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Transit Passage Regime Controversy Revisited:
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Transit Passage Regime Controversy Revisited:
An Appraisal and Analysis
on the Legal Ambiguities and Recent Trends*

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I. Introduction

It has already been almost a decade since the 1982 LOS Convention adopted. The controversy on the legal regime of transit passage through straits used for international navigation seems to have been worn out. Without any due scrutiny, this transit passage regime seems to have been passed as having created some new rights of free passage, including submerged passage, through, over and under the territorial sea of the state bordering the straits.

The argument that, except for Part XI of the deep-sea mining provisions, the Convention codifies customary law or reflects existing international practice, was asserted by some members of U.S. delegation right after the adoption of the Convention¹. They even affirmed that those important navigation and over-flight rights of transit passage through straits were universally recognized under customary international law and the U.S. is entitled to such rights no matter whether the U.S. is opposing the whole Convention and is not a party to it². Such pick-and-choose attitude of the U.S. has been bitterly criticized by most nations³.

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During the meantime, by the fact that many over-flights by the U.S. military aircraft over the important straits of the coastal states which have friendly political and military relations with the U.S., have taken place without any overt permission or protest from them, some ocean policy experts from the U.S. are now asserting that the transit passage through, over and under international straits has become a rule of international law, without any doubt. However, this U.S. view still does not seem to have been shared by all nations.

In our contemporary international community, ensuring an unimpeded right of navigation and over-flight through those choke-pointed channels is vital not only to some western naval powers, but also to average industrialized countries. Any arbitrary restriction on straits transit would probably have serious negative effects on developed and developing countries alike. By the same token, any lawlessness in the adjacent territorial area of the straits resulting from the denial of coastal states’ control would probably mean a serious disaster not only for the ships and aircraft in transit in those dense congestion, but also for the littoral administration in population control and protecting national property and resources.

When some critical defects of legal ambiguity in straits passage provisions of the LOS Convention encourage both such arbitrariness and lawlessness, any future straits passage dispute could not be settled peacefully. This study attempted to analyze and to find some workable, reasonable norm for straits communications.

II. Two legal approaches for straits passage regime.

When we devise a legal regime to govern the use of media for international communications, there are a few basic considerations we should keep in mind. The legal arrangements have to be designed so as (1) to ensure the safety and efficiency of communications, (2) to accommodate the different uses of areas that serve as communication media, (3) to protect the diverse interests, and (4) to distribute the costs of using the space fairly and reasonably among those states and interests involved. Particularly, the ocean has several other uses, like fishing, mining minerals, or dumping the waste and etc., even while serving as international communication media. So the legal regime for maritime communications must reconcile with these other competing uses.

To do this, some one has to control and regulate the international communications. But the very authority to control and regulate, might turn out to be the power to deny all or certain states access to the communications. That is because, in any given space used for movement of vehicles and transmissions in international communications, the fundamental question is whether control should be exercised by the individual state which is responsible for the particular vehicle and transmission, or by the state that has the responsibility and authority over the said space. Here we have

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two typical legal approaches in allocating the authority to control and regulate international communications: a common-use approach and a national approach. In a common-use approach, primary authority to control communications in a given area is vested in the international community with each state responsible for its own vehicles or transmissions using the media. In a national approach, primary authority to control communications is allocated to the individual state whose territory encompasses the media.

These two contrasting attitudes in allocating the authority to control the international communications should be selected in such a manner as to minimize potential conflicts between the competing interests and to enhance the safety and efficiency of the international communications, taking into account characteristics of particular media, the patterns and intensity of their use. When the communication space is so vast as that the exercise of exclusive national control on an area basis is not relevant, and is so remote from ordinary populated area as that the communication activities or the effects there-from do not affect and hinder other human activities, the common-use approach can provide a reasonable legal framework for use of the communication media such as high seas and outer-space. When the communication space is relatively less extensive and busy activities for various competing uses in the area need some rigorous control and enforcement, the national approach can provide a safe and efficient system of communications even in a congested area such as territorial sea. In the legal arrangements embodied in accordance with national approach, primary control of communications is vested in the individual state on an area basis within its territory.

