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The Law of the Sea in the Strait of Hormuz: Contending Legal Regimes at the Cusp of Conflict

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I. Introduction

This article resolves long-standing confusion over the legal regime that applies to passage through the Strait of Hormuz. Iran and the United States profoundly disagree about the applicable international law in the Strait of Hormuz, a narrow stretch of water through which travels 17 million barrels of oil per day—20 percent of the world total. The strait connects the Arabian Sea to the Persian Gulf and is ground zero in the clash between the two states. Each year 12,000 vessels, half of them oil tankers greater than 150,000 gross tons, converge in dense traffic patterns in Iranian territorial seas en route through the Strait. A bitter legal dispute over the right of passage, especially by foreign warships, military aircraft, and submarines, has simmered for decades, and it is a volatile element of the broader confrontation to stop Tehran’s nuclear program. In times of crisis at home or abroad, Iran has tightened its hold on the strait, inciting pushback from the United States. While Iranian action under nuclear nonproliferation regimes has captured widespread attention, there is virtually no contemporary analysis of the far-reaching disagreements between Iran and the United States on the international law of the sea, and in particular, the appropriate legal regime in the Strait of Hormuz.

The standoff is especially complicated because the United States and Iran are not parties to the United Nations Convention on the Law of the Sea (UNCLOS). Their status as holdouts colors every aspect of the bilateral legal relationship in the Strait of Hormuz. Their dispute is also layered and made more complex in that both states subscribe to some terms of the treaty, but reject others. Without adherence to a common rule set, the

1 A note on nomenclature: This article sticks with the historic term, “Persian Gulf,” rather than the more contemporary U.S. reference, “Arabian Gulf.” The historic usage dates to the time of Ptolemy. The more recent name, “Arabian Gulf,” emerged out of Arab nationalism in the 1960s and has become a way to vie for political leverage against Iran. Iran is fairly testy about the issue. During the 34th Plenary Meeting of the Second Session of the Third United Nations Conference on the Law of the Sea in 1974, for example, Iran responded to the delegate of the United Arab Emirates, who referred to the body of water as the “Arabian Gulf.” The Iranian representative called the term “Arabian Gulf,” “improper” and a “fabricated label,” of “recent vintage,” and a “distortion of fact.” U.N. Doc. A/CONF.62/SR.34, reprinted in I OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA (Summary Records of Plenary Meetings of the First and Second Sessions, and of Meetings of the General Committee, Second Session) 139, 140-142 (2009). See also, Richard Spencer, Iran Threatens Flight Ban over ‘Persian’ Gulf Name Row, TELEGRAPH (London), Feb. 23, 2010 (Iran threatens to ban airlines from landing in the country unless they acknowledge the body of water is properly called the “Persian” Gulf).


rivals embrace incompatible views of the source and content of the laws that govern passage through the strait. The legal relationship between the coastal State of Iran and the maritime rights of U.S. flagged merchant vessels and warships is distinctive, as every other coastal State that sits astride a major international strait is party to UNCLOS or another governing treaty, such as the Montreux Convention that governs transit through the Turkish Straits of the Bosporus and Dardanelles.\textsuperscript{5} Unlike the Turkish Straits or the Straits of Magellan, however, disputes over the legal rights in the Strait of Hormuz have strategic implications beyond regional security and affect the global economy.

This article resolves questions that surround the legal dimension of U.S.-Iranian competition in the Strait of Hormuz, and it provides the key to the riddle of claims and counter-claims made by both sides. Surprisingly, these important legal questions have been virtually ignored, even though the Strait of Hormuz has been the locus of conflict between Iran and the West in the past and will be an axis of naval operations in any war.\textsuperscript{6} These questions are not theoretical; the United States and Iran have sparred before in international litigation over questions of passage rights despite their lack of official diplomatic contact.\textsuperscript{7} Aside from the political-military outcome of the bilateral relationship, the legal dimension of the rights of each nation in the Strait of Hormuz begs for concrete analysis to inform scholars and policymakers.

A. Competing Claims

There is a greater likelihood of war in the Strait of Hormuz because Iran and the United States disagree about the rights and responsibilities afforded to each state in the international law of the sea. Both states have bypassed UNCLOS, the one multilateral treaty positioned to resolve their differences.

\textsuperscript{5} Convention Regarding the Regime of the Turkish Straits, July 20, 1936, 173 LNTS 213; C. G. Fenwick, The New Status of the Dardanelles, 30 AJIL 701, 704 (1936). See also, UNCLOS Art. 35(c).


\textsuperscript{7} The adversaries have appeared before the International Court of Justice against each other twice: United States Diplomatic and Consular Staff in Tehran (Iran v. U.S.), 1980 ICJ Rep. 3 (U.S. v. Iran Hostages Case) and Case Concerning Oil Platforms (Iran v. U.S.), Merits (Nov. 6, 2003), 2003 ICJ Rep. 161, 43 ILM 1334 (2003); Pieter Bekker, Case Report: Oil Platforms (Iran v. United States), 98 AJIL 550 (2004) and Bernhard H. Oxman, Oil Platforms (Iran v. United States), 91 AJIL 518 (July 1997).
With the January 8, 2013 accession by Timor Leste there are 165 States parties to UNCLOS. The treaty recognizes that coastal States may claim a 12 nautical mile territorial sea, measured from the low water mark running along the shore. Ships of all nations enjoy the right of innocent passage through the territorial sea. On the other hand, coastal States have broad and durable security interests in the territorial sea, and they may prescribe and enforce laws that condition or preclude altogether the surface transit of foreign warships.

When overlapping territorial seas connect one area of the high seas or exclusive economic zone (EEZ) to another area of the high seas or EEZ, they also constitute a strait used for international navigation. UNCLOS recognizes that states are entitled to exercise the right of transit passage through straits used for international navigation. The regime of transit passage affords more rights than innocent passage to foreign ships. In most circumstances, innocent passage can be suspended by the coastal State; transit passage cannot be suspended. Transit passage also allows submerged transit and overflight of aircraft through the strait. Only surface transits are permitted for ships engaged in innocent passage. In the absence of acceptance of UNCLOS, however, the United States and Iran cannot use these clear rules as a guide for policy and must revert to legacy treaties, such as the 1958 Convention on the Territorial Sea and Contiguous Zone, as well as customary international law, to determine their respective rights and duties in the Strait and escape the impasse.

Perhaps not surprisingly, the antagonists disagree on the source and content of the law that applies to the Strait of Hormuz, since legal determinations have strategic consequences for both powers. In contrast to the generous navigational provisions of transit passage contained in UNCLOS, the Territorial Sea Convention affords ships of all nations the more limited right of nonsuspendable innocent passage in straits overlapped by territorial seas. Tehran asserts that the navigational regime of transit passage through straits used for international navigation is solely a feature of UNCLOS, and therefore the privilege of transit passage is unavailable to non-parties, such as the United States. Furthermore, the 1958 treaty entitles States to the right of innocent passage in straits, which may be considered to exclude submerged submarines and or aircraft in flight. Iran is not a party to UNCLOS, and therefore is under no compunction to recognize legal regimes therein. Iran has signed, but not ratified, the 1958 Territorial Sea Convention. As a nonparty to the treaty, Iran is not legally bound to its terms. Under article 18 of the Vienna Convention on the Law of Treaties, however, Iran has a more limited duty simply not to “defeat the object and purpose” of the 1958 treaty.

The United States counters that although the regime of transit passage through straits used for international navigation is reflected in UNCLOS, it springs from customary international law, rather than the terms of the treaty. Although transit passage

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8 UNCLOS, Arts. 3-5.
9 UNCOS, Art. 17.
10 UNCOS, Art. 37.
11 UNCLOS, Art. 38(1)-(2).
13 Id., at arts. 14 and 16.
is codified in article 38 of UNCLOS, it merely reflects long-standing state practice and *opinio juris*. Even though the United States is not a party to UNCLOS, therefore, it nonetheless enjoys the right of transit passage through international straits as a matter of historical practice and a history of legal obligation among states. To put a final point on it, the United States rejects Iran’s claim of broad security competence over the territorial sea, since even article 16(4) of the 1958 Territorial Sea Convention precludes the coastal State from suspending innocent passage.

Both Iran and the United States insist the law is on their side, and the legal dispute serves as a destabilizing backdrop to other dimensions of U.S.-Iranian relations. What is the answer to this dilemma? It is not entirely clear that the United States is correct in its claim that transit passage is a feature of customary international law, and therefore that the rule has a legally binding effect outside of the treaty relationships formed by UNCLOS. In fact, the navigational regime of nonsuspendable innocent passage was in force for passage through international straits overlapped by territorial seas long before adoption of UNCLOS in 1982. The United States is a party to the 1958 Convention, and it appears that until or unless the United States joins the 1982 UNCLOS, it enjoys only the right of innocent passage in international straits formed by overlapping three nautical mile territorial seas.

**B. State Practice and Innocent Passage**

The historic meaning of the term “innocent passage” that is contained in the 1958 Convention is much broader than the more contemporary understanding of the word to describe only surface transit. State practice indicates that nations exercised an unfettered right of transit through international straits, not just on the surface with warships, but under the water in submarines and via overflight in aircraft, although this state practice is at variance with the actual text of the 1958 instrument.

Although some strait States challenged the practice of transit by submarines, warships and aircraft after World War II, the might of the U.S. Navy and British Royal Navy meant that during throughout the twentieth century such operations were routine. Despite the disagreement over transit rights, it appears that the minimum agreement between Washington and Tehran must include a right by the United States of nonsuspendable innocent passage of warships in the Strait of Hormuz under article 16(4) of the 1958 Territorial Sea Convention, complemented by a right of submerged travel and overflight through the strait derived from customary international law.

The appropriate legal regime for passage through the Strait of Hormuz—either innocent passage or transit passage, however, is inextricably tied to the collateral issue of the width of the territorial sea of Iran and Oman. During negotiations for the 1958 Convention, most nations accepted the rule that coastal states may claim sovereignty only over a three nautical mile territorial sea. The extension of the territorial sea from three nautical miles in 1958 to 12 nautical miles by the 1970s is a central characteristic of UNCLOS, forever changing the law of the sea.

Expansion of the territorial sea from three to 12 nautical miles is the central bargain in UNCLOS, and it is balanced by replacement of innocent passage with transit passage in straits as part of the overall package deal. Since Iran is not a party to UNCLOS, it does not enjoy the benefits of the package deal, including a 12 nautical mile
territorial sea. Iran also does not have to avail itself to transit passage by the ships, submarines, and aircraft of other states. Tehran, therefore, may insist that the United States enjoys only innocent passage through the Strait of Hormuz. At the same time, however, it also is entitled to claim only a traditional three nautical mile territorial sea, since the extension of the zone to 12 nautical miles in breadth is a benefit conferred on States parties to UNCLOS as a key part of a comprehensive bargain. In such case, whether the United States is correct that it is entitled to transit passage as a matter of customary law becomes somewhat immaterial because U.S. warships, aircraft, and submarines would enjoy high seas freedoms beyond Iran’s three nautical mile territorial sea. The Strait of Hormuz is more than 20 miles wide, so the area over which Iran could exercise sovereignty is quite limited.

While it is true that under this analysis U.S. surface warships could exercise only innocent passage within three nautical miles from the shore of Iran, and that aircraft in flight and submerged submarines might be excluded altogether from the water extending from the shoreline out to three miles, all of the shipping lanes directly in the Strait of Hormuz lie well outside of Iran’s three mile zone. The practical upshot is that U.S. ships, aircraft, and submarines would exercise unrestricted high seas freedoms seaward of Iran’s three nautical mile territorial sea and these rights are even more generous than transit passage in UNCLOS.

II. Waiting for the Next Crisis

Among some 125 international straits in the world, about 60 of them may be considered major world trade routes—essential sea lines of communication (SLOCs). The four most important artifacts of industrial infrastructure on the planet are the Panama Canal, the Suez Canal, the Strait of Malacca, and the Strait of Hormuz. Each is an economically and strategically critical asset, but because the Strait of Hormuz sits astride the conflict-prone region of the Gulf, it serves as a metaphor for separation of East and West, North and South, and Sunni and Shi’ite. These fault lines meet in the strait, which, at its narrowest point, is only 21 miles wide. An international maritime boundary runs equidistant between the shores of Iran in the north and Oman on the south.

In 2011, the daily world oil production was 87 million barrels. Seventeen million barrels—19 percent of total world production and more than 35 percent of seaborne traded oil—transits the strait every day. While the amount of oil the United States receives from the Gulf has been in steady decline in recent years, it still receives 13 percent of its oil from the Persian Gulf, which includes 8 percent from Saudi Arabia. Japan, for example, receives 75 percent of its crude oil imports from just four Gulf

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countries: Saudi Arabia (35 percent), United Arab Emirates (23 percent), Qatar (10 percent), and Kuwait (6.5 percent).²⁰ Qatar also exports about 2 trillion cubic feet per year of liquefied natural gas (LNG) through the Strait of Hormuz, or almost 20 percent of the global LNG trade.²¹ In 2011, before sanctions took affect, 11 percent of Japan’s oil imports came from Iran. More importantly, however, the world oil market trades on a global exchange, so a shortage in one area will still create price reverberations everywhere.²² Furthermore, the market trades at a marginal (market clearing) world price, so even small disruptions in the amount of oil available on the market can create wild spikes in energy prices.

The Persian Gulf has been a key transportation node in the global economy since the last days of World War II, when the British resorted to Persian oil supplies. From 1953 until 1979, the United Kingdom helped install into power and then strengthen Reza Shah Pahlavi of Iran as a bulwark in the Persian Gulf and Strait of Hormuz.²³ The Royal Navy maintained forces in the Persian Gulf until 1971, when it requested the U.S. Navy to fill that role. With the fall of the Shah and the hostage crisis at the U.S. embassy in Tehran in November 1979, the United States became concerned that the strait could be closed. The 1979 Christmas invasion of Afghanistan by the Soviet army caused more concern that the flow of oil could be interrupted. Since the seizure of the American embassy and the downfall of the Shah Pahlavi that same year, Iran has bedeviled U.S. Middle East policy.

