the discharge of pollutants from ships.

Shelton & Rose, *supra* note 3, at 528.

179. *Id.*

180. Moore, *supra* note 16, at 119-20.

181. For a discussion of the need for international consensus on issues concerning the law of the sea if our vital interests are to be secured, see Richardson, National Security and the Law of the Sea (July 13, 1974) (Remarks by Ambassador-at-Large Elliot L. Richardson, Special Representative of the President to the Law of the Sea Conference).

182. *See* Moore, *supra* note 16, at 120.

183. *See* Frank, *supra* note 2, at 121-23. While this note was being prepared for publication, the Third United Nations Conference on the Law of the Sea approved a treaty which the United States opposed. *See supra* note 31.

have certain express stipulations included in the text (e.g., submerged passage), this should be done only if it would cause no significant delay. There is also the possibility that any attempt to reopen negotiations will result in the strait states placing new demands on the table.

Absent any further amendment, an overall analysis of transit passage reveals it to be a solution that adequately addresses the needs of the maritime powers. Though it is not perfect, it does represent a superior alternative to the present regime of innocent passage.

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