The authority and title to control the international communications within the territory of individual state could be so decisive and exclusive as to include the right to impose restrictions on communications and to repudiate entire use of the areas as communication media in case of emergency. Though individual states possess the power to restrict or deny the use of areas under national control for international communications, they are restrained from exercising such power by their equally strong interests in using areas under the control of other nations for their own communications. Consequently, with all those decisive and exclusive titles of individual state’s control over communications in a national approach, arbitral abuse of the authority can be practically checked. The key to the effectiveness of these arrangements is the reciprocal interests of states in the maintenance of reliable international communications. These reciprocal interests stimulate the development of legal regimes that encourage nations to share the communication media under their control and promote the adoption of uniform rules and procedures in regulating communications. So far, the legal regimes using the national approach have generally been successful in devising effective and reasonable international communication arrangements.

We can find a typical example of a successful national approach in the international air space communication arrangements prescribed in the 1944 Chicago Convention. Article 1 of the Convention emphasized that every State has complete and exclusive sovereignty over the airspace above its territory. But at the same time, every individual State undertakes to collaborate in securing the highest practicable degree of uniformity in respective rules of air to facilitate and improve air navigation.(Article 37) As a remedy for the worst assumption that any individual state's rules of air are forced to lose their conformity with international standard or procedure, such differences are supposed to be notified to the Council of ICAO with in 60 days. Of course the Council

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7 Ibid. pp.427-28
shall make them notified immediately to all other States. (Article 38)

Only when the rapport between territorial state and the user state in connection with the reciprocal interests of communications were broken out, effectiveness of a national approach could no longer be guaranteed.

Particularly, in devising legal arrangements of communications through the straits used for international navigation, the relevance of national approach has been denied by developed seafaring states, on the ground that those developing states bordering the straits, seemed not to share with user states any reciprocal interests in the communication through straits used for international navigation. The developed seafaring states, especially the naval powers were afraid that with the newly expanded breadth of territorial sea from 3 miles to 12 miles in most important international straits, the international communications through and over the straits seemed to be denied or restricted by coastal state's arbitral control.

So they abruptly proposed new legal arrangements of straits passage which were apparently based on the common-use approach. They insisted that in international straits all ships and aircraft in transit shall enjoy the same freedom of navigation and over-flight as they have on the high seas.

But the developing states bordering the straits strongly opposed against naval power's proposal. They asserted that the straits in question are part of territorial sea and navigation through the straits should be dealt in accordance with the same rule as for the other part of territorial sea. These developing coastal states' responses were sensitive and emotional. But, the naval powers had held fast to their original notions of the freedom of navigation, refused to listen to those developing coastal states' argues.

Such an emotional rivalry did not do any good for devising a sound legal regime of passage. Of course, they had tried to seek some compromises and eventually settled with the United Kingdom's draft. As we have already known, the basic structure of present straits passage regime in part III of LOS Convention has come from this U.K. draft by the coined name of "transit passage." In our present transit passage regime, it is still unclear whether the basic stance for these legal arrangements is a common-use approach or a national approach. But finding a right approach in devising legal regime is a matter of choice between a common-use approach and a national approach, not a matter of compromise no matter how prudently it might be sought, particularly when it is the legal regime to govern the use of media for international communications.

Speaking the conclusion first, we should rather faithfully have chosen a national approach to the legal arrangements of straits passage and a common-use approach to those of EEZ navigation. The fear of that most states bordering the straits would not share with user states any reciprocal interests in international

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8 Draft Article on the Breadth of Territorial Sea, Straits, and Fisheries Submitted to Subcommittee II by U.S.A.
*Draft Articles on Straits used for International Navigation Submitted by the U.S.S.R.
A/AC.138/SC. II/L.7. (July 25th 1972.)
Malaysia, Morocco, Oman and Yemen: Draft articles on navigation through the territorial sea, straits used for international navigation.
United Kingdom: Draft Articles on the Territorial Sea and Straits used for international navigation.
communications is just groundless. The close interdependency of contemporary international community does not allow any single state to survive in self-sufficiency. In principle, Morocco, Spain, Indonesia, Malaysia, Iran, and Oman have the same national interests in international communications through the straits as vital as Japan, U.S.S.R and even as U.S.A. Only the degree of urgency each state practically realizes could be different. And such a difference of realization could also be found among advanced states. Above all, in congested area of international straits such ambiguities in present provisions of transit passage regime, particularly in connection with the enforcement title, shall give some formidable defects to the LOS Convention as the norm for the judicial settlement of future straits passage disputes.