On September 27, 1980, the United States issued a statement that the United States would take military action to ensure that the Strait of Hormuz remained open to international shipping. During the Iran-Iraq War from 1980-1988, Iran stationed irregular forces on small islands just inside the Strait of Hormuz to interdict shipping bound for Iraq and its Arab allies.

As a result of Iranian attacks on shipping, the United States and Iran fought a miniature naval war in the Persian Gulf from 1984-1987 called the “tanker war.”²⁴ More than 400 civilian seafarers died in attacks by Iran and 500 commercial vessels were damaged.²⁵ The United States claimed Iran sowed mines in the shipping lanes and conducted small boat attacks on oil tankers and American warships. On January 20, 1984, U.S. Central Command issued a Notice to Airmen and then released a parallel Notice to Mariners the following day that warned ships and aircraft not to approach too closely to naval forces on patrol in the Gulf.²⁶ The USS Samuel B. Roberts, the USS Princeton, and

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²⁶ The U.S. transmittal stated in part:
the USS *Tripoli* all struck moored contact mines while on patrol in the Gulf. In response, the U.S. Navy destroyed the *Sahan* and *Sablan*, two former American frigates left over from the Shah’s defense buildup, and burned two derelict oil platforms that it claimed were used to stage the attacks. Iran took its case to the International Court of Justice, which returned an opinion largely favorable to Iran.

The United States returned to the Persian Gulf during Operation Desert Shield/Desert Storm to eject Saddam Hussein’s army from Kuwait, and then maintained a “no fly” zone over parts of Iraq until 2003, in part through the use of naval aviation stationed aboard aircraft carriers in the Gulf.27 In 1998, President Clinton ordered the launch of a battery of cruise missiles from ships and submarines on patrol in the Gulf to destroy terrorist targets in the region. Most recently, the United States and the United Kingdom led a coalition of some 20 nations to topple the Ba’athist regime in Iraq from 2003-2011. Today former Secretary of State Henry Kissinger calls dealing with Iran’s nuclear program the most urgent foreign policy question for President Barack Obama’s second term of office.28

A. “Knife Fight in a Phone Booth”

In each of the past conflicts with Iran, the United States enjoyed large base complexes in littoral states in the Persian Gulf, and naval units operated in easy range of their targets. The United States had a monopoly on precision-guided munitions and secure C4ISR networks. Any scenario with Iran calls into question each of these assumptions, and strengthens Tehran’s hand. The United States has withdrawn its large ground footprint in the region, especially from Saudi Arabia.

Today Iran is especially adept at exploiting its geographic proximity to the Strait as one of its few pressure points against more powerful adversaries. The Strait of Hormuz naturally channels shipping into a targeting funnel vulnerable to Iran’s missiles and mines. One senior Navy officer said the Strait has little room for maneuver and little space to buy time: “It’s like a knife fight in a phone booth.”29 Iran has threatened to close

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the strait in the event that Israel or the United States conducts military strikes against the country’s nuclear program. The relationship is always testy. In January 2012, General Ayatollah Saleh warned the USS John C. Stennis not to reenter the Gulf during an Iranian war game. “I advise, recommend and warn them over the return of this carrier to the Persian Gulf because we are not in the habit of warning more than once.”

Today, much smaller U.S. installations in Bahrain and Qatar are more vulnerable, as they sit less than five minutes away from Iranian ballistic missiles garrisoned across the Gulf—105 nautical miles from Bahrain and 149 nautical miles from the sprawling Al Udeid air base. Without secure runways on the Gulf, U.S. power projection depends on aircraft carriers. Not completely invulnerable to Iranian mines and missiles inside the Persian Gulf, the massive ships may resort to launching attack aviation from the Arabian Sea, diminishing both range and time on station inside the Strait.

In the face of overwhelming conventional power by the United States, Iran has few conventional military options that augur in its favor. Tehran instead likely would resort to weapons of mass destruction (WMD), small unit marine guerilla forces, and swarming tactics to inflict maximum damage on oil shipping. Closure of the Strait of Hormuz is at the top of the list, as it hits the United States at the foundation of its power—the global economy and America’s perch atop a grandly formal Eurasian alliance system. The oil market shock caused by closure of the Strait would separate the United States from its Arab state friends in the Middle East that rely on bringing oil to world markets, and European and Asian allies who are dependent on Gulf oil. In this rather unconventional way, Iran has a global power projection capability, which is why the Chief of Naval Operations stated last year: “If you ask me what keeps me awake at night, it’s the Strait of Hormuz and the business going on in the Arabian Gulf.”

The Pentagon realizes the Strait is vulnerable. “The simple answer is ‘yes,’ they can block it,” Chairman of the Joint Chiefs of Staff General Martin Dempsey stated on January 8, 2012. For the past 20 years, Iran has invested heavily in the asymmetric capabilities needed to bypass the more powerful U.S. fleet and disrupt merchant shipping and threaten naval forces in the strait. Iran has concentrated on acquiring naval mines, fleets of heavily armed speedboats and powerful anti-ship cruise missiles, secretly situated along the bottleneck.

The regular Iranian Navy is relatively professional, and it operates an aging conventional surface fleet that is the remnant of the Shah’s constabulary force. The more politically favored and far less predictable Iranian Revolutionary Guard Corps Navy (IRGCN), however, is the country’s guerilla force at sea. The IRGCN has responsibility for security in the Strait of Hormuz, and since the early-1990s it has invested heavily to keep U.S. forces off balance. The highly ideological IRGCN has 20,000 personnel and

5,000 Revolutionary Guard Marines. These forces regularly exercise war plans to close the Strait. The force operates from bases at Bandar Abbas and Qeshm along the Strait and practices small boat swarm exercises against international shipping traffic with as many as 40 boats.

Iran’s inventory includes cruise missiles (generally first generation Chinese copies of the French Exocet missile and the indigenous Nasr missile), marine mines, Kilo- and Yono-class submarines, and Peykaap fast attack craft, the latter of which are armed with cruise missiles and torpedoes. These proxy forces are dispersed and mobile, and have mastered swarm techniques to overwhelm more powerful foes. More than a decade ago, a $250 million classified Department of Defense war game concluded that agile swarms of IRGCN speedboats could inflict major damage on the U.S. Navy’s powerful warships in a conflict. In the game, the United States lost 16 major warships, including an aircraft carrier, to swarms of enemy speedboats. In a more recent real-world event, on January 6-7, 2008, five armed Iranian speedboats approached three American warships in international waters near Hengam Island and maneuvered aggressively as they radioed threats that the ships would be “blown up.” In a television interview several days after the incident, Hoseyn Panahi-Azar, the director-general of the legal and international affairs department of the Iranian Foreign Ministry, stated that the regime of innocent passage applies to U.S. warship transits in the Strait of Hormuz. Transit through the Strait may not be suspended, he acknowledged, but Iran was entitled to “impose certain limitations based on their own laws [even] for transit passage.”

In the case of the United States, transit passage was unavailable because the right is contractual in nature, binding the flag state of a transiting vessel and the coastal state along the strait, according to Iran. Panahi-Azar explains: “This [rule] means that only [the ships registered in] the member states of the convention have the right of passage. In the case of the law of the sea convention, neither Iran nor America is a member of the convention.” Accompanied on the television show by Brigadier General Fadavi, acting commander of the Islamic Republic Guard Corps Navy, Panahi-Azar, stated that Iran had a special duty and enjoys recognized rights to facilitate traffic through the straits. In order to ensure safety and security along the route, Iran exchanges information with passing ships, such as speed, course, and type of vessel, in order to assist shipping. Since American ships enjoy only the more limited right of innocent passage, Iran asserts application of reasonable measures to manage innocent passage:

35 Jeremy Binnie, Gulf Guerillas: Iranian Naval Forces, JANE’S DEFENCE WEEKLY 34, 36 (Great Prophet 5’ exercise of April 2010 involved 40 small boats in a simulated attack).
Some countries will grant innocent passage without issuing permits. Some countries ask warships or military vessels to get permission beforehand. These are popular methods, most of the countries opt one of these methods. In the Persian Gulf, Iran and another country who is a member of the convention require military vessels to acquire prior permission before their innocent passage. Therefore if any military vessels enter Iranian waters without permission even if they are passing innocently it has violated the Iranian law. In addition, innocent passage has certain conditions and some of these vessels do not meet these conditions. They should not carry any potential threat against the coastal countries.\footnote{Vision of the Islamic Republic of Iran Network 2, Tehran, in Persian, Jan. 12, 2008, \textit{verbatim transcript translated in Iran TV discussion on Strait of Hormuz Incident}, BBC \textsc{Worldwide Monitoring Middle East–Political}, Jan. 13, 2008.}

American naval forces routinely transit the Strait and maintain a regular presence in the Gulf. The United States and the United Kingdom deploy mine countermeasure ships to Bahrain, for example. We may infer from U.S. submarine port visits to states inside the Gulf and reports of several collisions between submerged U.S. submarines and surface ships, that U.S. submarines patrol the Strait.\footnote{Andrew Scutro, \textit{Report: Lax Leadership Led to Hormuz Collision}, \textsc{Navy Times}, Nov. 15, 2009 (collision between submarine USS\textit{ Hartford} and amphibious warship USS\textit{ New Orleans} in Strait of Hormuz) and Sam Fellman, \textit{Attack Sub Collides with Ship in Persian Gulf}, \textsc{Navy Times}, Jan. 10, 2013 (submarine USS\textit{ Jacksonville} collides with a small civilian ship in the Persian Gulf). In one case, the submarine USS\textit{ Newport News} was following behind a Very Large Crude Carrier\textit{ Mogamigawa}, when it was sucked into the oil tanker by the low pressure effect of the larger ship. John M. R. Bull, \textit{Skipper of USS Newport News Relieved of Duty}, \textsc{Daily Press} (Hampton Roads, VA), Jan. 30, 2007.} The dire financial condition of the U.S. government budget and mandatory defense cuts as part of the sequester fiscal compromise will make it more difficult for the U.S. fleet to operate in force. Recently the Pentagon was unable to deploy USS\textit{ Harry S. Truman} (CVN-75) to the Persian Gulf because the Navy could not allocate the programmed $3.3 billion to overhaul the ship as budget cuts loom.\footnote{WALL ST. J., Feb. 11, 2013 and Sam LaGrone, \textit{Navy: Lincoln Refueling Delayed, Will Hurt Carrier Readiness}, \textsc{USNI News}, Feb. 8, 2013.} A second nuclear-powered aircraft carrier, the USS\textit{ Abraham Lincoln} (CVN-72), was delayed for deployment to the Gulf due to a $92 million shortfall in nuclear refueling.\footnote{WALL ST. J., Feb. 11, 2013 and Sam LaGrone, \textit{Navy: Lincoln Refueling Delayed, Will Hurt Carrier Readiness}, \textsc{USNI News}, Feb. 8, 2013.}

In January 2012, the Obama administration relied on a secret channel of communication to warn Iran’s supreme leader, Ayatollah Ali Khamenei, that any attempt by Iran to close the Strait of Hormuz was a “red line” that would cause America to respond.\footnote{Elisabeth Bumiller, Eric Schmitt and Thom Chunker, \textit{Top Iran Leader is Warned by U.S. on Strait Threat}, \textsc{NY Times}, Jan. 13, 2012, at A1.} More bluntly, General Martin E. Dempsey, the chairman of the Joint Chiefs of Staff, said the United States would “take action and reopen the strait,” if Iran tried to close it. His statement was supported by Defense Secretary Leon E. Panetta, who told
troops at a public gathering in January 2012 that the United States would not tolerate Iran’s closing of the strait.  

B. No Rules in Common

Normally, the rights of States situated along straits used for international navigation, such as Iran, and the rights of other nations to use the strait, such as the United States, are governed by the rules in UNCLOS. The treaty was adopted by a United Nations sponsored conference in 1982 after nine years of negotiation. Preceded by three failed attempts to negotiate a comprehensive multilateral oceans framework—at The Hague in 1930 and in Geneva in 1958 and 1960—UNCLOS marks a singular achievement in world order that is second in importance only after the Charter of the United Nations.

Since its adoption, the Law of the Sea Convention has begun to fill the role envisioned by Singapore Ambassador and President of the Conference T. B. Tommy Koh as the constitution for the world’s oceans. The framework forms an umbrella of global legal authority that is supplemented by some 50 additional treaties, and hundreds of codes and guidelines to form a comprehensive set of legal regimes and norms that apply throughout the oceans.

One of the principal achievements of UNCLOS is determination of the lawful width of coastal State territorial waters, and the associated navigational regimes that apply within them. The rules governing navigation are particularly important in international straits overlapped by territorial seas. In the case of U.S. and Iranian rights and duties in the Strait of Hormuz, however, the rules are much less certain because neither country is party to the omnibus treaty. The two states are among the most notorious holdouts, yet they also accept many terms of the Convention—just not necessarily the same ones. The absence of a clear and common rulebook and lack of agreement on the relevant rules that apply to the Strait of Hormuz generates regional instability.

In order to understand the equities and legal positions of Iran and the United States, it is essential to take a detour into the development of the territorial sea and the straits regime more generally. Much like today, the competition over oceans law emerged from a political and historical milieu in which states looked to sustain essential interests in national security.

The rivals may draw upon several discrete sources of international law applicable to the Strait of Hormuz, including customary international law, as well as general conferences and treaties, principally the 1930 Hague Codification Conference, the 1949

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Corfu Channel Case at the International Court of Justice, the 1958 (First) and 1960 (Second) United Nations Conferences on the Law of the Sea, the negotiations of the Third United Nations Conference on the Law of the Sea (1973-1982) and the comprehensive treaty it produced, the United Nations Convention on the Law of the Sea. Twentieth century negotiations were informed by hundreds of years of Western scholarship and state practice that form international law. Oceans law balances exclusive or restricted claims with inclusive or shared uses of the sea, which through a process of authoritative decision among states and other stakeholders form the “public order of the oceans.”

III. Evolution of the Straits Regime

A. Early Modern Period to the Twentieth Century

The process of authoritative decision in the law of the sea can be traced to the ancient world of Greece and Rome. Emperor Antoninus, for example, is quoted in the Justinian Digest stating: “I am indeed lord of the world, but the law is the lord of the sea.”

