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CONTEMPORARY LAW OF THE SEA: TRANSPORTATION, COMMUNICATION AND FLIGHT*

William T. Burke**

I. Introduction

This paper examines contemporary international law of the sea pertaining to the movement of vessels and aircraft on, over, and under the oceans. Special attention is devoted to the Geneva Session of the Third Law of Sea Conference (LOS). After initial broad description of basic claims and fundamental policies, discussion centers upon the major categories of claim and counterclaim, the more detailed policy considerations involved, and the trends in decision respecting each category of claim, including description of major LOS proposals and the Single Text. Trends are assessed in terms of suggested policies and recommendations are offered.

A. Claims and Counterclaims

As ocean use intensifies, potential interferences with movement of vessels and aircraft become both more numerous and relate to areas more and more distant from the coast. It is not surprising, therefore, that controversies over access to near-shore areas, and especially over access to straits, are more serious in recent years, and that political disagreement flares over potential disruption of traffic in waters once considered somewhat distant from ports and from land masses generally.2

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*This article was written prior to the New York Session of the Third LOS Conference, appearing as Law of the Sea Institute Occasional Paper #28, November 1975. A sequel will appear in a forthcoming Issue of Yale Studies in World Public Order. The sequel will describe and appraise developments during 1976 concerning the issues discussed here, including those in the LOS Conference and in unilateral actions by coastal states.

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Of course the means for employing the marine environment are not static. The next 25 years will undoubtedly witness innovations and extensions of marine technology that make the present level of ocean activity seem even less intense than it actually is. The stress on International decision processes is likely to be much greater in the future than in the past or present.

2. The best evidence for the political sensitivity of con-
The pattern of controversy is composed of the claims to authority advanced by states and other entities and the counterclaims made in response. Authority claimed relates to access to the various ocean areas as well to the competence to prescribe and to apply policy to events in these areas. The areas concerned are internal waters, archipelagic waters, territorial sea, zones of resource and other limited coastal jurisdiction beyond the territorial sea, and the ocean regions beyond national jurisdiction. The following is a brief summary of these claims and counterclaims as they concern access for transport and communication.

1. Internal Waters

States claim complete authority to control access of vessels, both private and governmental, to internal waters whether such waters are ports, bays, or areas beyond bays that may be useful as a route for international transport. In recent times some states wholly composed of islands have contended that all waters between the islands are internal. With respect to such waters, controls over transit in the ocean is the record of the U.N. deliberations on the whole ocean question dating back to 1968. It may also be recalled that the continuing controversy over the Strait of Tiran is now two decades old and this volatile straits issue contributed to the 1967 Arab-Israeli conflict. Closure of the Suez Canal as a result of this war led in turn to rapid evolution of very large crude oil carriers and the arrival of these mammoth ships is responsible for a great deal of the agitation about pollution control and the effects of this regulation on navigation in the 200 mile zone. More recently the Straits of Malacca and Hormuz have occasioned disagreement about coastal controls.

3. For explanation of the term "claim" as used herein see M. McDougal and W. Burke, The Public Order of the Oceans 1, n.1 (1962) (hereinafter cited as McDougal and Burke). Some passages in this paper concerning policy with respect to particular issues draw heavily upon policy discussions in this book.

4. Access to an area is, formally, a component of a prescription but is discussed here as a separate issue because of its importance.


6. See note 10 infra.
the basic claim by coastal officials is to a discretionary authority to permit or to deny access as they may unilaterally decide. In illustration of the arbitrary nature of this authority, denial of entry is sometimes made a strategy for securing political objectives unrelated to the use of internal waters, and the grant of access is sometimes similarly aimed. Opposing claims vary according to the area involved. A denial of access by the port state to a port in that state is commonly not opposed by direct contravention of the basic competence to deny, but by counterclaim that access is provided for by agreement between the states concerned or, infrequently, that the vessel must enter because of the weather or damage to the vessel. The counterclaim for access to internal waters may be based upon an alleged right to innocent passage or to freedom of navigation, which are customarily recognized with respect to the territorial and high seas, and which allegedly ought also be available to protect travel through such parts of internal waters as have served or can serve the same purpose.

In the case of warships, the assertion of comprehensive authority to exclude frequently takes the form of establishing limiting conditions for entry. Counterclaims are the same as for private vessels, except that considerably more controversy attends the claimed right of innocent passage for military and other government vessels.

2. Archipelagic Waters

Claims to special authority over access to the waters of states composed entirely of islands are not new, but serious consideration of them is recent. In earlier appearances at the 1958 Conference and in unilateral assertion, the claim was to a complete discretion over passage through archipelagic waters, which were then considered to be internal waters by the claimants.

8. But the U.S. protest to the Soviet claim to Peter the Great Bay is an assertion of a right of access on the ground that the Bay could not properly be included as internal waters. Whiteman, supra note 7 at 256-257.
10. U.N. L.S. B/15, at 105 (Philippines); Whiteman, supra, at 284 (Indonesia).

U.S. and other responses rejecting the Philippines and Indonesia claims are in Whiteman, supra note 7, at 283-291.
Recent assertions by way of proposals in the Seabed Committee and at the LOS Conference exhibit a range in the authority claimed over access for passage. Some versions still insist on proclaiming discretionary authority over passage, another would recognize a right of innocent passage that must be honored in some part of the archipelagic area even if suspended elsewhere, and still another would recognize a special right through straits while continuing the right of innocent passage through the remainder of the archipelago.

3. Territorial Sea

Claims to control access to the territorial sea include the denial of all passage through it and the claim to exclude particular vessels for cause.11 The former is the most far-reaching claim to competence and it may take two forms. One is that of forbidding access by any vessel for passage, as by completely suspending the right of innocent passage.12 The other form is by asserting that a class or type of vehicle is not entitled to any right of passage. The latter is illustrated by the contentions that aircraft have no right of access13 and that military vessels cannot have access without notice and authorization.14

The counterclaims to the above are that the coastal state has no authority to suspend innocent passage, a contention that is pressed primarily with respect to straits. More recently this counterclaim, in response to expansion by many states of the territorial sea to 12 miles, has become an even more sweeping rejection of coastal authority by asserting that in straits the coastal state should have no authority to deny any passage whatsoever in whatever mode it may occur, whether submerged, surface or over-flight and no matter what type of vessel is involved.15 This is

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11. The categories derive from the discussion in McDougal and Burke 180-81. The documentation in the footnotes herein is additional to that in McDougal and Burke.
15. The freedom of transit claim emerged because it ap-
the free or unimpeded transit proposal.\textsuperscript{16}

Another counterclaim is simply that a warship does have a right of innocent passage and that all types of vessels have such right.

The claim to authority to exclude particular passage for cause, asserting that passage must be innocent or it can be prevented or otherwise penalized,\textsuperscript{17} is expressed in three different ways but the basic claim remains the same. In one formulation, the coastal state asserts competence to prescribe regulations for events within the territorial sea, including conditions governing passage, and to enforce those prescriptions by denial of passage or other severe sanction.\textsuperscript{18} In a second formulation the coastal state alleges infringement of certain interests by a passing vessel which justifies interference with passage by prohibiting or otherwise penalizing the passage.\textsuperscript{19} A third conception is the claim that a particular passage is "non-innocent," with innocence defined in terms of compatibility with local interests, and such passage should be excluded or other sanction imposed.\textsuperscript{20} All of these asserted justifications for interfering with passage are in fact functional equivalents in the sense that they all purport to prescribe and to enforce policies for vessels in the territorial sea and all might, in any context, refer to precisely the same events. Coastal state laws sometimes use more than one of these formulations.\textsuperscript{21}

\textsuperscript{16} See text beginning at note 130 infra.
\textsuperscript{17} Some legislation is phrased more broadly. See, e.g., Yemen, Sudan, U.N.L.S. B/16, at 27, 32; Portugal, U.N.L.S. B/15, at 176.
\textsuperscript{19} E.g., Yemen, U.N.L.S. B/16, at 27.
The major counterclaims to coastal competence to exclude for cause are principally two: the assertion is made that the conception of innocent passage is excessively general in terminology and is formulated in such a way that coastal states might choose to interpret it subjectively in assessing the innocent or prejudicial character of passage. Another contention is that the coastal competence to prescribe is also conceived too broadly and should be more specifically formulated to identify permissible regulations with which passing vessels must comply or be excluded. This aspect of coastal authority is becoming increasingly contentious as technological change results in increasingly varied and complex vessels with distinctive characteristics.

4. Ocean Areas Adjacent to the Territorial Sea

Traditionally the contiguous zone was the term for the modest area beyond the territorial sea over which coastal states asserted a limited, usually specialized jurisdiction or control over access. This term is still employed to describe certain coastal authority, but a number of other labels are also being employed including adjacent sea, patrimonial sea, resource zone, and, the most likely candidate for official recognition, the economic zone. These latter terms usually refer to more extensive authority than is associated with contiguous zones.