III. Legal ambiguities of the transit passage regime

1. Concept of straits used for international navigation

(1) Reminding the fact that originally in the 1958 Convention, only an innocent passage which shall not be suspended was stipulated as a regime applied to the international straits, less than 6 miles wide between the baselines of the coast, the transit passage regime provided in Part III of LOS Convention has expanded the scope of straits concept to be applied the transit passage\textsuperscript{11}.

(2) "Used for international navigation" is one of the two factors for the definition of straits in transit passage regime. But this functional factor provides only equivocal criterion for the scope of straits concept. In 1956 ILC Draft, this functional factor provided with the qualifying word of "normally" in order to conform the meaning of ICJ decision for the 1949 Corfu Channel case\textsuperscript{12}. Actually, the meaning of ICJ decision was not quite clear. But it could be concluded that the said decision took into account the number of ships passing through the strait and the number of flags represented by those ships\textsuperscript{13}, just to evaluate the utility of the strait. That qualifying word of "normally" deleted in the U.S. Proposal, doesn't seem to enhance the clearness even if it had not been deleted\textsuperscript{14}.

(3) It is provided that if the strait is formed by an island of a state bordering the strait and its mainland, transit passage shall not apply, and unsuspended innocent passage shall apply if there exists seaward of the island a high sea route of similar convenience with respect to navigational and hydrographical characteristics. (Article 38 Para. 1)

The term of "similar convenience" originated from "equally suitable" route in the U.K. Draft\textsuperscript{15} has been developed as this and added with qualifying word, "with respect to navigational and hydrographical characteristics." With all those


\textsuperscript{12} Commentary on Article 17. ILC Yearbook (1956).

\textsuperscript{13} I.C.J Reports (1949), p.29.

\textsuperscript{14} For more detailed analysis about the criteria for the condition of utility, see Kim, Young Koo, Korea and the Law of the Sea (Seoul : Asia Pub. Co. 1988), pp.6-90.

developments of provision and addition of qualifying words to the condition of "similar convenience," the ambiguity inherited still seems not to be cleared\textsuperscript{16}. Dr. Arvid Pardo suggested adding an annex to the Convention enumerating all straits which are considered as to be applied the transit passage regime of the Convention as was done with regard to highly migratory species of living resources of the sea\textsuperscript{17}.

2. The right of Transit Passage : its nature and scope

(1) A review on the meaning of "freedom of navigation"

The substance of the right of transit passage is provided in Article 38. This important article has earned the equivocal disguise during the compromising process. It reads; "Transit passage means the exercise, in accordance with this Part, of the freedom of navigation and over-flight solely for the purpose of continuous and expeditious transit of the strait...." The term of "the freedom of navigation and over-flight" makes the transit passage quite different from innocent passage. And it is further asserted that with this term, the transit passage should be deemed as something which ought to be sorted as free passage in the high seas, and quite naturally, includes the submerged passage without any explicit terms\textsuperscript{18}. This line of contention seems to have become, ever more confident\textsuperscript{19}.

But as far as the strict textual interpretation were to be maintained, the legal reasoning for the above-mentioned contention could not be sustained against the following contradiction.

As professor Reisman has aptly pointed out, transit passage defined with the term of "freedom of navigation" in Article 38 para.2 has the characteristics which are incompatible with the high sea notion of freedom of navigation\textsuperscript{20}. This term "freedom of navigation" is used in Article 58 para.1 also. But it is emphasized with the clarifying words, "referred to in Article 87." Here, we can simply admit that the right of navigation exercised by all states in EEZ is the freedom of navigation as they do on the high seas. But in Article 38 para.2, the term, "freedom of navigation" is not emphasized and is not clarified either.

If it were the intention of the treaty to guarantee the freedom of navigation just as available on the high seas in the straits used for international navigation, should it not have some more explicit clarifying words than those used in the article 58 para.1? Of course, the legal status of the waters forming the straits used for international navigation, that is the territorial sea of the coastal states shall never be affected by transit passage regime.(Article 34) Needless to say, it is far more exclusive than that of the EEZ.