The greatest influence on contemporary law of the sea, however, arose much later, at the height of the Renaissance period in Europe. In the early modern period, Portuguese and Spanish explorers wandered into the Western Atlantic, Indian and Pacific Oceans, and laid claim for the crown to vast tracts of oceans as sovereign territory. From the start, their exclusive claims were untenable to other states. Between the rise of English sea power after the destruction of the Spanish Armada in 1588 and the end of the Dutch wars for independence from Spain and the Peace of Westphalia in 1648, the fiction that the Iberian powers could divide the world’s oceans had evaporated. By the early-18th century, Catholic and Protestant legal scholars accepted the rule that no state could purport to lay claim to the ocean common.

Although the doctrine of freedom of the seas prevailed, coastal States made a practical deviation from the Roman rule of mare liberum or “free seas,” to afforded coastal States exclusive control over a narrow belt of territorial waters adjacent to the coastline. Within these territorial waters or territorial sea the coastal State exercised complete sovereignty.

The territorial sea would have a confounding influence on passage through international straits. States could not agree on the breadth of territorial waters, although the “cannon shot rule” emerged as the most persuasive metric. The distance of a cannon

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50 James Williams, The Institutes of Justinian Illustrated by English Law 49-50 (London: William Clowes & Sons, Ltd, 2nd ed. 1893) (the sea is common in English law, as in Roman law, but “for purposes of safety, the state has a right of jurisdiction...for a distance...of a marine league from [the] low water mark.”).
shot was about three nautical miles, and many states accepted the idea that it marked the outer limit of a zone subject to the constabulary force of the coastal State. The simple formula is captured by the dictum by Cornelius Bynkershoek in 1703 that “[t]he power of the land properly ends where the force of arms ends.” For lack of another widely accepted standard, by the late nineteenth and early-twentieth century, the three mile standard for territorial waters remained the most popular, but by no means the sole, measure of the extent of territorial waters. Custom and state practice began to reflect the cannon shot rule, which entered into early American legal doctrine.

At the turn of twentieth century, John Bassett Moore, who served a quasi-official capacity in penning his eight volume restatement of international law for the Department of State, accepted the extent of the “littoral” or “marginal” sea as derived from Bynkershoek and also fixed the distance at a marine league, “that is to say three marine miles or a twentieth of a degree of latitude,”—formerly the range of a cannon shot. Following World War I, the League of Nations set out to codify significant areas of international law, and the width of the territorial sea and the rules that pertain in it were ripe for a final resolution by a major international conference, which met in the Hague in 1930.

B. Hague Conference on the Codification of International Law

In 1926, a draft convention prepared by a Committee of Experts of the League of Nations contained a “coastal sea” of three nautical miles from the “low-water mark along the whole of the coast.” That same instrument also confirmed the right of passage by foreign warships, although such vessels “must observe the local laws and regulations, particularly those relating to navigation, anchoring, and health control.”

As The Ann arrived off Newburyport, and within three miles of the shore, it is clear that she was within the acknowledged jurisdiction of the United States. All the writers upon public law agree that every nation has exclusive jurisdiction to the distance of a cannon shot, or a marine league, over the waters adjacent to its shores…. Indeed, such waters are considered as a part of the territory of the sovereign…. Indeed such waters within a marine league are considered as part of the territory of the sovereign.”

See also, Church v. Hubbart (1804) 2 Cranch 186, 234: “The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within range of its cannon [the measure used by him to delimit territorial waters]…is an invasion of that territory.” (Chief Justice Marshall).


Article 12, Appendix No. 1, Amended Draft Convention communicated to various Governments by the League of Nations Committee of Experts for the Progressive Codification of International Law, with
another draft convention developed by the International Law Association that same year recognized a three nautical mile territorial sea.\footnote{58}{Art. 5, App. No. 6, Draft Convention on Law of Maritime Jurisdiction in Time of Peace (Report of the Thirty-Fourth Conference, 1926, p. 101), reprinted in \textit{The Law of Territorial Waters} (Reporter, George Grafton Wilson), 23 AM. J. INT’L L. SUPP.: CODIFICATION OF INT’L L. 366, 366 (Apr. 1929). The article also specified that, “If serious and continued offence is committed [by a foreign warship in the territorial sea], the commander of the vessel shall receive a semi-official warning in courteous terms and, if this is without effect, he may be requested, and, if necessary, compelled, to put to sea.” \textit{Id.}}

These instruments helped to inform the preparatory work and negotiation on territorial waters for the 1930 Hague Conference on Codification of International Law. The Assembly of the League of Nations sponsored the conference in The Hague to codify three areas of international law: nationality, territorial waters and contiguous zone, and State responsibility for damage caused on their territory to foreign persons or property.

Thirty governments replied to a Preparatory Committee to address a list of questions to serve as a basis of discussion for delimitation of territorial waters.\footnote{59}{First Report Submitted to the Council by the Preparatory Committee for the Codification Conference, 24 AM. J. INT’L L. SUPP. 1, 3 (Jan. 1930) and Second Report Submitted to the Council by the Preparatory Committee for the Codification Conference, 3 AM. J. INT’L L. Supp. 3 (Jan. 1930). \textit{See, 2. Territorial Waters}, 24 AM. J. INT’L L. SUPP. 25, 25 (Jan. 1930). (Bases for discussion for the issue of territorial waters) and Jesse S. Reeves, \textit{The Hague Conference on the Codification of International Law}, 24 AM. J. INT’L L. 52-57 (Jan. 1930).} The Commission on Territorial Waters at the Conference for the Codification of International Law explored the feasibility of a maritime treaty. The Conference was the first attempt to codify a systematic and multilateral body of rules for oceans governance. The first order of business was to develop a list of Bases of Discussion that would be used to negotiate a treaty on the law of the sea. Half of the 28 Bases for Discussion formulated by the preparatory committee related to the delimitation of territorial waters, while the other half related to legal rights and obligations within the waters.\footnote{60}{S. Whittemore Boggs, \textit{Delimitation of the Territorial Sea: The Method of Delimitation Proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law}, 24 AM. J. INT’L L. 541, 541 (July 1930). \textit{See also}, Richard W. Hale, \textit{Territorial Waters as a Test of Codification}, 24 AM. J. INT’L L. 65 (Jan. 1930).}

1. Width of the Territorial Sea

The Committee first considered the territorial sea. To inform the dialogue, states were requested to respond to the following inquiry:

\begin{quote}
It would seem possible to take as the point of departure the proposition that the State possesses sovereignty over a belt of sea around its coasts. This involves possession by the State in the belt of the totality of those rights which constitute sovereignty, so that it is not necessary to specify that, for example, it has
\end{quote}
legislative authority over all persons, power to make and apply regulations, judicial authority, power to grant concessions, and so forth.\textsuperscript{61}

An associated set of questions asked states about the rights of other nations in the belt and the width of the territorial waters. States considered, “whether it is possible for special rights belonging to another State to restrict or exclude the right of the coastal State in the belt…. If so, what is the extent and ground of the claim?” Replies to these questions were offered by 23 states. Generally, states agreed that while the coastal State may exercise sovereignty over the belt, it must “respect the restrictions which result from international law.”\textsuperscript{62} A new conference draft instrument reflected the Bases of Discussion that coastal States possess sovereignty over a belt “round its coasts” that constitute territorial waters.\textsuperscript{63}

Participating states also were asked to make recommendations on the width of the territorial sea: “three miles, six miles, range of cannon, etc.”\textsuperscript{64} Twenty-two governments replied to the question.\textsuperscript{65} The United States suggested that territorial waters extend to a distance of three marine or nautical miles, measured from the low water mark.\textsuperscript{66} Although states were not unanimous in their responses, a majority of states replied that the breadth of the belt is three nautical miles. Several states presented a claim in excess of three miles, and proposals for four, six or even 18 miles were offered.\textsuperscript{67} In the end, the relevant Bases for Discussion on a new treaty, however, stated that the “breadth of the territorial waters under the sovereignty of the coastal State is three nautical miles.”\textsuperscript{68}

The Hague Codification conference failed to reach agreement on the breadth of the territorial sea, let alone the rights and duties that applied to the coastal State and


\textsuperscript{62} Point I, Nature and Content of the Rights possessed by a State over its Territorial Waters, Id., at 25-26. Replies were made by the following Governments: South Africa, Germany, Australia, Belgium, Bulgaria, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Romania, Siam, and Sweden. Id., at 26.

\textsuperscript{63} Jesse S. Reeves, Codification of the Law of Territorial Waters, 24 AM. J. INT’L L. 486, 490 (July 1930).


\textsuperscript{65} Id., at 27. Replies were made by the following Governments: South Africa, Germany, Australia, Belgium, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Portugal, Romania, and Sweden.

\textsuperscript{66} S. Whittemore Boggs, Delimitation of the Territorial Sea: The Method of Delimitation Proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law, 24 AM. J. INT’L L. 541, 541 (July 1930). The marine or nautical mile was defined as the equivalent of one minute of latitude at the particular latitude concerned, which varied about 19 meters between the equator and the poles. The distance of 1852 meters was regarded as a standard marine mile by the United States and adopted as the definition of a nautical mile by the International Hydrographic Conference at Monaco in April, 1929. The Technical Subcommittee of the Commission on Territorial Waters defined the baseline as the low-water mark along the entire coast, as indicated on the charts officially used by the coastal State, “provide the line does not appreciably depart from the line of mean low-water spring tides.” nn 2-3, Id., at 542.


\textsuperscript{68} Id., at 28.
foreign flagged vessels in the zone.  

A contemporary post mortem by University of Michigan political scientist Jesse Reeves lamented that the cause of failure lay not in poor preparation or faulty chairmanship, but rather in the difficulty of the issue:

Surely few matters in international law are more important than territorial waters. Few present more clearly so many opportunities for the examination of conflicting claims set forth by states to exercise jurisdiction. It may fairly be assumed that few topics present a larger factor of common intrinsic interest. But the responses of the governments had shown how far apart the responding states were. With scarcely an exception, each of the states represented upon the Commission had a double common interest in freedom of navigation on the high seas and in the maintenance of its authority over the adjacent waters. Yet no two states faced the seas with the same outlook. The fundamental differences among states vis-à-vis the seas are geographical, and as Napoleon said, “La politique des etats est dans leur geographie” (The policy of the state is in their geography).

Twenty of the 30 participant states advocated a three nautical mile territorial sea, led by the maritime powers of the United Kingdom and Japan. The U.S. proposal reflected U.S. law and viewed territorial waters as coextensive with the coastline to a distance of three nautical miles from shore. Scandinavian states of Iceland, Norway, Sweden, and Finland generally preferred four nautical miles, whereas a mixture of mostly Mediterranean and non-European states, which included Iran (Persia), supported a six nautical mile territorial sea. Some states, such as France and Germany, were in favor of a three-mile limit, but only if it also included a separate contiguous zone. Japan and the United Kingdom led a group of states that disliked a supplementary contiguous zone.

Disagreement over the width of the territorial sea was complicated by the Bases of Discussion that recognized general application of a three nautical mile territorial sea, but then was open to certain countries, yet to be enumerated, that would be entitled to a greater width. Thus, coastal States held out for a specific deal that inured special benefit to them within a system that set a three-mile standard for everyone else. These differences unraveled any prospect for a draft treaty, but the conference was not without some success.

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70 Id., at 487.

71 Id., at 492.

72 The U.S. position was reflected in the National Prohibition Act (41 Stat. 305), which defined the “territorial waters of the United States,” as “...a marginal belt of the sea extending from low-water mark outward a marine league, or 3 geographical miles...Section 2201, Regulations 2 (being a revision of Internal Revenue Regulation No. 60), relating to permits as provided in Title II, National Prohibition Act. (Effective, Oct. 1, 1927, pp. 197-198), *reprinted in The Law of Territorial Waters* (Reporter, George Grafton Wilson), 23 Am. J. Int’l L. SUPP.: CODIFICATION OF INT’L L. 241, 250 (Apr. 1929).

73 The latter countries include Brazil, Colombia, Cuba, Spain, Italy, Latvia, Persia, Portugal, Romania, Turkey, Uruguay, and Yugoslavia. Id.

2. Innocent Passage in Straits

On the matter of straits, governments were asked to consider “[c]onditions determining what are territorial waters within a strait connecting two areas of open sea or the open sea and an inland sea,” when the coasts belong to a single state and when they are shared by two or more states. Seventeen governments replied. The comments and diplomatic correspondence discussed the legal status of the Straits of Magellan, the Bosphorus and Dardanelles, and the Danish Sound Straits. The Strait of Hormuz was not mentioned. All three of the aforementioned passages, however, were (and are) subject to specific treaties governing transit, and therefore had limited utility for a determination of generic rules for straits.

No special treaty regulated transit through the Strait of Hormuz. The 1921 Barcelona Convention, however, sought to protect freedom of transit of commercial goods across international boundaries. The Barcelona Convention was the first multilateral treaty to recognize a general freedom of transit for all states, whether on land or at sea. Persia joined an annex to the treaty, which provides, “In order to ensure the application of the provisions of this Article [relative to free transit], Contracting States will allow transit in accordance with the customary conditions and reserves across their territorial waters.”

Most delegations at the 1930 Hague Conference reasoned that all the waters of the strait are territorial waters of the coastal State if the strait is not wider than twice the breadth of territorial waters. In straits shared by two coastal States and that measure less than twice the breadth of the territorial waters, the territorial waters are determined by an equidistant line drawn down the middle of the strait.

Points IX and X of the Bases of Discussion addressed innocent passage of foreign ships through internal waters during time of peace, including the rights of passage of merchant ships, warships, and submarines and “rights of passage of persons and goods.” Twenty-two governments submitted papers on the issue. The replies generally...
accepted the notion that all vessels, including warships, enjoy the right of innocent passage, balanced by the coastal States’ right to regulate the conditions of such passage.

The conference determined coastal States “should recognize the right of innocent passage through its territorial waters of foreign warships, including submarines navigating on the surface.” Although coastal States are entitled to make rules regulating the conditions of innocent passage, however, they did not have the right to require prior authorization. Likewise, foreign flagged warships had a duty to respect local laws and regulations. If a warship fails to comply with local laws and regulations after notice is given to the captain of the vessel, the only remedy available to the coastal State is to require the ship to depart the territorial sea.