The claim to control access to the traditional contiguous zone sometimes has asserted competence to prohibit access, but typically access has not been affected and only minor degrees of interference have been involved. But the advent of proposals for a more extensive and broadened scope of coastal authority may change the traditional position to the detriment of vessels seeking unimpeded access to the economic zone. In addition to potential direct claims to control access of vessels to the economic zone, for movement through it, claims to prescribe for events in this area are becoming more wide-ranging, seeking to protect a greater variety of coastal interests. Accordingly, the claims to coastal authority over these adjacent (but extensive) areas now begin to resemble the coastal authority claimed and honored in the territorial sea. As will be noted below, there is a very good possibility, indeed a virtual certainty, that the community will recognize major increases in coastal authority beyond the territorial sea with an overall impact on navigation that is not clear at this time.

The predominant claim in the adjacent area is still to unimpeded movement of vessels and aircraft, based upon the doctrinal justification that the area concerned is part of the high seas within which high seas freedoms must be recognized. Recent claims and proposals, however, would change at least the doctrinal position and, by strong implication undermine the hitherto well-recognized claim to free access of vessels and aircraft to this area. Thus, as will be noted later, some nations insist that the economic zone no longer be considered part of the high seas.

5. The Oceans Beyond National Jurisdiction

The specific claims customarily made to access to the ocean as a surface beyond national territory are primarily inclusive in character and relate most importantly to transportation and communication. Each state commonly asserts a right to sail its ships upon the seas, without the leave of others, and denies any competence in other states to interfere with such use except in accord with the general community expectations crystallized in international law. The space above the surface of the water as well as the bottom of the sea are also valuable for both transport and communication, and states make demand for access to and use of these areas also. Thus every state insists upon its right to send aircraft and, more recently, space vehicles through the air and space above the seas.

The extent to which ocean floor will continue to be open to unimpeded use for transport and communication is now dependent upon provisions for accommodating such use to other forms of exploitation, especially extraction of mineral resources.

C. Basic Community Policies

The basic policies at stake are those uniquely involved in the use of the ocean as a spatial extension resource which all may share, subject to the necessary physical accommodation as well as to those policies seeking both to protect the ocean from unwise use and to preserve the overall value position of adjoining coastal states.

The primary inclusive interests (beyond the ever-present aim of preserving minimum order) are in the maintenance of the freest possible access to the ocean, its open spaces and its adjoining facilities. The maximum freedom of access for transportation and communication continues to be in the interest of all states as facilitating production and exchange of raw mater-

24. McDougal and Burke at 763-78.
als and goods, encouraging specialization, and linking together the interdependent strands of a global production and distribution system.

An equally important inclusive interest is that of maintaining a healthy marine environment for all purposes, including resource extraction, recreation, tourism, and amenities. An appropriate weighting of this interest requires only minor limitations on freedom of access in terms of assuring that necessary standards are being met by vessels and national and international regulations are being observed. Interference with movement of vessels should be kept to the minimum consistent with an effective system for environmental protection.

The common exclusive interest shared by all coastal states is to protect against deprivation that might be imposed by vessels operating within national territory or jurisdiction. Appropriate recognition of this interest may, infrequently, require that considerations of efficient transport be subordinated in order that suitable protective action may be taken by a coastal nation.

The overall task for policy is to maintain an appropriate balance between the inclusive and exclusive interests identified above. More detailed discussion of specific factors relevant to policy is deferred to later examination of specific claims to authority.

II. Particular Controversies

A. Internal Waters

1. Clarification of Policy

Internal waters claimed by states and recognized by international law are much more extensive than before 1958 and often are large sectors traversed by ships moving between origins and destinations located outside the coastal state concerned. The 1958 Convention on the Territorial Sea and Contiguous Zone, 25

25. The best source for these claims is in the series Limits in the Sea produced and issued by the Office of the Geographer, U.S. Department of State. This series includes claims by Indonesia-Singapore, Soviet Union-Turkey, Poland-Soviet Union, Indonesia-Malaysia, Cyprus-Sovereign Base Area (U.K.), Mexico-U.S., Denmark-Sweden and others.

26. 516 U.N.T.S. 205-82. The other Geneva Conventions may be found in 450 U.N.T.S. 82-167 (High Seas); 499 U.N.T.S. 311-54 (Continental Shelf); 559 U.N.T.S. 285-342 (Fishing). All four conventions are reproduced in 52 Am. J. Int'l L. 834 (1958);
building upon the 1951 decision in the Anglo-Norwegian Fisheries Case,\textsuperscript{27} authorizes nation-states to enlarge internal waters substantially in certain circumstances. Subsequently many states have adopted straight baselines in accordance with the Convention and others have also used such baselines although there is question about their conformity with the 1958 Treaty.\textsuperscript{28} Furthermore there are now insistent demands, not wholly new, by some archipelagic states that they be permitted (or, as some assert, are already authorized) to adapt straight baselines to their island groups, thus establishing, at least potentially, enormous new areas of internal waters.\textsuperscript{29}

In contrast to earlier claims for expansion of the areas subject to coastal authority the interests apparently sought to be served include not only access to living resources but also protection against potential harms from ships entering the region. It seems probable, however, that in most instances resource interests provide the motivation for expanded boundaries and that concern over transiting vessels is only exceptionally a factor.

There can surely be no doubt that the general or inclusive interest in entry and transit through the new types of internal waters is realistically intense and shared by virtually all states, coastal and otherwise. Indeed the degree of community interest is magnified in some situations by the fact that areas sought to be subject to control by a coastal state are virtually essential for transit since the cost of avoiding the area is extremely high, perhaps even prohibitive. Detouring around entire island groups or selecting elongated alternative routes sometimes is not practicable.

The immediately important questions for policy appear to be twofold: should any right of access for transit of internal waters be recognized (or continue to be recognized as provided in the 1958 Convention\textsuperscript{30} or as otherwise provided) and, if so, what should be its nature? For the reasons noted above greatest weight is here given the community interest in efficient, reliable trans-


\textsuperscript{28} Pardo, "The Common Heritage - Selected Papers on Oceans and World Order" 311-12 (1975) (I.O.I. Occasional Papers No. 3). This source is a statement delivered by Dr. Pardo on Aug. 8, 1973, introducing the Malta draft articles on national ocean space. It is reproduced also in Ocean Development and Int'l L.J. 315 (1974).

\textsuperscript{29} Pardo, supra, at 312-15, offers acidulous comment on the extensiveness of these claims.

\textsuperscript{30} See text below.
portation, and accordingly it is believed that a right of access should form part of international law binding on all states. This preference is all the more strongly advisable in light of the belief that the community and coastal states are adequately protected by an appropriate conception of the right of innocent passage. Although this venerable doctrine has well served mankind's interest in freedom of ocean navigation over many decades, it too must be reformulated; this problem is discussed further below.

2. Trend in Decisions

It is generally understood that in customary law coastal authority over internal waters extends to arbitrary control over entry of foreign vessels whether this is for entry into port or for transit. The 1958 Geneva Convention on the Territorial Sea made a partial change in that law, for the states parties thereto, for those vessels seeking only to enter internal waters in order to pass through. Article 5(2) provides that where a straight baseline system includes former territorial sea or high seas areas within internal waters "a right of innocent passage...shall exist in those waters." The new right is not, thus, available for access to all areas of internal waters but only those resulting from the employment of a straight baseline system.

3. Appraisal and Recommendation

Consideration thus far in the Third LOS Conference indicates that no change will be made in provision for a right of access if a treaty is adopted. The Main Trends Working Paper developed at Caracas simply repeats the Geneva provision and no alternative formula is included. (Although other views might exist despite this latter fact, a change does not seem likely on this point.) The Informal Text in Article 7 also continues the Geneva prescription, although it deserves mention that the Text provision on baselines enlarges the opportunity for a coastal state to use the straight baseline system and, accordingly, also

31. See McDougal and Burke at 117-20 for further discussion; see also id. at 99-117 for consideration of entry into port.
enhances the potential importance of preserving freedom of access through recognition of innocent passage in the area. As will be discussed below, the concept of innocent passage may be clarified and sharpened, as a result of the Third Conference, in ways that reduce the scope of coastal authority. Continuation and enlargement of this provision for freedom of access clearly accords with desirable policy and the apparent trend in the negotiations.

B. Archipelagoes

1. Clarification of Policy

Balancing coastal and community interests in passage through the waters of island nations must recognize the intensity of both sets of interests in this setting. Insofar as the concentration of coastal interests is concerned, the most important fact is that the political unit is composed of a group of islands (or of several groups) variously separated by expanses of water. Exchange of goods and movements of people within the state as well as to the state from the outside depends in greatest measure upon use of the ocean, and all local value processes in which exchange and personal travel play a role are to a degree affected by this dependence upon the oceans as a route for communication and transportation. In particular, exercise of authority for implementation of local policies on matters of special importance to all states, such as immigration, entry of aliens, and the flow of commodities, becomes difficult in this context. The length of coastline to safeguard against activities to circumvent local policies is very great in relation to the land mass involved and poses severe problems for local officials.