We should have obviously been more prudent to introduce the high seas freedom of navigation into the territorial sea than into the EEZ. We have not been so

\textsuperscript{16} For more detailed analysis about the navigational and hydrographical characteristics as criteria to determine the similarity of the convenience, see Kim, Young Koo, \textit{op.cit.}, pp.-3-96.
\textsuperscript{19} Supra Note 4.
\textsuperscript{20} W Michael Reisman, “The Regime of Straits and National Security : An Appraisal of International Lawmaking”, \textit{74 AJIL} (1980).
prudent. We do not have had any such clarifying words in Article 38 para.2 to acknowledge the high seas freedom of navigation. And when we interpret Article 38 para.2 in good faith in accordance with the ordinary meaning to be given to the terms, and taking into account the structural consistency of the LOS Convention, this mere borrowing the high sea terminology of "freedom of navigation" does not make any sense. Consequently, the interpretation in the line of the said contention is contrary to the general rule of interpretation (Vienna Convention on the Law of Treaties, Article 31) and also contrary to the structural consistency of LOS Convention.

Further more, on the contrary, in article 38 para.2 the freedom of navigation is qualified, instead of being emphasized, with the modifying words, "in accordance with this Part". The freedom of navigation exercised in accordance with Part III, implies the right to proceed solely for the purpose of continuous and expeditious transit, under the burden of obligation to refrain from any act which is not incident to normal mode of transit, to refrain from any threat or use of force, and to comply with other relevant provisions, such as Article 41 and 42. Such a heavily circumscribed right is no longer compatible with a freedom of navigation on the high seas.

It is an outrageous jump of logic to invoke the term, "normal mode of transit" in Article 39 para.1, sub-para. (c), as an important basis for reasoning to contend the right of submerged passage. To sustain this contention of submerged passage, the said provision should have read as, “the normal mode of navigation referred to in Article 87”. Obviously, the expression of the Article 39 para.1 sub-para.(c) is far from the above reading. Article 39 simply prescribes the duties of ships and aircraft in transit rather than any implied right. Substantial intention and general structure of this provision are rather similar to Article 18 para.2 in Part II. Article 18 para.2 provides that acts of stopping and anchoring are allowed "only in so far as the same are incidental to ordinary navigation", while Article 39 para.1 provides that any acts "other than those incidental to their normal modes of continuous and expeditious transit", should be refrained. This very part of expression in Part III which conveys the prominent similarity to the regime of innocent passage, simply could not be invoked as some evidence implying the freedom of navigation as on the high seas, or any right of submerged passage.

Comparing with the tortured "normal mode" reasoning, the attempts to invoke some travaux preparatoire to vindicate the right of submerged passage seems more plausible, at least as an ostensible reasoning. During the early phase of UNCLOS III negotiation, the statements and proposals by states bordering the straits revealed apparent fears that the term, "freedom of navigation" might allow the right of submerged passage through the straits. Nevertheless, such comments, questions and proposals could not be any evidences that they understood and accept that submerged passage was to be included in the concept of transit passage.

The preparatory work, as well as the circumstances of the conclusion of a treaty could be the recourse as a supplementary means of interpretation. But they are only subsidiary means of interpretation under special circumstances. The relevance of said subsidiary means of interpretation shall be maintained only under following conditions.

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23 Article 32 of Vienna Convention on the Law of Treaties
First, it must be established that the parties attributed a special meaning to the text\(^{24}\). Second, ordinary textual interpretation leaves the meaning ambiguous or leads to a result which is manifestly absurd or unreasonable\(^{25}\). If an agreement relating to the treaty, such as attributing a special meaning to the term, "freedom of navigation," were made in connection with the conclusion of the treaty, the relevance of such agreement for the purpose of interpretation is beyond doubt. But unfortunately, any such explicit intentions of the parties to LOS Convention which share or accept an ancillary agreement or even any memorandum of understanding have never been established. There were only the facts that the U.S. and other handful naval powers continued to insist on its own understanding of an equivocal terms, and some records of comments and proposals by littoral states trying to eliminate any possible notion of the high seas characteristics from the very equivocal term, "freedom of navigation" in Art.38 para.2 of the ICNT.