The transit of foreign warships in territorial waters was not recognized as a right, but rather passage was accepted as a “general rule a coastal State will not forbid.” This determination reflected the general consensus during the first half of the twentieth century, albeit tempered by recognition of a greater right to transit the territorial sea overlapped by a strait used for international navigation. Analysis by the Columbia Law Review in 1950, for example, concluded

Generally, it appears that although warships do not as yet have a complete right of passage through ordinary territorial waters, they do possess, in peacetime, a qualified right of passage through littoral straits connecting two free seas. Such a development is in accord with the increasing recognition of the policy of freedom of the seas.

In the end, the 1930 conference provided a draft text that, although not adopted as a conference instrument, would inform the 1958 conference and conventions. No agreement emerged on the width of the territorial sea, and states stuck to the inclination they had going into the conference. The United States continued its policy of a three nautical mile territorial sea.

In the intervening nearly 30 years, however, the Second World War, the initiation of a Cold War, and a decision of the International Court of Justice would further shape the law of straits. In 1934, Persia adopted a law on the breadth of the territorial sea that claimed six miles. The next year, the state changed its name to “Iran,” a cognate of the word “Aryan,” which has been suggested was done to strengthen friendly relations with Germany. Although officially a neutral nation, Iran was invaded by Allied forces in

83 Id. Replies were made by the following Governments: South Africa, Germany, Australia; Belgium, Bulgaria, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Romania, and Sweden.
84 Basis of Discussion No. 20, 2 Territorial Waters, 24 AM. J. INT’L L. SUPP. 25, 40 (Jan. 1930).
85 Observations, Basis of Discussion No. 20, Id., at 40.
87 Peacetime Passage by Warships through Territorial Straits, 50 COL. L. REV. 220, 225 (Feb. 1950).
1941 soon after the German attack on the Soviet Union. Anglo-Russian armed forces occupied Iran until after the war.

B. Corfu Channel Case and Innocent Passage

In the years following World War II, the United States and the United Kingdom ruled the seas. The Allies shared a strong interest in freedom of navigation. Both maritime powers quickly became involved in a conflict arising from usage of international straits as an element of the emerging bipolar split in global politics. In 1945, President Franklin D. Roosevelt spoke in strong support of unrestricted navigation through international waterways, including the straits through the Black Sea. Roosevelt believed the causes of the world war were linked to coastal State restrictions on the passage of goods and vessels, such as the limitation on Russian warships through the Turkish Straits. Russia was held hostage to Turkish threats to stop the flow of traffic. Roosevelt thought this condition created potential for disruption of free intercourse, and had led to war between the Baltic Sea and Black Sea over the past 200 years.

The Royal Navy had similar notions that keeping straits free to navigation served as an international public good. The United Kingdom was party to the earliest and most authoritative international court opinion on rules applicable to straits used for international navigation. The 1949 International Court of Justice (ICJ) Corfu Channel Case opinion arose out of a dispute over British naval transits through the Corfu strait in the Adriatic Sea. In the few years following World War II, the Royal Navy used the Corfu Channel to provide aid to the beleaguered Greeks, who were engaged in a struggle against a large communist insurgency. The People's Republic of Albania occupied the eastern side of the Corfu Channel. The Greek island of Corfu lies on the western side of the channel.

The Royal Navy swept the Channel clear of mines in 1944 and 1945 and declared the waterway safe. At its narrowest point, the Channel closes to only three nautical miles, and Albania and Greece claim a territorial sea out to the median line. Because of the rocky seabed of the Corfu Island side of the channel, however, ships using the route are forced to navigate within one mile of the Albanian coast as they negotiate the narrow channel off the port of Saranda in southeastern Albania. Although the Corfu Channel was a strait used for international transit, it also constituted Albanian territorial seas.

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93 Corfu Channel Case (United Kingdom of Northern Ireland and Great Britain v. Albania), Merits, Apr. 19, 1949, ICJ Rep. 1, 35.

On May 15, 1946, two Royal Navy ships transited the Corfu Channel and came under fire from Albanian shore batteries. The warships suffered no casualties. The British protested the attack, but Albania charged the warships with violation of Albanian sovereignty over the territorial sea.

On October 22, 1946, another British Navy flotilla composed of the cruisers HMS *Mauritius* and *Leander* and the destroyers HMS *Saumarez* and HMS *Volage*, proceeded through the Medri channel. The narrow passage previously had been swept for mines. The *Saumarez* struck a mine at 14:53, however, and the blast caused severe damage to the ship and produced dozens of casualties. *Volage* closed on *Saumarez* and took her into tow stern first. At 16:06 a mine exploded near the *Volage*, severing the towline. While working damage control in the forward spaces, which were damaged by the mine, *Volage* reconnected the tow to *Saumarez* and both ships proceeded stern first, arriving at Corfu Roads at 03:10 the next morning. The Royal Navy suffered 44 dead and 42 injured in the mine strikes. Determined that it would re-sweep the Channel for mines in order to make the waterway safe, and to obtain evidence of state responsibility for the mine strike, the Royal Navy launched *Operation Retail* to clear mines from the strait.

The United Kingdom also filed a case against Albania in the ICJ. Albania threw up numerous procedural maneuvers to delay the hearing, but ultimately the Court rendered a decision in 1949. The ICJ found that the laying of the minefield was the proximate cause of the explosions on October 22, 1946, and they “could not have been accomplished without the knowledge of the Albanian Government.” The Court ordered Albania to pay £844,000 in compensation to Great Britain, or the equivalent of more than £20 million in present currency. The Court ruled that ships enjoy the right of innocent passage:

> It is…generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for the coastal state to prohibit such passage through straits in time of peace.\(^95\)

The opinion, however, was not entirely supportive of the British position, and it contains *dicta* relevant to the potential U.S. warship patrols in the Strait of Hormuz today. The ICJ scolded the Royal Navy’s self-help demining operations. In order to “ensure respect for international law,” the World Court concluded that it “must declare that the [mine sweeping operation] of the British Navy constituted a violation of Albanian sovereignty.”

In analysis that could foreshadow U.S. mine countermeasure operations in the Strait of Hormuz, the *Corfu Channel* court rejected the United Kingdom’s argument that *Operation Retail* was a method of legitimate self-protection or self-help as approach toward a slippery slope in which “might makes right.”

\(^95\) *Corfu Channel Case*, at 28.
The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.96

The case is an early indication of the direction of the Court’s jurisprudence on matters of aggression and self-defense in international straits, and augurs against the ICJ viewing any future U.S. demining operations with great sympathy.

C. First and Second United Nations Conference on the Law of the Sea

The ICJ issued the Corfu Channel opinion in 1949. Seven years later, in 1956, the International Law Commission (ILC) met to prepare draft text for consideration at a universal Conference on the Law of the Sea. The First United Nations Conference on the Law of the Sea met in 1958 and produced four treaties and an Optional Protocol based on the earlier ILC work. The key agreement for purposes of straits and the territorial sea is the Convention on the Territorial Sea and the Contiguous Zone.97 The agreement entered into force for the United States on September 10, 1964. Iran has signed but not ratified the treaty.

1. Width of the Territorial Sea

As the First United Nations Conference on the Law of the Sea opened in Geneva in 1958, the greatest unresolved issue was the width of the territorial sea. The maritime powers favored a three nautical mile zone in order to facilitate commercial and naval transit. Without widespread agreement on the width of the territorial sea, however, states would have to negotiate new treaties or agreements with each coastal State that is situated astride a strait in order to travel freely. This fragmented approach raised military risk and frustrated the purpose of a single rule set throughout the oceans that would facilitate travel without interruption or delay. It was impossible for negotiations to escape the gravity of Cold War competition, and the United States’ support for a three nautical mile territorial sea was stymied by Moscow and Beijing. Reporting from the First United Nations Conference on the Law of the Sea, Arthur H. Dean, the Chairman of the U.S. Delegation, described the tactic of the Sino-Soviet bloc to expand the width of the territorial sea from three to 12 nautical miles as all “part of its sand-in-the-gearbox technique” to impede effective global governance.98

96 Corfu Channel Case, at 35.
2. Innocent Passage in Straits

The 1958 Convention finally codified the right of innocent passage in the territorial sea, although famously, the Conference was unable to agree upon the actual width of the zone to which the navigational regime of innocent passage applies. Pursuant to article 14(1), all States, “whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.” Article 14(4) provides greater fidelity to the concept of innocent passage. “Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.”\(^{99}\) The text on innocent passage has been imported verbatim into article 19(1) of UNCLOS.

The Convention also recognizes in article 16 that all states enjoy the right of innocent passage through straits used for international navigation. Under article 16(4), the right of innocent passage cannot be suspended by the coastal State: “There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.” Article 16(3), however, states that “Subject to the [forgoing rule that bars suspension of innocent passage], 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…”

The Territorial Sea Convention was adopted in Geneva on April 29, 1958. On May 28, 1958, Iran signed the treaty. Tehran’s representative to the Conference attached a reservation to his signature to the treaty that the right of innocent passage was unavailable “so far as it relates to countries having no sea coast [along the strait].”\(^{100}\)

In less than a year—on April 12, 1959—Iran amended its 1934 law and unilaterally claimed a 12 nautical mile territorial sea.\(^{101}\) The United Kingdom protested the new claim as a threat to its vital economic and strategic interests. The British diplomatic demarche of October 12, 1959, rejected unilateral extensions of the territorial sea, but the protest was brushed aside by Tehran. Even with a broader territorial sea, Iran

\(^{100}\) The full reservation is as follows:

Translation by the Secretariat: In signing the Convention on the Territorial Sea and the Contiguous Zone, I make the following reservation: Article 14. The Iranian Government maintains the objection, on the ground of excess of competence, expressed by its delegation at the twelfth plenary meeting of the Conference on the Law of the Sea on 24 April 1958, to the articles recommended by the Fifth Committee of the Conference and incorporated in part in article 14 of this Convention. The Iranian Government accordingly reserves all rights regarding the contents of this article in so far as it relates to countries having no sea coast. Id. at 8-9. Dr. A. Matine-Daftry, May 28, 1958.

\(^{101}\) Iran, Majmo ‘eh-I qavanin, Act Dated 22 Favaradin 1338 (Corresponding to Apr. 12, 1959) Amending Act Relating to the Breadth of the Territorial Sea and Contiguous Zone of Iran dated 24 Tir 1313 (Corresponding to July 19, 1934), (IRANIAN OFFICIAL GAZETTE, 1958/1959), reprinted in UN Doc. A/CONF.19/5, Feb. 10. 1960, p. 15, art. 2 and UNITED NATIONS LEGISLATIVE SERIES, UN Doc. ST/LEG/SER.B/16, NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA, 1974, at p. 18.
was not supportive of efforts to prescribe the right of innocent passage through international straits for all nations. Tehran complained that as a coastal State, its strategic and political interests were “highly important psychological factors,” that did not lend to recognition of a general right of innocent passage for warships.

It was clear by the end of the First United Nations Conference in 1958 that the regime of innocent passage was unworkable for the major maritime powers. Article 14(6) of Territorial Sea Convention requires submarines to transit in innocent passage, meaning they travel on the surface and show their flag. The conference concluded the same year that the United States launched the nuclear-powered submarine, USS *Nautilus*. Although *Nautilus* was a fast-attack boat, it was a harbinger of the shift in nuclear strategy toward the most survivable component of the nuclear triad—ballistic missile nuclear submarines.

The Convention also did not provide any rights for aircraft to overfly the territorial sea, even over straits. Coastal States enjoyed complete and exclusive sovereignty over the airspace above the territorial sea, and no special rules specified greater rights over straits used for international navigation. In sum, the definition of what constituted innocent passage was too subjective, as it appeared to depend on the purpose, destination, cargo, or activities conducted along the voyage. The imprecision opened the door for conflicts between warships, submarines, and aircraft of maritime powers and coastal States bordering straits used by them.

The Second United Nations Conference on the Law of the Sea was an abject failure. It convened in 1960, and did not even adopt a treaty instrument. A U.S. proposal came close to approval at the conference, however. The United States advocated an extension of the territorial sea to six nautical miles in an effort to stave off the 12 nautical mile zone, which by then was viewed as inevitable.

Although the extension would close off 54 straits used for international navigation to free transit, the damage to U.S. deterrent capacity was regarded as “within tolerable limits.” Iran joined a conclave of non-Western states in a proposal for a 12 nautical mile territorial sea.

The Conference failed to adopt a draft treaty, although it came very close to agreement on a compromise proposal to recognize a six nautical mile territorial sea in conjunction with a six nautical mile contiguous zone for customs enforcement, for a total area under coastal State jurisdiction of 12 nautical miles from the shoreline. Since both the 1958 and 1960 conferences were unable to fix the breadth of the territorial sea, however, the issue persisted as the greatest unsolved dilemma of oceans law.

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102 UN Doc. A/CONF.19/C.1/SR. 17, at p. 9.
106 Id., at 106.
D. Straits and Superpower Condominium

By 1960, more states situated along international straits began to challenge the right of foreign flagged warships to pass through the strait. Just two years after the 1958 Geneva conference failed to determine the width of the territorial sea, Indonesia attempted to close off straits through the archipelago to foreign warships, or at a minimum require prior notification of warship transits. The width of the territorial seas and the right of (mostly Western) warships to transit in them was caught up in the post-colonial politics. Extension of the territorial sea from three to 12 miles was, in many respects, an act of self-actualization and an opportunity for newly-independent states to strike back at a legal system that they neither crafted nor felt protected their interests. Indonesia was one of the strongest advocates for greater coastal State competence over international straits.

1. Western Powers and Straits

On February 18, 1960, Indonesia adopted into law Regulation No. 4, which abrogated its three nautical mile territorial sea claim and instituted a 12 nautical mile claim. The new law effectively enclosed the Sunda Strait inside Indonesia’s territorial sea. The strait, which is only 16 nautical miles wide at its narrowest point, included a high seas corridor for shipping traffic when the territorial sea was only three nautical miles in width. With the expansion of the width of the territorial sea, however, the high seas corridor disappeared, and with it the high seas freedom of transit enjoyed by naval forces since the era of Dutch colonization.