Military considerations bearing on security are more complicated because of the geographical situation. Espionage, surveillance, and infiltration of arms and armed personnel are more easily accomplished where ocean areas are so vast in relation to isolated bits of land. The coastal state in such circumstances cannot maintain a regular watch over all means of access to the numerous islands or even to all parts of a single island. Foreign naval strength may be a peculiarly potent threat to local decision processes when ocean communication is so vital to the functioning of the community and, in particular instances, so vulnerable to just such threats.

The broader community interest in transportation in these

34. Part of the following derives from McDougal and Burke 411-19.

35. The policy considerations set out here relate to a nation composed of islands. Their applicability in other circumstances has not been considered.
waters matches that of the island nation. The importance of this use is magnified because travel between and through the islands may be not only the most efficient route but also the only practicable route between certain foreign destinations. A detour around the whole of an archipelago may necessitate an enormous deviation from, and lengthening of, the normal course between foreign destinations. Where a time element is a crucial consideration the archipelago route may be the only choice. In the main these considerations apply to both air and sea transport.

These factors have different policy effects for different archipelagoes. Local appreciation of archipelagic waters for purposes of transport and communication perhaps remains more or less constant, but the extent of the general community interest depends upon the location of the archipelago relative to established routes for shipping and flying. It seems doubtful, however, that it would be feasible to fashion policies which distinguish between archipelagoes from this point of view, considering the present decentralized state of ocean governance.

The balance between exclusive and inclusive interests seems so especially fine that solutions for comparable problems in apparently similar contexts require modification to be suitable in this instance. To confer exclusive discretionary control over access of all ships and aircraft through the creation of internal waters (or of territorial sea in the case of aircraft) out of all the waters among the islands would appear to go beyond the realistic needs of the nations concerned and at the same time impose potentially severe deprivations upon international transport. The local state does not require complete freedom of decision in order to secure adequate protection against undesirable effects introduced by foreign vessels in the adjacent waters; controls can be made considerably more selective than absolute exclusion of all vessels for whatever reason appeals to local authorities. This same consideration is also pertinent to the creation of territorial sea out of the waters intervening between islands, the only difference being that the concept of innocent passage reduces the play of coastal discretion. Although, in the modified form that is now being discussed, coastal authority would be reduced by the removal of highly subjective elements, the scope of coastal control would still in some respects go beyond what is reasonably required for these nations. In particular it would be undesirable to permit the archipelagic state to embargo all movement of goods through the archipelagic waters by suspending innocent passage. Similarly it would be undesirable to exclude all overflight simply by recognizing the traditional right of innocent passage, which does not extend to aircraft.

The key elements for policy here relate to the interests involved or affected by specific vessels or categories of ves-
sels and activities. The archipelagic state must be accorded the authority to meet its unique interests while at the same time preserving the genuine community-wide interest in efficient transportation.

Vessels of particular importance to the archipelago state include warships, tankers, and small craft especially suitable for smuggling. With respect to the former a suitable balance would provide for the right of innocent passage, with this right being clarified to insulate it from overly broad coastal discretion. The community interest in reasonably free movement would be preserved by the requirements of this approach while coastal interests are protected both by innocent passage and by permitting suspension of such passage for security reasons. It might be further useful to safeguard coastal sensitivities by requiring that warships provide notice of intended passage and that submarines transit on the surface unless otherwise authorized by coastal authorities.

The problem with respect to tankers does not differ materially from that of any coastal community. Desirable policy would therefore recognize coastal competence to regulate tanker navigation through establishing approved routes of passage and regulations for such passage, to be enforced by the coastal state.

The smuggling problem appears to be a highly specialized one, involving recognition of extensive authority over smaller craft that are used for this enterprise. Such authority would include visit and search throughout archipelagic waters. This problem can be handled adequately by provision of special authority for this particular purpose.

The problem of aircraft does not seem to be a particularly pressing one for island states. The speed of aircraft, fuel considerations, the vagaries of weather, and general safety considerations all support the notion that overflight above archipelagic waters ought to be insulated in as great a degree as possible from subjacent authority or control. It is illusory to believe that exclusion of aircraft would contribute much to island security, although it might be possible and useful to place limits on access of aircraft below a certain altitude.

2. Trend in Decisions

Prior to 1958 sporadic discussion and consideration failed to develop any general consensus about the permissible scope of state authority over archipelagic waters. The 1958 LOS Confer-

ence paid but slight attention to the matter, although both Indonesia and the Philippines made and withdrew proposals, and nothing was decided. Since 1958 the unilateral claims made by these same states have not been generally accepted, but they and others have pressed their cause in the LOS context. At the present stage the question remains unresolved, but it would not be surprising if treaty provisions of some kind attracted general support, at least if the inclusive community interests in navigation receive satisfactory protection. The following comments note the differences between the major proposals as they affect navigation and consider them in relation to desirable policy.

Numerous formal proposals address the question of a special status for the waters of mid-ocean archipelagoes, most of which make express provision for access for passage. Two major proposals, each by states composed entirely of islands but with totally different perspectives, appear to pose the feasible alternatives most directly. The so-called archipelagic states proposal, advanced by Fiji, Indonesia, Mauritius and the Philippines, began in 1973 as a short declaration of principles, including one establishing a version of the right of innocent passage, evolved later in 1973 into a full-scale set of articles dealing with passage in detail and somewhat differently, and then in 1974 appeared again as a slightly revised set of articles most of which were aimed at


In essence the archipelagic states would place the waters within the archipelago ("archipelagic waters") under the sovereignty of the state, although the term "Internal waters" is not used to label them, but provide for an especially defined right of innocent passage through the archipelago.

The structure of the proposed regime for passage is as follows. Article 4 provides that ships "shall enjoy the right of innocent passage through archipelagic waters," subject to other specific provisions concerning coastal regulation and enforcement. The most noteworthy point about this is that it refers only to ships and excludes aircraft. The term "ships" is used without qualification and the detailed provisions of Article 5 clearly indicate that warships and all other categories are entitled to the right. No mention is made of the mode of passage of submarines and this matter is left, therefore, to the regulatory competence provided for in Article 5.

The principal element in the archipelagic proposal for a balance between coastal and community interests is the designation of sealanes to which passage is restricted. Such passage must be innocent and can be suspended ("when essential for the protection of its security") but the coastal state must substitute other sealanes for those through which passage has been suspended. In this conception passage is assured as a matter of right so long as it is innocent. The term "innocent passage" is not further defined, presumably the version proposed elsewhere by Fiji or by the strait states being in mind, but the articles do provide a non-exhaustive list of the subjects of coastal regu-

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42. Id., Article 5(1) refers to restricting "any types or classes" of ships to designated sealanes and Article 5(9) concerns compliance by warships with coastal laws and regulations.
43. Id. According to Article 5(4) the coastal State may take "the special characteristics of particular ships" into account when designating sealanes and prescribing traffic separation schemes. Article 5(6) spells out numerous subjects of coastal regulation including "the safety of navigation and regulation of marine traffic."
44. It may be recalled that this language, which is drawn from Article 16(3) of the 1958 Convention on the Territorial Sea and Contiguous Zone, is intended to establish that the decision is not within the sole discretion of the coastal State. For discussion see McDougal and Burke at 214-16.
45. Of course there was no need for another definition of this concept which was the subject of numerous proposals including one by Fiji. U.N. Doc. No. A/CONF.62/C.2/L.19, III Off. Rec. 196.
latory authority and require compliance therewith by all vessels in innocent passage.46

The archipelagic proposal gives such states full authority to designate sealanes and prescribe separation schemes. In doing so the state is to take into account
(a) The recommendations or technical advice of competent international organizations;
(b) Any channels customarily used for international navigation;
(c) The special characteristics of particular channels;
(d) The special characteristics of particular ships.
The sealanes are to be demarcated, indicated on charts, and given due publicity. Changes may be made, also after due publicity.

The United Kingdom proposal47 is much less detailed and differs on this point mainly by treating access to all archipelagic waters as a right of innocent passage, but with the important proviso that the provisions on straits apply "where parts of archipelagic waters have before the date of ratification of this Convention been used as routes for international navigation between one part of the high seas and another part of the high seas or the territorial sea of another state ...."48 The archipelagic state must indicate all the routes used for international navigation.

The U.K. proposal did not address the question of competence to designate sealanes and prescribe traffic separation schemes, but its straits proposal (which would apply in archipelagoes)49 indicates a wholly different view than advanced by the archipelagic states. In this latter proposal the straits state could make a proposal on these points to the Intergovernmental Maritime Consultative Organization and could act only as approved by that body.