Could these irritated concerns in the part of the coastal states constitute the condition of an Estoppel? Professor Burke's line of reasoning apparently seems to be driving to an affirmative evaluation for this particular question\(^{26}\). The old Anglo-Saxon principle of Estoppel operates on the assumption that one party has been induced to act in reliance on the assurances or other conduct of another party, in such a way that it would be prejudiced were the other party later to change its position\(^{27}\). Needless to say, the seafarers' contention of high seas freedom of navigation through the straits has not originally been induced to assert in reliance on coastal states' said statements or straits proposals. And substantially, there has not been any change of position in the part of coastal states. In devising the draft provisions, they tried to eliminate any possible notion of high seas characteristics from transit passage regime. After the adoption of the LOS Convention, in interpreting the treaty provision they still try to eliminate any possible notion of high seas characteristics from the equivocal term, "freedom of navigation." There were no subsequent contradictory conduct of coastal states which has worsened the relative position of the seafarers.

Most important point of all is that no explicit agreement which attributes special meaning to the equivocal term of freedom of navigation has been established. With all those subsequent interpretative declarations of the coastal states\(^{28}\), intentions of the parties of LOS Convention have been clarified as that no high seas notion can be attributed to the controversial term of freedom of navigation in Article 38.

Consequently, not a fact which can make the travaux préparatoires to be successfully invoked is found in the preparatory work of the LOS Convention\(^{29}\).

(2) Coastal states' enforcement competence

It is also contended that the condition to circumscribe the scope of right of transit passage such as, "solely for the purpose of continuous and expeditions transit ", does not necessarily impose any obligation to the ships and aircraft in transit. They said, even when duties of ships and aircraft during transit passage prescribed in Article 39 para.1 such as ① to proceed without delay, ② to refrain from any threat or use of

\(^{24}\) Article.31. para.4  of Vienna Convention on the Law of Treaties.
\(^{25}\) Article.32 of Vienna Convention on the Law of Treaties.
\(^{26}\) W. T. Burke, op.cit., p.205.
\(^{28}\) Infra note. 37, 38, 39, 40  and their respective texts.
\(^{29}\) Rudolf Burnhardt, “Interpretation in International Law,” Encyclopedia of Public International Law , p.323.
force, and ③ to refrain from any activities other than those incident to their normal modes of continuous and expeditious transit, were ever to be breached, any correlative coastal right of prescriptive and applicative competence would not necessarily be allowed 30.

One can easily enumerate the differences between innocent passage regime and transit passage regime. In transit passage regime, aircraft enjoy the right of over flight. Right of transit passage shall not be impeded. (Article 38 para.1) Coastal states’ laws and regulations shall not have the practical effect of denying, hampering or impairing the right of transit passage as defined in the Convention (Article 42 para.2). States bordering straits shall not intentionally hamper or suspend transit passage. (Article 44) And there is not any explicit provision which render the coastal states the right to take necessary steps in straits area to prevent "non-transit" passage. (article 25).

With all those differences, nevertheless, transit passage can not be changed into something very close to the freedom of navigation on the high seas. The right of transit passage is deliberately circumscribed with the duties provided in article 39, with the obligations prescribed by Article 41 and 42. And quite naturally, those duties and obligations imply correlative rights in the part of the coastal states.

But Professor John Norton Moore further contended that those correlative rights are to be pursued through diplomatic channels or third-party dispute settlement, but not unilateral action by the strait state 31. This kind of generalized assertion could not be sustained. Foreigner’s voluntary subordination of the municipal law of the state where he acts is plainly expected in generally accepted principle of international law. Any right that is to be pursued through diplomatic channels within certain state's jurisdiction, is supposed to be exercised under the local law prior to any diplomatic efforts or third party dispute settlement procedure. This is undisputed and long-standing international legal practice. Professor John Norton Moore immediately admitted the coastal state prescriptive and applicative competences in connection with article 42 32. In my view, any reasoning to deny the coastal enforcement competence in connection with article 39, 41 and 42, is tortured and does not have any relevance.