Indonesia began to challenge the right of foreign-flagged ships to transit through the archipelago. On August 27, 1964, for example, a British aircraft carrier task force steamed through the Sunda Strait, travelling toward Singapore. Indonesia and Malaysia were engaged in low-level hostilities at the time, as Sukarno sought to break up Malaysia and oust the British from their military bases. The conflict threatened to draw Britain, and perhaps even America, into the conflict. The British had three aircraft carriers in the Far East at the time. Indonesia threatened “retaliatory action” if the U.K. flotilla re-transited the strait on the return journey from Singapore. To avoid provocation, however, the British issued a notification to Indonesia of the return transit and the fleet conducted passage through the Lombok Strait rather than the Sunda Strait.

The political fallout and forced diversion of British warships worried U.S. admirals in Hawaii because of the precedent it would set for other strategic straits. The

109 Short-Term Prospects in the Malaysia/Indonesia, U.S. Special Intelligence Estimate, Sept. 16, 1964, SNIE 54/55-64, 26 U.S. Dep’t of State, FOREIGN RELATIONS OF THE UNITED STATES 1964-1968, INDONESIA; MALAYSIA-SINGAPORE; PHILIPPINES, Doc. No. 75, pp. 158-160. See also, Note from Robert W. Komer of the National Security Council Staff to the President’s Special Assistant for National Security Affairs (Bundy), Sept. 4, 1964, 26 U.S. Dep’t of State, FOREIGN RELATIONS OF THE UNITED STATES 1964-1968, INDONESIA; MALAYSIA-SINGAPORE; PHILIPPINES, Doc. No. 71, at 153.

110 Dep’t of Defense, Commander in Chief, U.S. Pacific Commander, Implications [of] Indonesia’s Mare Nostrum, CINCPAC MSG 102244Z OCT 64 Parts I and II, Oct. 10, 1964 (Secret; declassified).
four-star Commander-in-Chief, U.S. Pacific Command (CINCPAC) was the most active element of the Department of Defense in defense freedom of navigation in the oceans. In 1964, CINCPAC sent a secret message under the subject, “Implications [of] Indonesian Mare Nostrum,” to the Joint Chiefs of Staff, with copies to the Chief of Naval Operations and the combatant commanders throughout the world, to explain the pressing need for both diplomacy and action to preserve navigational rights through Indonesia. The diplomatic cable, which has since been declassified, provides a window into how the debates of 50 years ago still resonate today:

The United States, since its inception, has been and is firmly committed to uphold the fundamental principle of freedom of the seas, which is for the general benefit and commerce of all nations, large and small. The United States regards as a wrongful and unacceptable appropriation of the high seas any claim more than three miles of territorial waters as well as any alleged right to convert into internal or territorial waters large areas of the high seas in and around island comprising [Indonesia] which have traditionally been used as high seas by vessels of all nations.

At the [Australia-New Zealand-United States] Council meeting in Washington on July 18, 1964, the Secretary of State stated that the United States expected to move around international waters of the world as it wished.

While the stated policy has been clear and consistent, the United States has provided prior notification to Indonesia of intended transits [through the archipelago]. This advance notification on the part of the United States in essence acknowledges the existence of the Indonesian claim and is opposed to our previous effective doctrine of ignoring and strenuously opposing such claims. Indonesia, to the contrary, has taken positive action on many occasions to enforce her claim. Included [sic] were the arrest of a British ship for failure to fly British colors in claimed Indonesian waters; strafing of an Okinawan fishing boat; apprehension of two Japanese fishing boats; forcing a British Navy salvage ship to depart the area, which precluded rendering assistance to an Indian ship with several hundred passengers, which was grounded on a reef in the claimed waters.

Indonesia’s claim of its nostrum precipitated as a result of the unannounced British transit of Sunda Strait with an aircraft carrier and several destroyers. As a resultant thereof [sic] the acting director of Indonesian naval intelligence informed the U.S. naval attaché that henceforth all repeat all [sic] ships would be required to provide written notification to and secure permission from the Indonesian foreign office prior to passing through Indonesian territorial waters…. Any subsequent omission of stipulated procedures would be countered with military force.

The United States is contributing to the Indonesian position by helping to developing international custom that foreign warships must notify Indonesia before undertaking peaceful passage in her claimed territorial sea or inland
waters. If the meaningful freedom of the seas concept developed during the period of *Pax Britannica*... is to remain resolute and energetic, it follows that the actual policy of the United States as practiced today requires modification. All such invalid claims must be discredited by ignoring and opposing them on a worldwide basis. The mere fact that the U.S. acknowledges the existence of these claims, coupled with the provision of prior notification and our reluctance to freely use such illegally claimed high seas, tends to lend credence to their validity under international law.

It is essential that we reverse the tendency to habitually defer implementation [of freedom of the seas] because of the existence of other problems [in bilateral relations], which will usually be present.

If we continue to avoid transit or to notify the Government of Indonesia informally of [U.S. Navy] transits, we set the stage for a future incident disadvantageous to the United States. It is recognized that insistence upon principle may result in some adverse effects. However, such effects would, in all probability, be no worse than have recently been evidenced in Indonesia, such as anti-U.S. charges, destruction of U.S. property, disrespect towards the U.S. flag and vilification of U.S. policies. Historically, compromise of a principle has seldom accomplished its purpose. In the opinion of CINCPAC, the long-term importance of the principle of the freedom of the seas is so great that it must not be emasculated.

Inaction today will only more fully restrict the use of the high seas when needed tomorrow, not only in times of Cold War but more importantly in times of crisis and emergency. Accordingly, the [Commander in Chief, U.S. Pacific Command] recommends:

(a) the actual practice be modified to the end that the U.S. exercise its historic right to the free use of those waters of the Indonesian archipelago, and the claimed waters of all other countries, which it considered to be high seas, by the frequent and unannounced operation of its warships and aircraft therein;

(b) that the United States come out loud and clear in opposition to the mare nostrum edict of Indonesia by the execution within the time frame of the next two months, and at frequent intervals thereafter, of operations within these waters to include transits of the Sunda and/or Lombok straits with appropriate naval forces on an unannounced basis.\textsuperscript{111}

The concern and uncertainty expressed by the Chairman of the Joint Chiefs of Staff in 1967 would not be resolved for another 15 years. The concern that straits states would begin to hamper free navigation through the straits was a major inducement for the

\textsuperscript{111} Id.
United States to enter into negotiations at the Third United Nations Conference on the Law of the Sea. With the adoption of UNCLOS in 1982, however, precise and universal rules regarding transit passage through international straits were codified in a multilateral treaty—a treaty the United States still has not joined.

Ironically, it would be only with the help of its Cold War rival that the United States and the other maritime powers would fashion a workable legal regime for straits used for international navigation. The Soviet Union did not formally adopt a 12 nautical mile territorial sea until 1960, although it routinely exercised jurisdiction throughout such a zone as early as 1927. At the height of the Cold War, both the Soviet Union, leading the communist bloc, and China, which also had influence among newly independent states in the developing world, championed expansion of the territorial sea from three to 12 nautical miles in width. Moscow initially thought a larger territorial sea would disproportionately hamper deployment of Western naval forces and maritime commerce, and therefore introduced greater military risk for the West. It slowly dawned on the Soviet Union, however, that it suffered even more from closure of international straits than did its adversaries in the West.

2. The “Disappearing” Straits

The U.S. Navy’s 1959 operational law manual recognized a three nautical mile territorial sea, which meant that most of the world’s strategic straits were open to underwater transit. As states began to abandon the three nautical mile territorial sea for a 12 nautical mile territorial sea beginning in the 1960s, however, many strategic straits that were greater than six nautical miles in width, but less than 24 nautical miles in width, suddenly came under coastal State authority, including the Strait of Hormuz.

By one count, there are only 52 international straits that are less than six miles in width. Most of these passages are relatively unimportant, such as the Bali Channel or Strait of Bonifacio between Corsica and Sardinia. A handful of straits used for international navigation are less than six miles in width are not unimportant, but are of


secondary significance for the global economy or international security, and include passages such as the Strait of Messina between the “boot” of Italy and the eastern tip of Sicily to connect the Tyrrhenian Sea with the Ionian Sea, the Torres Strait between Australia and Papua New Guinea, and the Sunda Strait between Sumatra and Java that connects the Java Sea and the Indian Ocean.\textsuperscript{116} On the other hand, there are about 60 international straits that are greater in width than 24 nautical miles, and therefore free transit through them is relatively unaffected by an extension of the territorial sea from three to 12 nautical miles.\textsuperscript{117}

In comparison to the 52 quite narrow straits less than six miles in width and the 60 straits that are in excess of 24 nautical miles in width, there are some 153 straits used for international navigation that are between 6 and 24 nautical miles wide.\textsuperscript{118} The U.S. Department of State has similar numbers. The Geographer in the Bureau of Intelligence and Research issued a report in 1969 that stated that among the 140 straits regularly used by international shipping, 116 of them became territorial sea after the extension of the territorial sea to 12 nautical miles.\textsuperscript{119} These straits, which are along the periphery of the oceans where shipping lanes converge into narrow bottlenecks, include most of the world’s principal passages. The channels are essential for military mobility and global trade.

The Strait of Malacca that connects the Indian Ocean to the South China Sea, the Strait of Gibraltar that connects the Mediterranean Sea with the Atlantic Ocean, the Bering Strait that connects the Arctic Ocean to the Eastern Hemisphere, and the Strait of Hormuz, that connects the Persian Gulf with the Arabian Sea all fall into this middle category.\textsuperscript{120} The narrow ribbon of high seas not subject to the territorial belt would be erased. The Strait of Gibraltar, which is 7½ nautical miles in width at its narrowest point, and the 17 nautical mile wide Strait of Dover, would fall completely within the territorial waters of the coastal State. These legal regimes applicable in these passages were profoundly affected by the extension of the territorial sea from three nautical miles to 12 nautical miles because the preexisting high seas corridor was swallowed up by the coastal State. As the waterways fell under coastal State jurisdiction, worldwide access was cast into doubt.

3. The Soviet Union “Discovers” Straits

Although the United States needed to preserve navigational rights through straits in order to maintain worldwide security commitments, the Soviet Union realized its own position was more desperate. Once the territorial seas were extended from three to 12 nautical miles in width, the Soviet Fleet could be closed off from the high seas by the whim of its neighbors. The Soviet Navy lay in four fleet concentrations: Severomorsk-Murmansk on the Kola Peninsula in the European Arctic near the border with Finland, the Baltic Fleet at Baltiysk, the Black Sea Fleet at Sevastopol, and the Pacific Fleet at Vladivostok. The ships and submarines of each base were zone-locked by the territorial sea of its neighbors, and could be subject to suspension of innocent passage, albeit temporary.

The Black Sea Fleet had to navigate the Turkish Straits to enter the Mediterranean Sea, which in any event were tightly regulated by the Montreaux Convention and unaffected by the specific terms of UNCLOS. Once in the Mediterranean Sea, however, the ships and submarines had to transit through the Strait of Gibraltar to enter the high seas. Similarly, the Baltic Fleet had to navigate one of the three straits intersecting Denmark—the Great Belt, the Little Belt, or the Øresund—in order to enter the North Sea. The Pacific Fleet had similar trouble to gain access to the Pacific Ocean. Ships and submarines underway from Vladivostok were hemmed in by the Sea of Japan and could reach the high seas only through one of the narrow passages guarded by U.S. naval forces and their allies, including the Tsushima Strait between South Korea and Japan, the Kanmon Strait separating Kyushu and Honshu in Japan, the Tsugaru Strait between Honshu and Hokkaido, the Le Perouse Strait between Hokkaido, Japan and Sakhalin Island, Russia, and the Strait of Tartary that connects the Sea of Japan to the Sea of Okhotsk (which itself is hemmed in by the Kuril Islands that extend northeast from Hokkaido to the Kamchatka Peninsula).

Finally, the Russian Fleet lay at Murmansk, the largest city north of the Arctic Circle. Murmansk is ice-free due to the warm influence of the Gulf Stream, but in order to escape the Arctic Ocean (which, of course, was bounded by ice), vessels had to run the Greenland-Iceland-United Kingdom gauntlet of NATO aviation and naval forces. In short, the Soviet Union realized that the changes in UNCLOS would drastically constrain its ambition for global power projection, and so Moscow joined with the United States, Japan, France, and the United Kingdom, to ensure that the regime of transit passage replaced innocent passage in the new international law of the sea.

IV. The Third United Nations Conference on the Law of the Sea

Malta Ambassador Avid Pardo is credited with energizing the General Assembly to call for a Third Conference on the Law of the Sea. In 1967, Pardo proclaimed that a sea bed treaty was an essential instrument for all nations to share the “common heritage” of sea bed riches. At the 22nd Session of the General Assembly, he presented a broad vision for a North-South governance framework for sea bed mining in a moving speech that became

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121 Art. 35(c), UNCLOS.
a clarion call for developing states that wanted favorable adjustments in global governance.\textsuperscript{122}

It became quickly apparent, however, that the issue of legal rights to the wealth of the sea bed and ocean floor beyond areas of national jurisdiction presupposed establishment of agreement on the outer limit of the territorial sea. States still were split over maritime powers’ preference for a three nautical mile zone, and many developing states that wanted 12 nautical miles, or even 200 nautical miles. The issue led the Secretary-General of the United Nations to consult with member states to determine the feasibility of a third conference on the international law of the sea.\textsuperscript{123}

Any negotiation on a law of the sea would have to include more than just sea bed resources. The maritime powers feared that reopening dialogue on a comprehensive law of the sea would invite unwelcome proposals to further restrict navigation, particularly through international straits. On the other hand, resolution of the uncertainty over navigational freedoms would promote maritime strategic interests. Against this backdrop, President Richard Nixon sought to reassert some control over the direction of the agenda of a future conference through a new proposal. The United States had come to accept that it was futile to resist the drive for a 12 nautical mile territorial sea, but needed a guarantee of freedom of navigation. While in agreement on the desirability of a sea bed treaty, the president declared

\begin{quote}
It is equally important to assure unfettered and harmonious use of the oceans as an avenue of commerce and transportation, and as a source of food. For this reason the United States is currently engaged with other states in an effort to obtain a new law of the sea treaty. This treaty would establish a 12-mile limit for territorial seas and provide for free transit through international straits.\textsuperscript{124}
\end{quote}

Nixon’s compromise gained traction while the General Assembly went ahead to plan a third major conference on the law of the sea. Under the authority of the United Nations General Assembly, a Committee on the Use of the Sea and Ocean Beds beyond the Limits of International Jurisdiction for Peaceful Purposes (Seabed Committee) was formed to consider negotiation of a single, comprehensive treaty.\textsuperscript{125} Three subcommittees met between 1971 and 1973 to prepare draft articles for negotiation of a single,

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Subcommittee I focused on the international legal regime of sea beds beyond the limits of national jurisdiction. Subcommittee II had responsibility for developing a conference agenda, and it also considered, inter alia, exploring rules for territorial waters and international straits. Subcommittee III looked at marine environmental protection and marine scientific research. In Subcommittee II, the debate over straits sprang from three questions, which at first separated the developed nations and traditional maritime powers from most of the developing states: What is the legal nature of the strait? What navigational regime applies in the strait? Is the regime of navigation the same for warships as merchant vessels? The Soviet Union, while still competing with the United States on other issues, joined the maritime powers on the issue of straits.