46. Id. The subjects for archipelagic regulatory competence are the same as those proposed for the territorial sea in the Fiji proposal on that subject (C.2, L.19) with the addition of the broad category "the preservation of the peace, good order and security of the coastal State." The addition of this category may seem redundant in light of the provision in Article 4 that innocent passage is subject to the regulatory competence in Article 5. It may have been thought necessary to spell out this basis of competence because the interests mentioned are not elsewhere included in the articles.
48. Paragraph 7, Id. at 100. The U.K. proposal would establish specific criteria for qualifying as an archipelagic State. In discussion in Amerasinghe, supra note 36 at 555-556.
The Single Text produced in Geneva most closely resembles the provisions advocated by the U.K. and tends substantially in the direction of community interests in navigation and overflight. Two forms of protected passage are established, one being the normal right of innocent passage as established in other provisions of the Text and the other a new right of archipelagic passage. The former right may be suspended by the archipelagic state "if such suspension is essential for the protection of its security," while archipelagic passage shall not be suspended. It is this latter right which is most protective of community interest, and the balance it would strike in this respect is most significant.

The right of archipelagic passage for ships and aircraft is to be exercised in "sealanes and air routes suitable for the safe, continuous and expeditious passage of foreign ships and aircraft..." These passageways may be designated by the archipelagic state in accordance with prescribed standards and procedures which appear to limit the discretion of the coastal state. First, the designated lanes and routes must embrace "all normal passage routes used as routes for international navigation..."
or overflight through the archipelago, and, within such routes, as far as ships are concerned, all normal navigational channels . . . ." Within these lanes the coastal state may also prescribe traffic separation schemes. Second, before the coastal state may designate a sealane or air route or prescribe a separation scheme it must follow a set procedure which appears to give a veto on such issues to an international agency. The archipelagic state must refer proposed sealanes or separation schemes to "the competent international organization with a view to their adoption." The organization in turn is limited to consideration of these proposals for adoption. It is only after this adoption that the archipelagic state may designate the sealane or prescribe the separation scheme. If the organization does not accept the proposal, presumably the archipelagic state cannot take action.55

Since the coastal state may not act, or be able to act, to designate sealanes, it is very important to note the provision that if this state does not designate sealanes "the right of archipelagic passage may be exercised through the routes normally used for international navigation through the archipelagic waters." Accordingly, access for passage is provided irrespective of coastal authority or lack of action to designate sealanes or air routes, at least insofar as there are existing routes "normally used for international navigation."56

The right of archipelagic passage is subject to prescriptions in the treaty, in other international agreements, and in coastal laws and regulations on specified subjects. Article 125(1) prescribes that passage shall be without delay, shall refrain from impermissible coercion or other violation of the U.N. Charter, and refrain from any activity other than that incidental

55. The U.K. proposal on this point, Article 3 of Chapter III in C.2, L.3, differs in that the action of the international organization is not limited to the proposals by the State affected and it could approve other sealanes or traffic separation schemes. III Off. Rec. 186.

56. This situation could arise because the State referred no proposals to the international organization, because the latter did not approve the ones submitted, or because those approved were not promulgated. In any circumstance it does not appear that passage could lawfully be disrupted by the archipelagic State simply because of its failure to act.

If the archipelagic State designates sealanes or schemes different than those approved, ships are not obliged to respect them under these articles. That obligation is limited to sealanes and schemes "established in accordance with this article." Article 124(11).
to "normal modes of continuous and expeditious transit," with the usual exceptions of force majeure or distress.

Vessels in passage are also, according to Article 125(2), to comply with "generally accepted" international regulations for safety and pollution prevention. Civil aircraft are to observe the International Civil Aviation Organization's Rules of the Air, while state aircraft "shall normally comply with such safety measures. . . ."57

Coastal regulatory competence is specified in Article 128 with considerable care to establish limits thereon not only by specifying permissible subject matter but also in significant instances by determining the content. The coastal state may make laws and regulations regarding safety of navigation and marine traffic but only as provided in Article 124. In that provision it may designate sealanes or establish separation schemes, subject to prior approval of an international organization, and "[s]uch sealanes and traffic separation schemes shall conform to generally accepted international regulations."58 The coastal competence to prescribe extends also to "prevention of pollution" but only insofar as this gives "effect to the applicable international regulations regarding the discharge of oil, oily wastes, and other substances in the archipelagic waters . . . ." On two matters no specific limitations are placed on coastal competence and, accordingly, the archipelagic state may enact laws to prevent fishing and circumvention of customs, fiscal, immigration or sanitary regulations. It is expressly provided that these laws are to be non-discriminatory and must not in application deny, hamper or impair the right of passage.

Other than provision for making laws and regulations and the limitation just mentioned, there appears to be no article dealing expressly with enforcement. It is difficult to understand how much enforcement competence is left to the coastal state if such actions cannot "hamper" passage, since any effective direct action beyond surveillance would appear to require some interference with passage. Perhaps the prohibition against impairing or hampering passage is to be interpreted as limiting enforcement action only to that essential to make coastal pre-

57. Although this language no doubt reflects difference in substantive policy, the difference between "ships shall comply" and "aircraft shall observe" is not clear but probably it is not significant. Aircraft should also "at all times monitor the radio frequency assigned by the appropriate internationally designated air traffic control authority or the appropriate international distress radio frequency." Article 125(3)(b).

58. Article 124(8).
scriptions effective and ruling out unnecessary or excessive measures not suitably aimed at preventing proscribed conduct.

3. Appraisal and Recommendation

The Single Text provision would without much doubt secure the community interest in passage through archipelagoes. The right of archipelagic sealanes passage provided for in Articles 124-128 is virtually identical with the right of transit passage in Articles 38-41. In some major respects the provision for archipelagic sealanes passage is very close to the Fiji concept of innocent passage. In fact the main difference is not so much the substance of the definition of passage but in the vehicles entitled to a right of access. The archipelagic states proposal would exclude aircraft and require surface passage by submarines, while the Text allows submerged transit and overflight.

There is a major difference between the Text provision on coastal competence to legislate and that permitted by the archipelagic States proposal. The Text rejects the archipelagic states position on their authority to establish sealanes and traffic separation schemes, instead suggesting limitations involving international organizational approval. However, such limitations in the Text would not deprive the coastal state of protective authority, because elsewhere the Text forbids virtually anything a vessel might do except steam through the area.

One caveat about the Text concerns its provisions for enforcement, which are neither very forthright, nor, perhaps at least in one respect, very adequate. As in other parts of the Text, the competence to enforce is not directly established here but has to be inferred from the provision that foreign vessels shall comply with the laws and regulations of the archipelagic state. Such a provision is often interpreted as authorizing enforcement competence, although it can be seen that no reference is made in this provision to compliance with international regulations. Articles 125(2) and (3) require such compliance by ships and aircraft in transit, but it is not clear that they authorize coastal enforcement. However, it seems probable that the archipelagic state does have such competence as otherwise there would be none, except in the flag state.

The Text in two different provisions enjoins the coastal state from hampering archipelagic sealanes passage (Articles 126 and 128); this appears somewhat redundant. It may be difficult, in any case, to enforce local laws or any laws without 'hampering' passage.
C. Territorial Sea

1. Clarification of Policy

Stated most generally, the major policy problem is the familiar one of balancing the coastal interest in protection of all its internal value processes, including impact on both ocean and land areas, from events in and over its territorial sea, and the community interest in safe and efficient movement of vessels and goods.\(^{59}\) Recent changes in transportation technology serve to emphasize and to heighten legitimate coastal concerns over possible undesirable consequences from occurrences in its adjacent waters.\(^{60}\) At the same time the spectacular technological development in the shipping industry, coupled with increased demand for petroleum and other commodities, place even greater value on ocean transportation for individual states and for the community as a whole. Dependence upon ocean transport is a characteristic of every nation in the world.

A more specific policy question is whether the traditional doctrinal expression, freedom of innocent passage, continues to provide an acceptable compromise between the competing interests involved.\(^{61}\) As observed in another discussion of policy, "the common inclusive interest in assuring full and efficient use of the oceans is stressed in terms of freedom of passage, and the concurrent common exclusive interest in permitting protection of coastal value processes is recognized in the qualification that to be privileged passage must be innocent, i.e., not offensive.

\(^{59}\) It bears some emphasis that access to the territorial sea is important also for safety reasons. This was part of the message to Committee II in Caracas by the representative of the International Chamber of Shipping. II Off. Rec. 120, para. 22.


\(^{61}\) It is now generally agreed that states have no arbitrary competence to exclude all passage in the territorial sea and this matter is not discussed here. For some discussion see McDougal and Burke 196-216. States still continue to claim to close off areas of territorial sea without mention of justification. See U.N.L.S. B/15, at 192 (Ecuador), and 212 (U.S.S.R.).
to certain coastal interests."

Government officials of leading maritime nations have for several years expressed major reservations about the adequacy of this previous balance of interests and have urged new policies on the world community. These reservations occur in part because of the potential incorporation into the territorial sea of areas previously considered by some to be part of the high seas, in which freedom of navigation hitherto prevailed. In summary form, the complaints about previous authoritative policy are that (1) the doctrine of innocent passage permits an excessively subjective judgment by the coastal state and such subjectivity may imperil genuinely inoffensive passage; (2) the concept does not apply to aircraft; and (3) submarines must travel on the surface to qualify for the right. Accordingly new policies are urged which would permit vessels and aircraft to transit through, over, and under straits in virtually the same manner as if the area were high seas. The new policy would continue to subject vessels and aircraft in straits to some laws and regulations regarding safety of navigation and preservation of the marine environment, but their application is seemingly not envisaged as a threat to freedom of movement.