Article 42 para.5 reads as; the flag state of a ship entitled to sovereign immunity which acts in a manner contrary to the laws and regulations of the states bordering the straits shall bear international responsibility for the loss and damages which results to the states bordering the straits. This is an emphasizing provision which clarifies how the loss and damages to the coastal states shall be compensated in case of sovereign immunity. Ordinary ships which are not entitled to sovereign immunity shall be under the coastal state regulatory competence. It is a matter of course interpretation from the article 42 para .5

Article 233 is also on the same premise of this line of interpretation of the Article 42 para.5. It reads as; when a foreign civilian ship or civil aircraft has committed a violation of the laws and regulations referred to in article 42, para.1 (a) - regulations of navigational safety and of traffic separation scheme-, and (b) - regulations of pollution control-, causing or threatening major damage to the marine environment of straits, the States bordering the straits may take appropriate enforcement measures and shall respect mutatis mutandis the safe-guards. It is a natural assumption that coastal state’s appropriate enforcement measures includes physical inspection of the vessel accused, to institute proceedings, and detention of the vessel where the evidence

31 Ibid. p.107.
32 Loc. Cit.
so warrants. The emphasizing point of article 233 is, as far as pollution control enforcement is concerned, even in the straits area the safeguard should be respected.

(3) The innocent passage through straits provided in Article 16 para.4 of 1958 Convention on the Territorial Sea and Contiguous Zone, is not to be suspended. But it was no more and no less than an innocent passage. Like wise, the transit passage through straits provided in Part III of 1982 LOS Convention is unimpeded and not to be suspended. But it still is no more and no less than a transit passage.

As soon as the passage is anything but proceeding without delay, solely for the purpose of continuous and expeditious transit of the strait, it is no longer the exercise of the right of transit passage through straits and shall be subject to the coastal state's enforcement competence.

IV. Has the transit passage regime accepted as a customary rule of law?

Some U.S. ocean policy expert insisted that the transit passage through straits is a near universally accepted navigational right enshrined in customary international law, quoting the fact that U.S. military aircrafts over fly an average of one international strait, 24 miles wide or less, per day worldwide\(^{33}\). Nevertheless, most important states bordering straits do not seem to accept this assertion as a reality of the world practice.

On the contrary, there have been a few cases of arbitrary restrictions on straits transit passage by the States bordering straits. Late September in 1988, Indonesia announced brief closure of the Sunda and Lombok Strait\(^{34}\) is temporary closure of the important international straits was committed for what it said were the Indonesian Navy's live firing exercises. With this inexplicable act, the Indonesia seemed to violate its obligation not to defeat the object and purpose of a treaty prior to its entry into force\(^{35}\) because Indonesia had already been 26th ratifying State to the 1982 LOS Convention at that time\(^{36}\), and the LOS Convention clearly prescribes that there shall be no suspension of transit passage.(Article 44)

After all the Indonesian temporary closure of the straits can not be invoked as a precedent to advocate any formulation of modifying state practices which allow the States bordering straits any right to suspend transit passage. Nevertheless, this incident has vividly demonstrated the ample possibility of arbitral interpretation of the regime of transit passage. Even among the contracting parties of LOS Convention, there has not been formulated any "universal acceptance" of the concrete norms of transit passage regime, without mentioning among the states which are not the parties to LOS Convention.

In their interpretative declarations in accordance with article 310, Oman and Yemen bordering the strait of Hormuz and Babel Mandeb respectively, emphasized that the application of the transit passage provisions does not preclude a coastal state from taking such appropriate measures as are necessary to protect its interest of peace

\(^{33}\) William L. Schachte Jr., op. cit., p. 36.
\(^{36}\) Indonesia ratified the 1982 LOS Convention on February 3rd, 1986.
and security\textsuperscript{37}. Upon signature of the LOS Convention, Spain bordering the strait of Gibraltar declared as follows\textsuperscript{38}:

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

Iran, bordering the strait of Hormuz also clarified;

The provisions pertaining to the right of transit passage are product of \textit{quid pro quo} which do not necessarily purport to codify the existing customs. And therefore it seems natural and in harmony with article 34 of the 1969 Vienna Convention on the Law of Treaties, that only states parties to the Law of the Sea Convention shall be entitled to benefit from the contractual rights created therein\textsuperscript{39}.