To address governance of straits, the United States introduced Draft Articles on the Territorial Sea and International Straits as Subcommittee II convened in 1971.127 The U.S. proposal treated the three questions as indivisible. On July 30, 1971, the United States proposed that a navigational regime of high seas freedoms should apply in straits used for international navigation.128 Under this scheme, ships and aircraft of all nations would enjoy the same freedom of navigation and overflight for the purpose of transit through international straits as they did on the high seas. The United Kingdom, the Soviet Union, Australia, the Netherlands, and Norway supported the American proposal. On August 3, 1971, Ambassador Stevenson delivered a statement in Sub-Committee II of the Seabed Committee that reaffirmed the U.S. proposal on the regime of straits was indivisible from acceptance of a 12 nautical mile territorial sea.129

A. Innocent Passage in Straits

In March 1972, the Iran and Oman signed a joint communiqué that included a pledge to cooperate in the maintenance of peace and security in the region and “the free passage of ships and freedom of movement through the Hormuz Straits and adjoining seas….\textsuperscript{130} On July 17, 1972, Oman extended its territorial sea from three nautical miles to 12 nautical miles—for the first time the narrowest part of the Strait of Hormuz lay entirely in the


\textsuperscript{128} UN Doc. A/AC 138/SC.II/L.4.


territorial seas of a state bordering the strait. The Omani decree recognized the principle of innocent passage for ships and aircraft of other states transiting the Strait of Hormuz. The Omani laws mirrored Iran’s revised 1934 statute that reserved the right to prohibit foreign warships from entering certain areas of the territorial sea.

By 1975, well before adoption of the regime of transit passage through international straits, the 12 nautical miles had become the accepted standard width of the territorial sea. While the width of the territorial sea from 3 to 12 nautical miles was viewed as inevitable, however, replacement of innocent passage with transit passage came much more slowly. At the Caracas session of the Conference in the summer of 1974, the Iranian delegate stated that the concept of freedom of navigation through straits should not deny the legal nature of the territorial sea, an area normally subject only to innocent passage. Iran also submitted draft articles on August 21, 1974, that provided that only the warships and commercial vessels of nations with a coastline on the Persian Gulf are entitled to nonsuspendable innocent passage. Iran had made the same point in a reservation it filed upon signing the 1958 Territorial Sea Convention. The rationale is that the Gulf is a semi-enclosed sea, and traffic from non-resident states could be considered as not innocent and subject to suspension by the coastal State.

Iran submitted draft articles on August 21, 1974, that provided that only warships and commercial vessels of nations with a coastline on the Persian Gulf should be entitled to nonsuspendable innocent passage. The rationale was that the Gulf is a semi-enclosed sea, and requires special dispensation from the normal regime of straits. “The geographical characteristics…would have to be taken into account in determining the scope and extent of the coastal State’s jurisdiction. Enclosed or semi-enclosed seas

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131 UN Doc. ST/LEG.SER.B/18, UNITED NATIONS LEGISLATIVE SERIES 80-82 (1976), UN Sales No. 76 Vol. 2.
134 By December 1975, for example, the U.S. Department of State determined that of the 128 independent coastal States, 80 of them claimed a territorial sea of at least 12 nautical miles in width; 57 claimed exactly 12 nautical miles. LIMITS IN THE SEAS: NATIONAL CLAIMS TO MARITIME JURISDICTION (3rd rev. ed. Dec. 1975).
present...more acute problems, which could not be solved by global norms applicable to all oceans....”\textsuperscript{140} Iran styled its position as a balanced approach that took account not only of the needs of navigation but also of the need to protect coastal State and conserve its resources against pollution.\textsuperscript{141} Furthermore, Iran considered traffic through the Strait of Hormuz from non-resident states as probably not innocent and subject to suspension by the coastal State. For Iran, the requirement of a navigational regime of innocent passage for foreign warships was essential to give meaning to the idea that the oceans should be reserved for “peaceful purposes.”\textsuperscript{142}

Until the end of the Third United Nations Conference, Iran was adamant that only the regime of innocent passage applies in the Strait of Hormuz. Iran also had in mind a more restrictive version of innocent passage than what was adopted by UNCLOS. In August 1980, for example, Mr. Farivar of the Iranian delegation reiterated his country’s position that even the right of innocent passage should not be applied to foreign warships in the territorial sea, since they are by their very nature not innocent. The “only concession” made by Iran was that warships would be permitted to transit a strait used for international navigation overlapped by territorial seas if it constitutes an “obligatory route” between two parts of the high seas.”\textsuperscript{143} Even in that case, however, “the passage of warships should take place with due respect for the sovereignty of the State bordering the strait.”\textsuperscript{144} Iran also opposed inclusion of the right of overflight through straits used for international navigation, “since the air space over that portion of the territory of the coastal State was, according to international law, subject to the sovereignty of that State.”\textsuperscript{145}

On several occasions Committee Two of the conference debated whether coastal States could condition the right of innocent passage of warships. States were split into two camps. The major maritime powers included the United States, Japan, the United Kingdom, France, and the Soviet Union, and they naturally opposed broad coastal State

competence to regulate foreign warships in innocent passage. A large bloc of States actually opposed innocent passage for warships altogether. During the final week of the substantive negotiations, there still was no middle ground. During the last few days of negotiation, Gabon presented a formal amendment to article 21 of the treaty that would allow coastal States to require prior authorization or prior notification for passage of warships through the territorial sea.

The new text would add a paragraph to article 21(1), concerning laws and regulations of the coastal State relating to innocent passage. The new provision would afford coastal states “the right to require prior authorization and notification for passage through the territorial sea.” The maritime powers were dogged in their opposition. Mr. Momtaz, the delegate from Iran, stated that the coastal State had a responsibility to “preserve the legitimate interests of international navigation in its territorial sea.” This duty, however, should not “be to the detriment of the interests and security of the coastal State,” and therefore Iran supported the amendment to article 21 proposed by Gabon since it reflected Tehran’s longstanding policy to insist on prior authorization for the passage of foreign warships. By co-sponsoring the Gabon amendment on article 21 in A/CONF.62/L.117, Iran hoped to reframe the balance of security interests in straits to inure to the benefit of the coastal State:

The object was to give due weight to the security of the coastal State and to afford it the means of preventing attacks on its security or independence. Inasmuch as the territorial sea was part of the sovereign territory of the coastal State, there could hardly be objections to measures by the coastal State in the territorial sea, which were intended to protect that State’s security.

Similarly, Iran supported a proposal by Spain near the close of the conference on April 13, 1983 in A/CONF.62/L.109. Spain sought to enhance coastal State control of aircraft flying through international straits, and strengthen the coastal State’s hand in

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vessel-source pollution enforcement. Three days later, Iran stated in plenary that the right to transit through international straits “should not be allowed to jeopardize the coastal State's security.” “Passage through the straits must be innocent, in the true sense of the term. Iran would guarantee passage only to vessels that did not pose a threat to its security. It could not give an unconditional guarantee of freedom of navigation, [even through straits that] led to enclosed or semi-enclosed seas.”

Gabon withdrew the draft text in favor of another proposal, co-sponsored by Iran, that added a reference to “security” after the word “immigration” in article 21(1)(h), which provides that the coastal State may enact laws to prevent infringement of its customs, fiscal, immigration, and sanitary laws. Gabon withdrew the proposal only in response to an appeal by the President of the Conference, Ambassador Tommy T. B. Koh of Singapore. In exchange, the proponents sought and obtained a reaffirmation on the record by Ambassador Koh that their decision was “without prejudice to the rights of coastal States to adopt measures to safeguard their security interests, in accordance the articles 19 and 25 of [the] Convention.” Article 25, for example, already permits the coastal State to temporarily suspend innocent passage for reasons of security. Since those provisions already had been accepted as within the rights of the coastal State, the United States downplayed the importance of Koh’s statement. Thomas Clingan, Vice-Chairman of the U.S. delegation to the negotiations, concluded, it “cannot be said that the President’s statement does more than restate the obvious.” Accordingly, the traditional view of the maritime states that warships, like other ships, are entitled to a right of innocent passage in the territorial is still the law of the sea.

Iran has signed, but not ratified UNCLOS. At the time of signature, Iran issued a declaration that addresses the provisions of innocent passage, including the competence

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155 UN Doc. A/CONF.62/L.117, Apr. 13, 1982, reprinted in XVI OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA (Plenary Meetings, Summary Records and Verbatim Records, as well as Documents of the Conference, Resumed Eleventh Session and Final Part Eleventh Session and Conclusion), at 225. The proposal was sponsored by Algeria, Bahrain, Benin, Cape Verde, China, Cong. Democratic People’s Republic of Korea, Democratic Yemen, Djibouti, Egypt, Guinea-Bissau, Iran, Libyan Arab Jamahiriya, Malta, Morocco, Oman, Pakistan, Papua New Guinea, Philippines, Romania, Sao Tome and Principe, Sierra Leone, Somalia, Sudan, Suriname, Syria, Uruguay and Yemen: amendment to article 21. Id.
158 Id.
of the coastal State to require prior notice or permission for innocent passage in the territorial sea. Iran stated during the final session of the negotiations that articles 19 and 25, in conjunction with article 21, implicitly recognize the “rights of the coastal State to take measures to safeguard their security interests, including adoption of laws and regulations regarding, inter alia, the requirement of prior authorization for warships willing to exercise the right of innocent passage through the territorial sea.”  

Not only does Tehran claim that the right of innocent passage, rather than transit passage, applies in the Strait of Hormuz for states not party to UNCLOS, it also requires that foreign warships request and obtain prior authorization for the transit. 

B. Strait of Hormuz in the Taxonomy of Legal Regimes

The Third United Nations Conference on the Law of the Sea adopted the United Nations Convention on the Law of the Sea in 1982, and the convention entered into force in 1994. The treaty contains a variety of navigational regimes that apply to different areas of the ocean. High seas freedoms apply in areas beyond the territorial sea of coastal States, that is, not just on the high seas, but also in exclusive economic zones and above continental shelves beyond the territorial sea. Innocent passage applies in the territorial sea; nonsuspendable innocent passage applies in archipelagic waters that are not part of a designate archipelagic sea lane or a route normally used for international navigation.

The treaty contains a carefully tailored set of rules for different types of straits used for international navigation. The navigational regime of high seas freedoms applies to geographic straits. Waterways that are greater than 24 nm wide, as measured from lawfully drawn baselines, may constitute a geographic but not a juridical international strait. In such cases, a corridor or route through the high seas or EEZ in that area creates an “exception” to the regime of transit passage in that complete high seas freedoms, rather than the more limited transit passage regime, would apply.  

Pursuant to Article 36 of UNCLOS, for example, ships and aircraft transiting through or above straits used for international navigation that have a high seas or EEZ corridor suitable for navigation, such as the Taiwan Strait, enjoy high seas freedoms of navigation and overflight and other lawful uses of the seas relating to such freedoms while operating in and over the high seas corridor. In adjacent areas constituting territorial seas, however, ships and aircraft enjoy only the right of innocent passage.

Separate treaties, rather than the provisions of UNCLOS, apply to straits regulated by “long-standing international conventions in force” that specifically relate to such straits. The navigational regime of transit passage in UNCLOS does not apply to straits regulated by long-standing international conventions in force specifically relating to such straits, such as the Turkish Straits (the

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160 Id., Art. 36.  

161 Id., Art. 35(c).  

Bosporus, the Sea of Marmara, and the Dardanelles) the Danish Straits, \(^{163}\) the Åland Strait, \(^{164}\) and the Strait of Magellan, \(^{165}\) which are governed by treaties. Each strait under Article 35(c) of the Convention is *sui generis*, with the rules pertaining to the strait contained in a separate and pre-existing treaty.

Article 36 of UNCLOS provides that the right of nonsuspendable innocent passage applies in straits that have a route through the high seas or EEZ that is of similar convenience as the strait, so long as the alternative route meets the test with respect to navigational and hydrographical characteristics. The same navigational regime applies in straits that are formed by an island of the state bordering the strait and its mainland and where there exists seaward of the island a route through the high seas or EEZ of similar convenience with respect to navigational and hydrographical characteristics. \(^{166}\) The Strait of Messina, bordered by Sicily and Calabria, Italy, is the classic example of this type of strait regime. Article 38(1) of UNCLOS states that “transit passage shall not apply if there exists seaward of the island a route through the high seas or through the exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.” \(^{167}\)

International straits that are located within archipelagic waters are subject to the navigational regime of archipelagic sea lanes passage (ASLP). \(^{168}\) The definition is nearly a verbatim replica of the regime of transit passage through international straits. \(^{169}\) Finally, “dead end straits” are those passages that connect the high seas to the territorial seas of a state by means of a strait bordered by one or more states. \(^{170}\) Ships entering the state located at the *cul de sac* end of the strait

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\(^{163}\) Treaty between Great Britain, Austria, Belgium, France, Hanover, Mecklenburg-Schwerin, Oldenburg, the Netherlands, Prussia, Russia, Sweden, and Norway and the Hanse Towns, on the One Part and Denmark on the Other Part, for the Redemption of the Sound Dues, Copenhagen, Mar. 14, 1857, 116 Consolidated Treaty Series 357.