Adequate examination of policy preferences on such a complex question is most usefully undertaken by considering the detailed policy issues involved expressly or by implication. The

62. McDougal and Burke 185.
64. U.N. Doc. No. A/AC.138/SC.11/SR.37 (Statement by Mr. John R. Stevenson) 28 Jul. 1972). The U.S. proposal was for coastal enforcement of internationally agreed regulations. It is stated that "a coastal State has enforcement rights with respect to violations of its laws and regulations over ships exercising their right of free transit through the territorial sea in straits." Verbatim Statement of John R. Stevenson in Subcommittee II, July 28, 1972. But this is qualified by reference to the U.S. proposal which appears to be limited to coastal laws implementing international navigational safety standards and internationally agreed traffic separation schemes. See also note 88 infra.
following are matters to be examined:

a) the right of innocent passage for military vessels;
b) coastal authority to deny innocent passage;
c) clarification of the concept of innocent passage and the scope of coastal competence to prescribe laws and regulations for passage;
d) the question of a special right, beyond innocent passage, in straits.

(a) The right of innocent passage for military vessels

Despite opportunities decision makers have not yet adequately resolved the policy problem of access by military vessels to the territorial sea. Unclear as authoritative decisions may be, however, the interests at stake are no mystery. Despite the rhetoric so freely employed in political discussions, there is a widespread community interest in assuring and safeguarding freedom of movement for military vessels about the globe. Maintenance of naval forces is a common element of the policies of many nations and no one seriously contends that this form of mili-

65. These specific policy issues are more detailed formulations of the categories of claims discussed supra. The claim to comprehensive continuing authority to deny all passage includes the question of whether warships have a right of innocent passage and whether a coastal State may deny even innocent passage. The occasional exclusive competence to deny passage for cause includes the innocent passage issue and the scope of coastal competence to prescribe and to apply policy. The straits issue presents all three of the questions above mentioned in a specific geographical setting.


The I.L.C. itself recommended that warships could pass only on receipt of authorization if the coastal State wished to so require. Such provision is incompatible with a right of innocent passage.
military force is incompatible in any way with the United Nations Charter.67 There is, also, no doubt that military craft must have access to the territorial sea in order to use the ocean in a normal and effective way. We now have centuries of experience with the peacetime deployment of naval ships all over the globe; their movement through narrow ocean passages is quite common, and remains generally unnoticed and without attendant controversy. Although submarines are relatively new, experience does not indicate that they present special problems and, accordingly, these vehicles should also enjoy the right of innocent passage, subject to particular conditions as mentioned later.

At the same time, warships are specialized to the exercise or support of coercion and are usually perceived as meaningful symbols as well as instruments of national power.68 Warships are frequently deployed to achieve coercive effects, though it is often not intended that a single weapon be discharged or launched. The mere presence of a particular state's warships in a certain region can have coercive connotations for coastal and other flag states in the vicinity.69 Accordingly, it is wholly understandable that in particular circumstances a coastal state may perceive a genuine need for protecting itself against serious deprivations from vessels passing through its territorial sea.70 For this purpose the coastal state must have authority to consider the potentially harmful impact on its position of such passage, including the possible repercussions from third nations who feel threatened, and to take appropriate action to safeguard its interests.

The requirements of these competing interests are not met by the extreme positions currently being advocated, either denying any right of access for military vehicles or denying any

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67. See Moore, John E., Foreword, Jane's Fighting Ships 1973-74 at 73-78 for comments on navies around the world.
69. For an attempt at a comprehensive listing of naval actions and expected effects see id. at 74-79.
70. "Any instrument of military power that can be used to inflict damage upon an adversary, physically limit his freedom of action, or reveal his intentions may also affect his conduct, and that of any interested third parties, even if force is never used. The necessary (but by no means sufficient) condition is that the parties concerned perceive (correctly or otherwise) the capabilities deployed, thus allowing these capabilities to intrude on their view of the policy environment and so affect their decisions." Id. at 6.
coastal competence, short of use of force in self-defense, to protect domestic public order and security. To ensure the legitimate world community interest in freedom of movement for military craft, it is necessary to recognize that such vehicles have a right of access; to protect legitimate coastal state interests it is similarly necessary to recognize that the right is conditional upon regard for important coastal interests. In sum an appropriate balance of interests recognizes that generally military craft have a right of innocent passage in the territorial sea. To be acceptable this balance requires that the doctrine of innocent passage be reformulated to provide assurance that both flag and coastal state interests are adequately protected.

(b) Coastal authority to deny innocent passage

Assuming that all vessels are entitled at least to innocent passage through the territorial sea generally, it is asserted by some that adequate protection of coastal interests requires recognition that such passage can be denied for compelling reasons related to coastal security. The factor of most importance here in assessing desirable policy is the effect on the general community interest in reliable and efficient movement of commodities throughout the world. This factor varies greatly, depending on whether the territorial sea affected by a denial is within a strait, since this may impede all traffic between parts of the globe and gravely disrupt the economic and physical well-being of many nations. There is ample justification for concluding that "in balance against the high importance of straits for international navigation... there appears no coastal interest of sufficient gravity to merit authorizing the coastal state to deny all passage through a strait, except in time of the highest expectations of violence."71 In the latter context prescriptions relevant to periods of violence are applicable, displacing those considered part of the law of the sea.

In other areas of the territorial sea, however, this balance of interests no longer pertains. The threat of substantial disruption to traffic movement is significantly less and certain coastal interests might justify suspension of all passage. Because the effects of denial may still be serious, the interest of the coastal state should be substantial. "The state should be made to justify suspension by reference to a necessity for protecting an interest of an especially vital sort, such as military security or other interest of equivalent importance. If community authorization to suspend passage, whether innocent or

71. McDougal and Burke 189.
not, were limited to protection of interests of this level of seriousness, the potential, occasional harm to navigation would not appear to outweigh the benefit to the coastal state. 72

(c) Clarification of the concept of innocent passage and the scope of coastal competence to prescribe laws and regulations for passage

As noted earlier, coastal claims to authority over passage are expressed in three technically different but functionally equivalent ways73 and the same basic policy problem arises from each claim. That problem is to determine the balance between coastal competence to prescribe for events in the territorial sea affecting passage and the preservation of efficient use of the area. It may be useful to structure the discussion of this broad policy question explicitly in terms of the three different expressions of the basic claim. Accordingly, the detailed discussion to follow is directed at (i) the general scope of authority of the coastal state, (ii) a reformulation of the concept of innocent passage, (iii) coastal authority to regulate in the territorial sea.

(i) general scope of authority of coastal state

Coastal state concern over preservation of internal value processes continues to justify the extension of state territory, as such, into the ocean. Accordingly, it is desirable policy to provide that state sovereignty over the territorial sea is exercised subject to the provisions of international law. The most important policy problem, however, is to clarify the limitations on the exercise of sovereignty over the territorial sea.

It ought to be noted, further, that the geographical extent of state territory and of the relatively comprehensive authority called sovereignty should also continue to be modest. While it is likely that the growing intensity of activities in areas beyond a modest territorial sea will have increasingly important effects on the coastal state, it does not follow that the best way to cope with this development is to extend state territory further and further into the ocean. Limited, functional allocations of authority to coastal nations and to international agencies appear more suitable as means to deal with coastal problems. These functional allocations can be made beyond the

72. Id. at 191.
73. Illustrations of these claims are in notes 18-20 supra. See also McDougall and Burke at 226.
territorial sea as a means of extending jurisdiction for particular purposes.74

(ii) a reformulation of the concept of innocent passage

The more precise policy question is how to summarize in a rather concise doctrinal statement the scope of coastal competence to deny passage because it is not innocent, i.e., to define what is meant by innocent passage. As indicated above there are sound policy grounds for reformulating this concept.

The 1958 Convention on the Territorial Sea and Contiguous Zone defines innocent passage in Article 14 as that which is not prejudicial to the peace, good order, or security of the coastal state.75 A number of alternative means might be employed for improving on this definition in terms of making it more precise and less susceptible to the discretionary appreciation of the coastal state.

Factors particularly bearing on policy on this question include the scope of the interests sought to be protected by the coastal state, the range of events believed to threaten coastal interests, the importance of the area concerned for inclusive use,

74. It is presently not desirable policy, in the view urged here, to extend state territory into the ocean under any guise or label, including the exclusive economic zone. Some coastal States take the view that the economic zone should not be considered part of the high seas and that the only community rights recognized in the zone should be those explicitly listed in the treaty creating the zone. All authority and jurisdiction other than that explicitly withheld would be considered to be allocated to the coastal State. In substance this point of view is that the economic zone is another part of state territory and that residual authority in the zone belongs to the coastal State.