The most significant interpretative declarations among all, are those made by Egypt and Israel concerning passage through the Strait of Tiran and the Gulf of Aqaba. Upon ratification of the LOS Convention, Egypt declared;

The provisions of the 1979 Peace Treaty between Egypt and Israel concerning passage through the Strait of Tiran and the Gulf of Aqaba come within the framework of the general regime of waters forming straits referred to in Part III of the Convention, wherein it is stipulated that the general regime shall not affect the legal status of waters forming straits and shall include certain obligations with regard to security and the maintenance of order in the state bordering the strait.\textsuperscript{40}

With respect to the above declaration, Israel rendered to a communication Note as follows;

Moreover, being fully compatible with the United Nations Convention on the Law of the Sea, the Regime of the Peace Treaty will continue to prevail and to be applicable to the said areas.

It is the understanding of the Government of Israel that the declaration of the Arab Republic of Egypt in this regard, upon its ratification of the Convention, is consonant with the above declaration.\textsuperscript{41}

Actually, 1979 Treaty of Peace between Egypt and Israel was the first major diplomatic statement on the strait passage regime since the ICNT Draft. It was particularly instructive document, even though a bilateral agreement it might be, purporting many general norms of international strait passage regime. Without the mention about any duties on the part of passing ships and aircraft or the extent of

\textsuperscript{38} Ibid. p.25.
\textsuperscript{39} Ibid. p.25.
\textsuperscript{40} Ibid. p.35.
\textsuperscript{41} Ibid. p.46.
coastal competence and rights, this document could lead to the interpretation that the parties' intention was to subject the Gulf to a comprehensive and unqualified freedom of navigation and over-flight.

Even Professor Michael Reisman who had faithfully attempted a strict textual interpretation of the problematic provisions of the ICNT pertaining to the transit passage regime and concluded that any such alleged freedom of navigation as available on the high seas and any right of submerged passage could not possibly be construed from them, affirmed that with such a clear-cut formula, this Treaty of Peace between Egypt and Israel does not need any tortured, casuistic interpretations. He even evaluated that in the document the waterways are characterized as international and any hint of a territorial competence with regard to passage is repeatedly excluded; there is no right of transit characterizable by the coastal state, but instead only unimpeded, unsuspendable "traditional freedom of navigation".

But a careful reading of the document arrives another interpretation other than professor Reisman's welcoming evaluation. In the Peace Treaty, the parties continue to regard the Strait and the Gulf as part of the territorial sea and not as part of the high seas.

The exercise of freedom of navigation and over-flight is therefore limited by, and has to be reconciled with, the exercise of coastal competence and rights in the territorial sea. The interpretative declaration of Egypt and the Israeli note reaffirmed this.

With all those interpretative declarations and clarifying notes, it is quite clear that no *opinio juris* has been crystallized enough to admit the freedom of navigation and over-flight, including the right of submerged passage, as customary right.

Generally speaking, the legal effects of the interpretative declarations particularly provided in Article 310 might have something to be cleared. For this Article 310 as well as Article 309, has provided with the understanding that the Convention would be adopted by consensus. And the fact that the Convention was not adopted by consensus might introduce unanticipated features into this Article and its role in the future of the Convention. Notwithstanding these considerations, the proviso at the end of Article 310 distinguishes enough the interpretative declarations of Article 310 from reservations of Article 309. And the interpretative declarations are successfully clarifying the intentions of parties in the equivocal provisions of the LOS Convention.

**VI. Conclusion**

It is contemporary international practice that any *travaux preparatoire* which is not documented can not be successfully invoked. And taking into account the preparatory work of the Convention during the UNCLOS III and the circumstances of concluding phase of the negotiation does not give us any decisive evidence to recognize substantial characteristics of a common-use approach. In spite of the formidable equivocal provisions which induce some naval powers' contention that the freedom of

42 W. M. Reiseman, *op. cit.*, p.76.


navigation as on the high seas can be drawn out, the general structure of the legal arrangements can be deemed as based on a national approach.

As this study has early suggested, we should rather have been more faithful with the national approach in devising and interpreting the provisions of transit passage regime. Now, only some faithful textual interpretation of Part III of LOS Convention based on the national approach, would be able to cure the critical defects of legal ambiguity in straits passage provisions of the Convention, and eliminate any possible arbitrariness of the coastal states' and lawlessness of the user states'.

Even through territorial air space which is far more exclusive than territorial sea, the international communication is successfully maintained in the legal arrangements based on national approach. There is no reason why we could not have the rapport of reciprocal interests between user states and coastal states in present transit passage regime as provided in Part III of LOS Convention.