\(^{164}\) Convention on the Non-Fortification and Neutralization of the Åland Islands of October 21, 1921, 9 L.N.T.S. 211, *entered into force*, Apr. 6, 1922.

\(^{165}\) Boundary Treaty between the Argentine Republic and Chile, done at Buenos Aires on July 23, 1881, 159 Consolidated Treaty Series 45 (Agreement between Argentina and Chile to neutralize the Straits of Magellan, place no fortifications along its shores, and open the Strait to shipping of all nations). The terms of the treaty were reaffirmed in Article 10 of the 1984 Treaty of Peace and Friendship between Argentina and Chile, resolving the Beagle Channel dispute. HUGO CAMINOS, THE LEGAL REGIME OF STRAITS IN THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 131 (1987).

\(^{166}\) UNCLOS, Art. 38(1).

\(^{167}\) Id.

\(^{168}\) Id., Arts. 46-47 and 53.

\(^{169}\) The ASLP regime, unlike the regime of transit passage, does not permit passage throughout the entire strait (shoreline to shoreline). Instead, ships and aircraft may approach no closer to the land on either side of the strait than ten percent of the distance between island features. The regime applies to designated archipelagic sea lanes, and the coastal state has a duty to designate as sea lanes all routes normally used for international navigation and overflight. An archipelagic state is not required to designate archipelagic sea lanes. However, if it elects to do so, if must first seek the approval of the International Maritime Organization. If the archipelagic state does not designate all routes normally used for international navigation, then vessels and aircraft of all nations are entitled nonetheless to utilize such routes in ASLP. Id., at Art. 53(3)-(5).

\(^{170}\) Id., Art. 38(1) and 45(1)(b).
are entitled to nonsuspendable innocent passage in order to ensure that the port State is not landlocked, with a territorial sea leading nowhere.\textsuperscript{171}

While the historic rule of innocent passage was preserved in some types of straits, such as dead end straits, UNCLOS adopted the general rule of transit passage for most straits. A normal strait connects one area of the high seas or exclusive economic zone (EEZ) to another area of the high seas or EEZ, and is used for international navigation.\textsuperscript{172} The broadly permissive navigational regime is just one step removed from complete high seas freedoms; in exchange, the coastal State still exercises sovereignty over the area of the strait overlapped by territorial seas. For the maritime powers, the achievement of transit passage had an almost poetic symmetry.\textsuperscript{173} The Strait of Hormuz illustrates the “classic” strait in that it is used for international navigation “between one part of the high seas or an exclusive economic zone and another part of the high seas or exclusive economic zone.”\textsuperscript{174} Iran was unsuccessful in obtaining special status for straits connecting semi-enclosed seas to the high seas. Conventional application of UNCLOS, therefore, indicates that transit passage is the appropriate navigational regime for the Strait of Hormuz under the terms of the treaty.\textsuperscript{175}

Ships, submarines, and aircraft of all nations enjoy a right of transit passage through such straits. Transit is exercised “solely for the purpose of continuous and expeditious transit.”\textsuperscript{176} Transit passage may be conducted in the “normal mode of operation” for ships, aircraft, and submarines.\textsuperscript{177} The term “normal mode” means that submarines are entitled to transit submerged, military aircraft may overfly in combat formation and with normal equipment operation and surface ships may transit in a manner consistent with vessel security, to include formation steaming and launch and recovery of aircraft, if consistent with sound navigational practices. Navigation through the strait “shall not be impeded” by the coastal State.\textsuperscript{178}

The straits have a dual nature, which continues to recognize that they are simultaneously territorial seas of coastal States. The regime of straits does not “affect the legal status of the waters forming such straits” or deprive the states bordering the strait of their sovereignty and jurisdiction over the waters, sea bed, and airspace.\textsuperscript{179}

While conducting transit passage, ships may conduct formation steaming and launch and recover aircraft and other devices. Ships and aircraft have a duty, however, to “proceed without delay through or over the strait,” and refrain from the threat of use of force “against the sovereignty, territorial integrity, or political independence” of states

\textsuperscript{172} Art. 37, UNCLOS.
\textsuperscript{174} UNCLOS, Art. 37.
\textsuperscript{175} J. ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS 268-69 (3rd ed. 2012).
\textsuperscript{176} UNCLOS, Art. 38(2).
\textsuperscript{177} \textit{Id.}, Arts. 38 and 39.
\textsuperscript{178} \textit{Id.}, Art. 38.
\textsuperscript{179} \textit{Id.}, Art. 34(1).
bordering the strait.\textsuperscript{180} Ships also have a duty to comply with “generally accepted international regulations, procedures, and practices for safety at sea….”\textsuperscript{181} The sovereignty and jurisdiction of the strait is exercised subject to the other rules in Part III, and, importantly, “other rules of international law.”\textsuperscript{182} Unlike innocent passage through territorial seas, states bordering international straits may not suspend transit passage.\textsuperscript{183} Therefore, although the coastal State still exercises sovereignty over territorial seas overlapped by straits, the international community retains a virtually unmitigated easement that applies shoreline-to-shoreline and that permits transit under the water,\textsuperscript{184} in the air,\textsuperscript{185} and on the surface.\textsuperscript{186} Article 42 allows states bordering straits used for international navigation to adopt laws and regulations relating to transit passage with respect to safety of navigation and regulation of maritime traffic, prevention of fishing, including stowage of fishing gear, and customs, fiscal, immigration and sanitary (health quarantine) matters. Littoral state laws also may be designed to prevent, reduce, and control pollution by giving effect to international regulations regarding “discharge of oil, oily waste and other noxious substances” in the strait.\textsuperscript{187} The rule, however, does not entitle the littoral state to develop regulations affecting construction, design, equipping and manning (CDEM) of foreign-flagged ships. With the limited exception for violations that may cause or threaten to cause major damage to the marine environment of the strait, a bordering State may not enforce its laws against foreign flag vessels transiting the strait.\textsuperscript{188} Foreign ships exercising the right of transit passage shall comply with the regulations, but the rules must not discriminate in form or in fact among foreign flagged vessels.\textsuperscript{189} The U.S. position is not only is the strait subject to the regime of transit passage, but also the approaches to the strait—tertiary territorial seas at each end of the strait. Charles H. Allen, Deputy General Counsel in the Department of Defense, for example, explained that if the right of overflight or submerged transit applied only within the geographical delineation of the strait, but not to areas leading into and out of it, then normal overflight and safe submerged transit would not be possible in many cases.\textsuperscript{190} Converging ships, submarines, and aircraft at the hypothetical entrance to a strait is a risk

\textsuperscript{180} \textit{Id.}, Art. 39(1)(b).
\textsuperscript{181} \textit{Id.}, Art. 39(2)(a).
\textsuperscript{182} \textit{Id.}, Art. 34(2).
\textsuperscript{183} \textit{Id.}, Art. 44.
\textsuperscript{187} \textit{UNCLOS}, Art. 42(1)(b).
\textsuperscript{188} \textit{VIRGINIA COMMENTARY II}, para. 42.10(g), at 377. \textit{See also}, \textit{UNCLOS}, Art. 233.
\textsuperscript{189} \textit{UNCLOS}, Art. 42(2) and (4).
to safe navigation. In 1988, the U.S. Navy Judge Advocate General used the Strait of Hormuz to illustrate the principle:

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 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.

While the regime of transit passage in Part III of UNCLOS should have been the last word on the Strait of Hormuz, it is not. Iran and the United States are not parties to the Convention. For its part, the United States pledged, even before the end of the Third United Nations Conference that it opposed the treaty, but only due to Part XI on seabed mining (which itself subsequently was revised to satisfy U.S. and other developed states’ concerns in an implementing agreement in 1994). Iran never ratified the treaty, so the Iranian-American bilateral relationship in the strait is not governed by the terms of the treaty.

C. Strait of Hormuz Traffic Separation Scheme

There is, however, another source of international lawmaking that has been accepted by both parties and over an extended period of time: the International Maritime Organization (IMO). The IMO is the specialized agency of the United Nations responsible for safe and secure shipping. Both Iran and the United States are members of the organization, which is governed by consensus among its 170 member States.

Article 312 of UNCLOS contains an amendment process for States to make revisions to the treaty. An affirmative vote of half of the States’ parties is required to make changes to the treaty, however, and obtaining a majority appears to be

exceptionally difficult and beyond reach as a practical matter. Of course, Iran and the United States are not entitled to vote on changes in any case.

Because it is virtually impossible for States’ parties to adopt changes to UNCLOS through the normal procedures in article 312, however, the real amendments to the international law of the sea and further development of UNCLOS takes place at the IMO. UNCLOS itself refers to the IMO once (and numerous times makes oblique references to the “competent international organization,” which is a universal code for the IMO). The member States of the IMO regularly meet to produce treaties and other instruments that implement the broad vision and norms of UNCLOS. Ironically, the United States and Iran are members of the IMO and have been active participants in its meetings for decades. Although not party to UNCLOS, Iran and especially the United States wield influence at IMO in the development of global oceans law and policy.

The Navigation Subcommittee of IMO is responsible for considering adoption of special navigational rules in straits used for international navigation to ensure safety and environmental protection. One of the principal methods for managing maritime traffic is traffic separation schemes. States bordering straits may, with the consensus of the member States of the IMO, designate sea lanes and prescribe traffic separation schemes for navigation in the straits when such regulations are necessary to promote the safe passage of ships. Before traffic schemes can be enforced against foreign flagged ships, however, they must be referred to IMO for adoption. At the IMO, the Maritime Safety Committee, comprised of representatives from member States, endorses the proposal, after which the IMO Assembly considers it for approval.

Once designated by IMO, ships in transit passage have a duty to respect and observe approved sea lanes and traffic separation schemes. Within specific limits, states bordering straits may adopt additional laws and regulations relating to transit passage through straits. Coastal States have authority to adopt laws relating to the safety of navigation and to institute IMO-approved traffic separation schemes, although the regulations may not impose unique, excessive or unreasonable requirements on international shipping. Traffic separation schemes must reflect internationally accepted standards, although they do not diminish “present or future claims and legal views of any State” concerning UNCLOS. The United States has long recognized the validity of IMO-approved traffic separation schemes, and Iran generally has respected the rights of ships of all nations to exercise their right of transit in the traffic scheme in the Strait of Hormuz.

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195 Art. 41(1), UNCLOS.
196 Id., Art. 41(4). See also, Marion Llyod Nash, Digest of U.S. Practice in International Law 1979 at 1120-22. (Stmt. by Ambassador Elliot L. Richardson to Congressman Paul Findley (R-IL)).
197 Art. 41(7), UNCLOS.
There are two traffic separation schemes in the Strait of Hormuz, which are observed by oil tankers and warships of all nations. The approach to the Strait from the Arabian Sea includes two traffic lanes between Iran and Oman at the narrowest point. The inbound lane runs closest to Iran and the outbound lane is nearest Oman. There is a two-mile wide lane for traffic into the Strait and parallel two-mile wide lane for shipping out of the Strait, and these two lanes are separated by a two-mile wide buffer zone. The lanes are situated beyond three nautical miles from the shoreline of Iran. A second set of traffic lanes channels shipping well inside the Gulf. These lanes are partially within three nautical miles of the Iranian islands of Greater Tunb, Lesser Tunb, and Furur Island. Adherence to these traffic separation schemes by Iran and the United States validates that the two States recognize the navigational regimes in UNCLOS, despite Iran’s protestations to the contrary and regardless of whether the United States has held the treaty in abeyance.

Iran and the United States have bypassed formal participation in UNCLOS and are firmly ensconced in the business of the IMO, with delegations that regularly participate in all aspects of development of the international law of the Sea. In much the same way that developing countries leap-frog installation of ground infrastructure and land-line telephones and jump straight to cellular phone networks, Tehran and Washington have bypassed the political difficulty of joining UNCLOS as the last generation of oceans law and instead grope toward the future at the IMO. Although the rivals have reached a consensus on the rights of transit through the Strait of Hormuz through a rather circuitous route, respect for the traffic separation schemes by Iran suggests that it has, in practice, accepted the American position that the right of transit passage applies in the Strait.

V. Conclusion: The Not So Elusive Navigational Regime

From the outset, negotiators at the Third United Nations Conference on the Law of the Sea from 1973-1982 envisioned a final treaty that would be an inclusive “package deal.” States would not be entitled to pick and choose cafeteria style among the rights and duties contained in the text, but rather were compelled to accept or reject a single anthology agreement.

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203 Alan Beesley, The Negotiating Strategy of UNCLOS III: Developing and Developed Countries as Partners—A Pattern for Future Multilateral International Conferences?, 46 LAW & CONTEMP. PROBS. 183, 187-88. (Ambassador Beesley was Chairman of the Drafting Committee of UNCLOS III).
A. Nature of the “Package Deal”: *Quid pro quo*

The essence of the “package deal,” is that interlocked legal regimes carefully and fairly balance the interests of flag, port, and coastal States. Costs are apportioned and benefits assigned in a comprehensive fashion. States Parties must either accept or, in the case of the United States and Iran, reject the entire agreement. At the conference in 1979, representative of Iran Mr. Kazemi stated as much when he cautioned against upsetting the package deal by reopening negotiation on the *Informal Composite Negotiating Text (ICNT)*:204

> Admittedly, the *Informal Composite Negotiating Text* was far from satisfactory to all delegations, but nonetheless it represented a very careful balance between views that were often contradictory. Every effort should be made to maintain that precarious balance and the Conference must at all costs refrain from re-opening discussion of issues, which had already been solved in ways that were accepted to most of the parties concerned.205

The ICNT had been produced after extensive and detailed negotiations on each aspect of the treaty, and was preceded by earlier draft instruments that would be shaped into the treaty text.206

In the closing session of the Conference, Iranian delegate stated in plenary that the “package deal” was only reluctantly accepted by Tehran:

> Despite all these misgivings and difficulties we have had as regards some sections of the Convention—particularly the questions of the innocent passage of warships through the territorial sea, the participation of national liberation movements such as the Palestine Liberation Organization, the priorities and privileges provided for some industrial countries in connection with the sea-bed regime—for the sake of unanimity in the pursuit of common goals together with the Group of 77, the delegation of the Islamic Republic of Iran voted in favor of adopting the Convention.207

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207 UN Doc. A/CONF.62/SR.191, Dec. 9, 1982, para. 66 *reprinted in XVII OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA (Plenary Meetings, Summary Records and
Furthermore, the essential bargain, from the Iranian point of view was extension of the territorial sea to “only” 12 nautical miles, and corresponding creation of the EEZ, rather than extension of the territorial sea from three to 12 nautical miles, but only in exchange for the right of transit passage through straits. While some developing states certainly traded “only” a 12 nautical mile territorial in exchange for a 200 nautical mile EEZ, the center of the bargain on the expansion of the territorial sea from three to 12 nautical miles was recognition of the right of transit passage through straits used for international navigation.