There is still serious doubt about whether or not States will act to confer meaningful authority on international institutions to cope with the regulatory problems that will be emerging as ocean uses continue to intensify beyond the territorial sea. If states continue to be reluctant to establish effective international regulation the only alternative left will be the coastal State. The former course still seems preferable, but the desirability of this policy is affected by the passage of time. The problems that need to be met cannot be left unresolved or the interests of all suffer.

75. An account of earlier consideration of this issue and different formulations is in McDougal and Burke 233-63.
the type of vessels or vehicles concerned in terms of function, and the procedure employed to protect coastal interests, including the matter of notification.

An important aspect in the formulation of a doctrinal statement of innocent passage is the expression of the interests which the coastal state may protect against prejudice. Certainly in view of the sometimes critical, indeed indispensable, nature of the territorial sea, including straits for navigation, the coastal interest must have very considerable substance. Beyond the degree of seriousness of the interest protected, however, is the way this interest is expressed. If a single formula is used, as in Article 14, or the words chosen are of high order of generality and abstraction, the range of interests to be protected will be wide and, more importantly, left to the unreviewed and, perhaps, non-reviewable, discretion of the coastal state. There is, therefore, ample justification for preferring that a prescription on innocent passage be formulated with maximum precision and certainty of reference.

An accompaniment to either high abstraction (which gives discretion to the coastal state) or great precision (hopefully limiting coastal discretion) is to provide a third-party institutional mechanism to which appeals may be made, regarding the boundaries of coastal authority to protect exclusive interests and the degree of protection available to flag state (community) interests. If such an institutional device could be created to operate with the necessary dispatch and reliability, it would then be possible to secure optimum protection of all interests concerned. However, the difficulties inherent in such a mechanism and the practical remoteness of realizing it could make this more an ideal than a real alternative in policy.

In the absence of an institutional structure, the community interest would be best served by reducing the degree of discretion permitted by the present concept of innocent passage. An initial step is to narrow the scope of coastal competence by discarding the formula of "peace, good order, and security" in straits, which is the most critically important area. Although some concept of innocent passage might continue to be applicable in straits, the concentration of inclusive interests justifies a somewhat different and narrower formulation of coastal interests that might justify interference with passage. One such interest is in military security. That this interest deserves preservation and continues to have high importance in a community lacking reliable centralized institutions to protect against unlawful force hardly needs documentation.

Another adequate justification is the interest in the regulation of navigation for safety purposes. Preferably this inter-
est would be effectively protected by prescription of international regulations, including traffic separation schemes, but to the extent that no agreement is reached, the coastal state should be authorized to impose its own traffic regulations and to enforce them by appropriate sanctions.

To assure that the coastal state actually has a timely opportunity to exercise the necessary surveillance and control to protect itself, it may be further desirable to require that some passing vessels should give adequate advance notice of their intended transit. Since it is primarily from military craft that a coastal state might have any realistic need to feel apprehension about security, the interest of most intense concern, it is appropriate to limit this requirement to such vehicles, including submarines. To the extent, if any, such a system is thought to disadvantage one or another state, it is perfectly possible that special arrangements can be made for waiver of the notice, or modification of its terms, or for special provisions to deal in particular ways with different types of vehicles. Submarines, especially, might be dealt with by such arrangements.

For areas of territorial sea other than straits a different approach is warranted, and the current general formulation could be retained in the community interest so long as another modification, noted below, is adopted. Retention of somewhat broader coastal discretion for areas outside straits appears to be in accord with community interests since these areas are not essential to international transportation and present far less potential for harmful impact on inclusive use. Accordingly, greater weight might rationally be placed upon protection of a broad category of coastal interests.

Another factor important for policy regarding innocent passage concerns the range of events the coastal state can take into account in determining whether a particular incident of passage prejudices coastal interests. It is one thing to base this judgment only on the activities of a particular ship in transit (even in light of the general context of contemporary relations between the coastal state and others) and quite another to reach conclusions derived from a much broader state of affairs such as the nature of the cargo aboard, its ports of call, destination, previous history in transit, and so forth. To permit coastal officials to take into account the latter range of factors, and to link them with prevailing political relations with or between other states, broadens coastal discretion very considerably and extends it to substantial license. Concern for the broad community interest (including the coastal interest as a flag state in other contexts) justifies establishing limits on coastal discretion by providing that the innocence, or lack there-
of passage must be determined only by specific acts occurring during passage in the territorial sea itself. The long record of experience with transit through the territorial sea establishes that coastal interests are very rarely offended by the acts of passing vessels. Such an arrangement therefore seems designed both to provide ample protection for coastal interests and to safeguard the broader community interest in movement of vessels free of consequential interference.

Accordingly, an additional component of the formulation of this policy factor would be a definitive list of activities that a coastal state could with reason consider offensive or prejudicial. The important characteristic of such a list is that the acts are unequivocal in nature, subject to external scrutiny, and, by definition, are closely related in a causal sense to detrimental impacts on coastal interests of serious consequence.

We have already noted in previous discussion of desirable policy that submersible vehicles should be accorded the right of innocent passage. The more critical question here is whether submerged passage ought to be considered compatible with coastal interests and, therefore, an exercise of innocent passage. Particular concern has been expressed by the United States over the prospect that submersibles might be required to surface during passage through straits. This particular subject has been ventilated on numerous occasions and there is no need here to add to the discussion beyond the assertion that the case has not been made for a new policy that would insulate submarines in straits from subject to the normal legal process otherwise applicable to vessels. Submerged transit means, if it is significant at all, that the coastal community has no notice or knowledge of a presence of these vessels in its territorial sea. Indeed, so far as the coastal state is aware, the submarines could be stationed within the territorial sea as well as use the area for moving between external points. There appears to be a very insubstantial basis


77. According to recent reports, U.S. submarines are employed for missions which call for stations within claimed 12 mile territorial seas but beyond three miles. The New York Times report by Seymour M. Hersh described these missions as follows: "The Holystone operation, which more recently has carried the code names Pinnacle and Bollard, involves the use of specially equipped electronic submarines to spy inside the waters of the Soviet Union and other nations. The intelligence-gathering
for concluding that the security position of the powers employing nuclear or other submarines would be materially prejudiced by requiring these craft to travel on the surface through straits or other parts of the territorial sea. There may be, on the other hand, understandable apprehension on the part of coastal communities about the use of national territory, without notice or knowledge, by foreign military craft of great strategic and tactical significance.

Another contention is that safety requires submerged transit. It seems rather late in the day to urge this seriously in view of the previously wide acceptance of a requirement for surface transit in the territorial sea, including acceptance by the major powers operating nuclear submarines. There may be substance to this point, but concern for safety can be satisfied in other ways more consonant with coastal interests than simply providing for unannounced submerged passage by large nuclear-powered vessels carrying nuclear weapons.

An appropriate balance of interests in this situation suggests that a submarine ought to be treated no differently than any other vessel. This means that a submarine on the surface is entitled to the same right of passage as other vessels but submerged transit requires authorization by the coastal state. In the event that submerged transit is considered essential or desirable in a particular situation the flag state can of course make special arrangements.

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78. In this connection, the development of surveillance systems is relevant. See S.I.P.R.I., Tactical and Strategic Antisubmarine Warfare 21-31 (1974), and S.I.P.R.I., World Armaments and Disarmaments 303-325 (1974).

79. It may be recalled, also, that the traditional requirement of surface passage applied to narrower territorial seas than are now generally claimed. Submarines are now larger than ever but presumably the submarines of yesteryear, such as in 1958, would also have been safer when passing submerged. This contention does not seem to have been pressed when the 1958 Convention was negotiated. Goldblat says that "in certain instances submerged passage might be safer from the navigation point of view." Goldblat, supra note 72, at 314.
arrangements with the coastal state. It may be added that military submarines ought as a matter of policy to provide notification as would other military craft. Such a notice requirement may be helpful in securing acquiescence by the coastal state in submerged passage.

Among other factors relevant for policy are the type and characteristics of a ship, including its method of propulsion and type of cargo. Of special importance are nuclear-powered craft and carriers of bulk or hazardous cargo. As noted in the following section, desirable policy would recognize coastal competence to prescribe special regulations for passage by such vessels, including the use of designated sealanes. In this sense such factors can be taken into account in determining whether a particular passage is prejudicial to coastal interests. Such policy would recognize that these classes of vessel have a right of access to the territorial sea and that the conditions of its exercise include conformity to reasonable coastal regulation.

(iii) coastal authority to prescribe and apply in the territorial sea

The policy question here is how to balance exclusive coastal interests with those of the wider community in formulating a specific, rather than general, statement of coastal regulatory and enforcement authority in the territorial sea. An indication of the scope of such authority, as a component of the concept of innocent passage, might be a useful technique for increasing the certainty of expectation of those whose vessels use the territorial sea. The aim should be to reach a consensus on the subjects to which coastal prescriptions may be extended and on the categories of vessels to which specific regulations are or may be directed. Of course a treaty provision indicating general categories of the subjects of potential coastal legisla-

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81. The function of such provision goes further. The simple provision of a definition of innocent passage and the addition of a list of prejudicial activities does not meet the needs for governing passage in the territorial sea. Indication of the scope of regulatory authority is addressed to amplifying coastal authority to meet such needs. In another sense, too, recognition of adequate regulatory competence may assist in persuading coastal states to accept an objective definition of innocent passage.
tion would not provide detailed guidance, which is the function of the regulations themselves. Concerned coastal states presumably would enact the necessary legislation containing the specific directives applicable to all or part of the territorial sea. Nonetheless, general treaty provisions would serve to indicate the bounds of coastal prescriptive competence and offer useful elaboration of the requirements of innocent passage.

The coastal state should be recognized as having the necessary authority to apply its laws and regulations for events in the territorial sea by taking enforcement action. Clearly such enforcement will have an impact on navigation in the area, but such impacts should be the minimum consistent with effective protection of coastal interests. In applying coastal law that state ought not discriminate among vessels nor engage in petty harassment for technical offenses.

An additional desirable feature of a treaty statement on coastal competence to apply policy would be a limitation on the nature or severity of the sanction applicable in the event of non-conformity. Exclusion or prohibition of passage by an offending vessel may be considered a relatively light penalty in some contexts. Imposition of a fine or the required posting of a bond or even a prospective ruling of one kind or another may sometimes be an appropriate as well as relatively light penalty but at others an onerous burden. Where the impact of a violation of a coastal regulation by a passing vessel is not too serious the penalty should be one that accommodates the need for utmost freedom of movement. In areas outside straits, for example, the least drastic penalty may be to require an offending vessel to move outside the territorial sea to effect passage. In a strait, however, this requirement might be extremely costly because of the possibility that an extensive change of course and consequent loss of time would be necessitated. Conversely, anywhere in the territorial sea it may be very burdensome to arrest a vessel and hold it for further, perhaps prolonged, legal proceedings. Required posting of financial security could be an expeditious way of providing both for a possible monetary penalty and for efficiency of movement.

(b) Special right of passage for straits

As noted in previous discussion there are serious doubts in some quarters that overall community interests, especially the interests of maritime states, are adequately protected by recognizing a right of innocent passage for all ships that cannot be

82. Of course states already enact such legislation. The U.N. Legislative Series includes a large compilation of this material.
suspended in straits. In the traditional conception aircraft would have no customary right of access at all. In this view the innocent passage doctrine confers excessive discretion on the coastal state to characterize passage as offensive to coastal interests and, therefore, impermissible. The concern animating this critical attitude is for both military and commercial vessels, with oil carriers being the gravest concern among the latter class. To allay the concern, some advocate removal of the qualification of innocence entirely from the law applicable to passage through straits, thus transforming these areas for this purpose to a status resembling the high seas. This would also permit overflight by aircraft and submerged passage by submarines.

While there would be no dispute that this proposal protects navigation through straits, it is by no means so clear that it adequately secures the protection of exclusive coastal interests in some respects. The arguments advanced by proponents of free transit are a mixture of legalistic assertion and of contention that coastal interests are safeguarded by providing for internationally prescribed regulations coupled with coastal enforcement.

With respect to the former, it is contended that straits wider than six miles are now governed by the high seas principle of freedom of navigation in the areas beyond a three-mile limit. Accordingly, in this view, it is apparent that coastal states never previously required, or were permitted, protection of coastal interests and, presumably, they do not need such protection now as they do in areas historically regarded as part of the territorial sea.


84. Perhaps there is some irony in Cuba's position in support of free transit deserving mention: "Because of the aggressive policy towards Cuba which the United States had pursued since the beginning of the Cuban Revolution, principally in the seas surrounding Cuba, it was vitally important for his country, from the standpoint of both economics and defence, that there should be a guarantee that maritime communications with other continents could not be cut off; . . . ." II Off. Rec. 127, para. 11.
The more substantive contention is that the free transit (later this shorthand term became "unimpeded transit") proposal would protect coastal interests because it contemplates the applicability of treaty provisions concerning environmental protection and safety of navigation as well as a limited coastal competence to designate traffic lanes. It is contended too that the coastal state has no need for other authority over passage because straits are not suitable places for vessel activity that would prejudice coastal interests.

Only this substantive contention deserves serious consideration. The legal contention, mainly advanced by the United States, is weak and self-serving. By the late 1960s and early 1970s, if not even earlier, it was plain that a twelve mile territorial sea was the single most popular limit among states and that there was absolutely no prospect of confining this region to a three-mile width. Indeed by the time the legal argument


The U.S. proposal for the strict liability of all vessels and aircraft in straits was "for accidents caused by their failure to observe" the relevant IMCO and ICAO regulations and procedures. Liability in other instances would presumably have to be established in accordance with prevailing law.


The difficulty with these arguments is the assumption that the authors know what will be considered to threaten coastal security, and that "hostile intent" must connote overtly antagonistic actions. This conceptualization unfortunately fails to take into account the whole range of coercive actions and effects involved in employment of naval vessels. See Luttwak, supra, note 68. Of course military missions are undertaken in confined waters, apparently as a matter of course. See note 77 supra. Continued repetition of statements which fly in the face of evidence supportive of widespread suspicions may be harmful and, at the least, erodes the credibility of the United States.

87. It was already apparent in 1958 that this limit had not the slightest prospect of gaining general acceptance. The 1958 Conference never seriously considered the three-mile limit and it was clear then that nothing less than a six-mile territorial sea had a chance of adoption. The advent of numerous
for free transit was being emphasized, the most important straits were already fully incorporated within the claimed territorial sea of adjoining states (Malacca, Gibraltar, Bab-el-Mendab, Hormuz, etc.), and it was clearly evident to most observers that international law permitted a territorial sea out to twelve miles. The reality was that straits states had claimed a 12-mile territorial sea which incorporated these areas within national maritime territory and it was no longer tenable to negotiate as if this fact did not exist or as if less than 12 miles would be newly independent States beginning in 1960 rather quickly eliminated any realistic possibility of a 6-mile territorial sea.

However the U.S. Navy has continued to insist and to rely successfully upon a 3-mile territorial sea and the failure to enforce a wider limit lends some credence to the U.S. positions. On the other hand the success of this insistence and reliance might also be laid solely to considerations of superior strength and not to expectations about conduct in conformity with law.


89. At least so far as the LOS Conference is concerned, the U.S. legal case seems irrelevant, but it may have continued to make sense to press the U.S. position in opposition to state claims in specific situations. Even here, however, the strong case for a 12-mile limit as compatible with international law put this opposition on a very fragile foundation.

In 1958 the U.S. announced that its 6-mile proposal was only for negotiation purposes and it was returning to its 3-mile limit and views after the failure of the Conference to agree. 2


69. This course no longer seems credible.

90. As of 1970 the claimed territorial seas of adjacent states already included either the whole of these straits or the channels for navigation. Only the Strait of Hormuz retained an area of high seas (which was eliminated by the Oman extension to 12 miles in 1972), but the navigation channels were within the internal waters of Oman assuming the use of the hypothetical baseline system. For the territorial sea claims of various strait states including Iran, Oman, Malaysia, Indonesia, Spain, Morocco, Yemen (Aden), Yemen (Sana), Ethiopia, France, Egypt, Saudi Arabia, see U.S. Department of State, Bureau of Intelligence and Research, Office of the Geographer, "National Claims to Maritime Jurisdictions", April, 1974, 2d Rev. as amended June, 1975.

The Geographer has also issued maps depicting claims for the Straits of Malacca, Hormuz, Bab-el-Mendab, Gibraltar and others.
considered required by international law in the future, if the conference failed to produce a treaty.

One difficulty with the view that the free transit proposal, as described above, recognizes sufficient coastal authority to protect exclusive interests is that a major issue at stake is: who initially decides whether or not a particular passage prejudices coastal interests. It may well be that a third party would conclude on review of a situation that no significant coastal interests were offended by ships in straits; however, this would not provide an adequate response to an argument that such a decision should be made by coastal officials, who alone have the responsibility and effective authority for safeguarding internal value processes against detrimental impacts of acts in the adjacent territorial sea. There is, furthermore, a measure of unreality in the idea that coastal states should be satisfied to accept in advance, sight unseen, the good will and beneficent intentions of known and unknown future flag states operating with unknown equipment and weapons in an unknown future context of relations with other nations. In the absence of an international institution responsible for securing coastal state interests, a free transit proposal geared primarily to international arrangements (including the U.N. Charter) leaves the coastal state without any recourse whatsoever in all conceivable future circumstances that might engage interests which the coastal state might wish to protect.91

91. Egypt made a special point of inquiring of the United States "how the coastal state could verify whether a submarine refrained from testing weapons of any kind during its passage through straits if it remained submerged." II Off. Rec. 131, para. 11. The U.S. reply was that it intended to abide by its legal obligations in this respect and that ships, surface or submerged, would not choose to use confined waters such as straits to take action threatening coastal security. Furthermore submerged passage was the safest way for submarines to travel through straits. II Off. Rec. 135, paras. 64-65. See note 85 supra.