Near the end of the Caracas session, for example, Chairman of the Second Committee Ambassador Aquilar of Venezuela stated that acceptance of a 12-mile territorial sea and 200-mile EEZ was the “keystone of the compromise” in the treaty, and favored by a majority of delegations. Acceptance of the formula of 12 and 200 was “dependent” on the resolution of other issues, and “especially on the issue of passage through straits used for international navigation.” Thus, the United States and many other countries, and the Chair of Committee II during the negotiations, understand that the essential bargain in the convention is acceptance by the maritime powers of a 12 nautical mile territorial sea in exchange for the right of transit passage through straits used for international navigation.

B. Contemporary Role of Customary Law

Iran maintains that the careful balance of rights and duties reflected in UNCLOS are available only as a specific condition of agreement of the package deal. Since the regime of transit passage is a quid pro quo for acceptance of other terms of the treaty, states not party to UNCLOS, such as the United States, are not entitled to exercise transit passage in the Strait of Hormuz. To permit the United States to enjoy transit passage is to indulge Washington in the very type of “cherry picking” among the provisions of UNCLOS that the package deal was designed to prevent. The regime of transit passage is reserved only for parties to UNCLOS.

Although Iran is not a party to UNCLOS, it signed the treaty upon its adoption by the Third United Nations Conference on the Law of the Sea in Montego Bay, Jamaica, on December 10, 1982. Iran clarified its position on its most important maritime equity through an “interpretive declaration on the subject of straits” made under article 310 of

Verbatim Records, as well as Documents of the Conference, Resumed Eleventh Session and Final Part
Eleventh Session and Conclusion, at 101, 105.

UN Doc. A/CONF.62/ SR.23, July 1, 1974, para. 16, 18, reprinted in I OFFICIAL RECORDS OF THE
THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA (Summary Records of Plenary Meetings of

CONFERENCE ON THE LAW OF THE SEA (Documents of the Conference, First and Second Session), at 242-
243.

CONFERENCE ON THE LAW OF THE SEA (Documents of the Conference, First and Second Session), at 242-
243.
the treaty.\textsuperscript{211} Iran stated that “[n]otwithstanding the intended character of [UNCLOS] being one of general application and of law making nature, certain of its provisions are merely product of \textit{quid pro quo}, which do not necessarily purport to codify the existing customs or established usage (practice) regarded as having an obligatory character.”\textsuperscript{212} Although article 38(1) affords all ships and aircraft the right of transit passage, it is doubtful that this phrase captures ships and aircraft of non-parties. Article 36(1) of the \textit{Vienna Convention on the Law of Treaties} requires that provision of treaty rights to third states arise only in the case in which treaty parties intended the provisions to accord those rights.\textsuperscript{213} There is no evidence that the drafters of the Third United Nations Conference contemplated according such rights to non-parties. Tehran offered article 34 of the 1969 \textit{Vienna Convention on the Law of Treaties} in support of its statement. The provision states that only parties to a treaty are entitled to benefit from the contractual rights created therein. Third parties inure no rights under a treaty, unless those are specifically set forth by the terms of the agreement.

If that is the case, then Iran advocates the regime of innocent passage applies to the United States in the Strait of Hormuz, and the regime is derived not from UNCLOS but based upon customary international law, the 1958 Convention, and the \textit{Corfu Channel Case}. Iran’s declaration made upon signature of UNCLOS in 1982 preserves the country’s prerogatives on the Strait of Hormuz, at least until such time as UNCLOS is universally accepted.

The United States protested Iran’s position on several occasions. Near the end of the Third United Nations Conference on the Law of the Sea, the United States left nothing to chance, and made a statement to drive home the point that coastal states may not condition innocent passage of warships on prior notification or consent.

Delegates also discussed the legal question of the rights and duties of States, which do not become party to the Convention adopted by the Conference. Some of these speakers alleged that such States must either accept the provisions of the Convention as a “package deal” or forgo all of the rights referred to in the Convention. This supposed election is without foundation or precedent in international law. It is a basic principle of law that parties may not, by agreement among themselves, impair the rights of third parties or their obligations to third parties. Neither the Conference nor the States indicating an intention to become parties to the Convention have been granted global legislative power. The Convention includes provisions, such as those related to the regime of innocent passage in the territorial sea, which codify existing rules of international law, which all States enjoy…. To blur the distinction between codification of customary international law and the creation of new law between parties to a convention undercuts the principle of the sovereign equality of States. The United

\textsuperscript{211} Interpretative Declaration on the Subject of Straits, Islamic Republic of Iran, Dec. 10, 1982, Recognition of Rights under the Convention (Only vis-à-vis States Parties), \textit{reprinted in LAW OF THE SEA BULL. NO. 1} (Sept. 1983) at 17.

\textsuperscript{212} Interpretative Declaration on the Subject of Straits, Islamic Republic of Iran, Dec. 10, 1982, Recognition of Rights under the Convention (Only vis-à-vis States Parties), \textit{reprinted in LAW OF THE SEA BULL. NO. 1} (Sept. 1983) at 17.

States will continue to exercise its rights and fulfill its duties in a manner consistent with international law, including those aspects of the Convention, which either codify customary international law or refine and elaborate concepts, which represent an accommodation of the interests of all States and form part of international law.\textsuperscript{214}

Indeed customary international law has recognized the unimpeded right of transit by all nations through international straits as a principal of natural law. In his landmark volume in the law of nations, Swiss diplomat Emmerich de Vattel (1714-1767) stated that:

It must be remarked with regard to the \textit{streights [sic]}, that when they serve for a communication between two seas, the navigation of which is common to all, or to many nations, he who possess the \textit{streight}, cannot refuse others passage through it, provided that passage be innocent, and attended with no danger to the state. Such a refusal, without just reason, would deprive these nations of an advantage granted them by nature; and indeed, the right of such passage is a remainder of the primitive liberty enjoyed in common.\textsuperscript{215}

Similarly, in 1894, the \textit{Institut de Droit International} met in Paris and determined straits “which serve as a passage from one free sea to another can never be closed.”\textsuperscript{216} The idea persisted after World War II. In his treatise on international straits, Erik Brüel concluded that “the right of merchant vessels to pass through international straits in time of peace is…definitely recognized as a principle of existing law.”\textsuperscript{217} At the outset of the Third United Nations Conference, John R. Stevenson, Chairman of the U.S. delegation, stated that the United States “believes we now have—and have always had—full high seas freedoms, such as freedom of navigation and overflight beyond the three-mile territorial sea. We find the existence of these rights in straits used for international navigation confirmed by their historical and continuing exercise.”\textsuperscript{218} The idea persists in American thought. Ambassador James L. Malone, Chairman of the U.S. delegation to the Third United Nations Conference on the Law of the Sea, speaking at a conference at Duke University in 1982 stated that

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\item \textsuperscript{215} \textit{EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS: A WORK TENDING TO DISPLAY THE TRUE INTEREST OF POWERS § 290, at 192 (Northampton, (Mass.): T.M. Pomroy for S. & E. Butler, 1805).}
\item \textsuperscript{216} \textit{INSTITUT DE DROIT INTERNATIONAL, ANNUAIRE XIII 330-331 (1894-95), \textit{cited in John Bassett Moore, I A DIGEST OF INTERNATIONAL LAW} 699 (Government Printing Office, 1906).}
\item \textsuperscript{217} Erik Brüel, \textit{1 INTERNATIONAL STRAITS: THE GENERAL LEGAL POSITION OF INTERNATIONAL STRAITS} 216 (1947).
\end{itemize}
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Particularly with respect to navigation rights, the history of the law of the sea has been predominately a history of customary rules evolving through state practice. In this area the [Law of the Sea] Convention incorporates existing law, which will continue to apply to all states, not because of the treaty, but because of the customary law underlying the treaty. This is a fundamental, immutable, and time-honored principle of international law.219

Although the United States has not signed UNCLOS,220 the Senate Foreign Relations Committee prepared a report on the treaty in 2007. The report contains U.S. understandings related to transit passage:

(A) all ships and aircraft, including warships and military aircraft, regardless of, for example, cargo, armament, means of propulsion, flag, origin, destination, or purpose, are entitled to transit passage and archipelagic sea lanes passage in their “normal mode”

(B) “normal mode” includes, *inter alia*
   (i) submerged transit of submarines;
   (ii) overflight by military aircraft, including in military formation;
   (iii) activities necessary for the security of surface warships, such as formation steaming and other force protection measures;
   (iv) underway replenishment; and
   (v) the launching and recovery of aircraft;221

As a non-party, however, the regime of transit passage is unavailable to the United States as a right of treaty law. Is the United States correct in its claim that transit passage has entered into customary law? Certainly, the centuries of experience with peacetime deployment of warships attest that their movement through straits is “quite common, generally unnoticed, and usually without attendant controversy.”222 Indeed, states have used narrow passageways on innumerable occasions, so the idea of their closure as a matter of law is relatively new.

Although freedom of navigation was exercised in straits used for international navigation, it was done within the framework of the three nautical mile territorial sea. Transit passage, however, is both a greater and a lesser right than what existed for maritime powers in centuries past. It is a greater right because it dispenses with the

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obstacle of coastal State maritime boundaries to transit the strait. Under transit passage, ships, aircraft, and submarines are no longer bound by the limitation of avoiding a coastal State’s territorial sea, and may move through the strait on any track shoreline-to-shoreline.

The regime of transit passage is also a lesser right, however, because traditional transit exercised high seas freedoms, albeit beyond the territorial sea. Beyond three nautical miles, states were entitled to exercise the full range of high seas freedoms in international straits. Unlike transit passage, high seas freedoms allow essentially unfettered operations. Submarines may travel submerged and aircraft enjoy complete freedom of overflight. There is no requirement that the exercise of high seas freedoms be conducted in a manner that is “continuous and expeditious,” as is the case with transit passage. Similarly, whereas patrols and survey activity is precluded while in transit passage, these activities, and many more, are part of high seas freedoms and other internationally lawful uses of the sea.

We may say at least that non-parties to UNCLOS are recognized as having under positive law the right of nonsuspendable innocent passage through straits used for international navigation. Furthermore, under article 15(5) of the 1958 Convention, submarines in innocent passage must travel on the surface and show their flag. The rule of innocent passage through straits is reflected in article 16(4) of the 1958 Convention. Iran argues that the regime of innocent passage applies in international straits, and that position cannot be dismissed out of hand. The United States is party to the 1958 Convention, and the terms bind it as a matter of law. The only exception for adherence is if a rule more recent in time and derived from a binding treaty or binding as a matter of custom and state practice supersedes the 1958 Convention. Since the United States is not party to the 1982 Convention, it must rely on the argument that the regime of transit passage has entered into customary international law either before or after adoption of the Law of the Sea Convention, and therefore displaced earlier U.S. obligations arising from the 1958 treaty. In such case, the United States may assert, and in fact has asserted, that the regime of transit passage reflects customary international law and is binding on all states.

If Iran claims only a three nautical mile territorial sea, then it seems reasonable that it could expect other states to honor the corresponding regime of innocent passage through the territorial sea. Iran also must expect, however, that states will exercise the full panoply of high seas freedoms and other internationally lawful uses of the sea outside of three nautical miles.

On the other hand, Iran’s current claim of a 12 nautical mile territorial sea suggests that other nations are entitled to exercise freedom of navigation through the strait, either in transit passage or the historic antecedent of high seas freedoms, which is even more permissive. Instead, Iran has sought to preserve the navigational regime of innocent passage through the strait, while at the same time incorporating the contemporary 12 nautical mile territorial sea. Clearly, this result was rejected by the Third United Nations Conference on the Law of the Sea as an effort to break up the bargain of the package deal with cafeteria-style selection and rejection of legal provisions, and this practice has no basis in treaty or customary law.

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Some scholars suggest the regime of transit passage has entered into customary international law not as a general right, perhaps, but at least for some particularly important straits.\footnote{R. R. CHURCHILL & A.V. LOWE, LAW OF THE SEA 113 (3rd ed. 1999) (customary law akin to transit passage exists in straits such as Dover and Gibraltar) and Said Mahmoudi, \textit{Customary International Law and Transit Passage}, 20 OCEAN DEV. & INT’L L. 157 (1989) (customary right of transit through Strait of Hormuz).} The crystallization into customary law of rights akin to transit passage, however, is inseparable from the general right of a 12 nautical mile territorial sea. To put it another way, the coastal States that claim a 12 mile territorial sea as a feature of customary law would be hard pressed to reject the corresponding right of transit passage (or even a continuation of high seas freedoms) in their straits used for international navigation.

Most of the shipping lanes through the Strait of Hormuz lie well beyond three nautical miles from the Iranian shoreline (and even beyond Iran’s excessive straight baselines in the strait). The shipping channels do pass within a few nautical miles of Iranian islands beyond the immediate mouth of the strait and inside the Persian Gulf, however.

Iran and the United States have not been particularly helpful in selection of international laws that would resolve the dilemma. The United States is party to the 1958 Convention; Iran has signed the treaty, but is not a party. Iran has also signed the 1982 Convention, but is also not a party to it; neither is the United States, which has not signed the treaty, although President Clinton did sign the 1994 Implementing Agreement on Part XI. Thus, the two competitors are not in a treaty relationship formed by a general international law of the sea.

The two states are also at an impasse concerning the role of customary international law in resolving their dispute. While the United States recognizes that coastal State territorial seas may extend to 12 nautical miles from shore, it also insists upon the right of transit passage through straits overlapped by those very territorial seas. Iran has claimed a 12 nautical mile territorial sea, but at the same time has unfairly stuck with the less generous regime of innocent passage through the Strait of Hormuz.