92. We are wont to look on these questions of coastal security solely in terms of weapons and ships employed by the superpowers. The territorial sea is not very relevant when considering the use of highly sophisticated and extremely destructive weapons systems by such powers. But the territorial sea has importance in a variety of other contexts, including both those involving activities and coercive methods other than direct force and those in which smaller, weaker states are antagonists. In the former instance, coastal states may be concerned with
From the most general perspective the policy problem is not only to protect navigation in an area indispensable to its effective functioning but also to assure the coastal interest in safeguarding its internal processes. If this is an adequate statement of the problem, it is not desirable policy to adopt an approach which in substance provides only for the former and not for the latter.

This is not to deny, however, that there is ample justification, as well as precedent, for making special provision to protect vessel movement in straits. The 1958 Convention on the Territorial Sea and Contiguous Zone makes such provision for straits generally by forbidding the suspension of innocent passage in straits. In addition there have long been special international arrangements for especially strategic straits as well as for comparable artificial waterways; these agreements date back to the early 19th century. Nothing in ocean use or in disputes about such use today suggests any less need for special protection of transit through straits, and there is much evidence of intensified and more critical international dependence to support such protection. The critical difficulty, and need, is to achieve special protection for navigation in straits while at the same time preserving essential coastal interests.

Desirable policy to achieve the above purposes calls for some changes in previous legal provisions, particularly in those concerning innocent passage. It is not important whether or not that precise term is continued, although there is some advantage in it because it stresses that both coastal and community interests are at stake. If the concept were to be retained in straits it certainly would continue to be indispensable to provide that it cannot be suspended or similarly abridged in any way. Beyond this, it is clear that a highly abstract formulation of innocent passage cannot offer an acceptable assurance of the unimpeded movement that is required by international transport. Reformulation and refinement are needed to provide the essential breadth of doctrinal application, objectivity in determination, superpower coercion, if not violence, and it is simply not credible to pretend that these situations are not pertinent or not present in the minds of negotiators. Diplomats are able to read newspapers too.

The gist of the text statement is that the complexity of the real world demands reference to a very large context of pertinent state-to-state relations. A proposal which dismisses them as irrelevant or unimportant may face difficulty in adoption.

and fairness to all interests concerned. Such reformulation could take a variety of forms, as discussed in the previous section, so long as navigation in straits is insulated from interference unrelated to vital coastal interests. The conceptual improvements already mentioned appear satisfactory for this purpose.

A final word needs to be added about aircraft. Although the problem is a narrow one, involving relatively few states and one class of aircraft, it is desirable to provide that those aircraft are entitled to a right of access to pass over straits in the same sense as vessels. One reason for this conclusion appears to be the incongruity of permitting aircraft to enter as a matter of right when on the deck of an aircraft carrier but not when in flight. Another is that some bodies of water might otherwise become virtually closed seas for military aircraft since access by air could become difficult if not impossible. The establishment of a closed sea by all bordering nations might be an acceptable arrangement, but it is quite another matter to permit straits states to make this decision for all concerned. Recognition of this right of access can of course be accompanied by conditions that safeguard coastal interests.

2. Trend in decisions; appraisal and recommendation

The following discussion is organized about the four principal policy issues just discussed.

(a) The right of innocent passage for military vessels

Although the 1958 Conference made provision for innocent passage for "all ships" including warships, some states were vigorously opposed to inclusion of the latter, while the number favoring inclusion of warships in the right of innocent passage was not large. In light of this, there could understandably be some uncertainty about the general consensus on this issue when, beginning in 1960, a large number of new states reached independence. It appeared reasonable to speculate that a number of these states, and perhaps a large number, might be unsympathetic to extending the right of innocent passage to military craft. As the new consideration of the law of the sea began, therefore, it was doubtful that states generally were in accord on a provision on this issue.

The question of access by military vessels to the territorial sea must be classed as one of the overriding issues considered by the Third Conference on the Law of the Sea and its

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94. Whiteman, supra note 7 at 416; McDougal and Burke at 218-20.
preparatory body, the Seabed Committee. At the Conference, however, relatively little attention has been given to the question of denying access to warships by withholding the right of innocent passage from such vessels. There are numerous proposals regarding passage through the territorial sea, but few proposals seek to single out warships and to deny them the right of innocent passage. Some do distinguish warships, however, and there is considerable sentiment in favor of this course, but the major issue is whether or not warships should have an even more secure right of access to straits than innocent passage. The leading maritime states take the view that a right of innocent passage alone is not adequate, insofar as straits are concerned.

During the preparatory work, only two proposals of over a dozen provided expressly that the coastal state could require authorization and notification of the passage of warships. The so-called "strait states" proposal would have done so, although some of these states joined in inconsistent proposals in other contexts (both Indonesia and Malaysia would recognize a right of innocent passage for warships through archipelagic waters); it is not surprising to find this polar position being advocated by nations in this group. The other proponent, also not surprising despite incompatibility with its own long-term interests, was China, which seized every opportunity to oppose the Soviet Union and, to a lesser extent, the United States.

Of the new or revised proposals tabled at the Caracas session of the Conference, only that of Malaysia, Morocco, Oman, and Yemen denied a right of innocent passage to warships. These states would, in addition, require notification or authorization for nuclear-powered ships or ships carrying nuclear materials, a category not limited to warships. This proposal also would require notification, except for passage in designated sealanes, for research and hydrographic ships. Tankers and ships carrying nuclear substances or materials (apparently other than weapons) would be required to pass via designated sealanes.

The Single Text stipulates that the rules applicable to

95. The reference is to formal proposals and to the OAU Declaration. The latter does not mention warships as such. 1973 Rep. II, at 4. Nor do several of the formal proposals, e.g., SC.II, L.21; SC.II, L.24; SC.II, L.27; SC.II, L.37, all in 1973 Rep. III.
all ships do, indeed, apply to warships, as defined in this treaty, and, accordingly, these vessels would be entitled to the right of innocent passage through the territorial sea. In the exercise of this right the warship is to comply with coastal laws and regulations and may be required to leave the territorial sea if it disregards a request for compliance therewith. It may be required to leave "by such safe and expeditious route as may be directed by the coastal state."

Appraisal and Recommendation

The debate in Committee II on the territorial sea and in straits used for international navigation sheds uncertain light on the outcome concerning the concept of innocent passage for warships. The issue is hardly even mentioned in the territorial sea discussion: the nature of the debate and the ambiguous terms used in the consideration of straits combine to obscure a definite trend. In the latter debate it is worth emphasis that the basic issue discussed, the notion of unimpeded transit or transit passage (labels signifying the same thing) assumes that warships already have a right of innocent passage but that it is unsatisfactory. The response to this by some states rather fuzzes the issue. Some reject both free transit and innocent passage and declare that warships require authorization. Others state that innocent passage for warships is enough but that authorization is required. This latter view is a contradiction in terms; there can be no right of passage if the coastal state may or may not give authorization. Other states simply state a conclusion that innocent passage is enough, without clarifying what these words connote or whether they mean to extend the right (whatever it is) to all ships.

The impression one gets from these debates, however, is that there is considerable support for the idea that warships have a right of innocent passage in the sense of a genuine right of access. There does not appear to be any great pleasure in this view, as may be seen most directly in the statement of Sri Lanka, but some influential developing states appear willing to acquiesce. Other developing countries, of course, vigorously reject any notion of a right of access for warships, even where qualified by the term innocent. It is not possible, on the basis

100. Article 29(1), id. at 13.
101. Id., Article 29(2).
of the public record at least, to forecast the relative numbers in these camps, but there is reason to speculate that the supporters of innocent passage are in the majority. If the maritime states would compromise on a form of innocent passage in straits, it would seem likely that this right of access might achieve the necessary two-thirds support to become part of a treaty. The compromise might involve the giving of notice of passage, as suggested by Sri Lanka and Nigeria.

(b) Coastal authority to deny innocent passage

Previous decisions indicated a firm general expectation that coastal states could lawfully deny all passage through the territorial sea even if in any particular instance it were not prejudicial to coastal interests. But the permissible occasions for such denial were limited. The consideration of this issue in the International Law Commission and the decisions at the 1958 Conference establish the qualifying conditions for the exercise of this authority: (1) the suspension of innocent passage is permissible only in specified areas of territorial sea not within straits; (2) suspension cannot be selective or discriminatory; it must apply to all vessels; (3) it must be temporary, although the meaning of this is not defined; (4) suspension should be effective only after publication of notice, presumably thus giving potentially affected vessels an opportunity to choose alternative routes and prohibiting instantaneous decisions; (5) suspension is permissible only for protection of coastal security in the narrow military sense of the term; (6) the judgment that security reasons justify suspension is not within the complete discretion of the coastal state.

The record of proposals and discussions in the LOS Conference establishes that the previous firm expectation continues to exist on this issue. There were relatively few proposals during the Seabed Committee dealing with the question of suspension of passage and those few uniformly repeated the 1958 Convention provision. The only substantial change in this respect was suggested by the archipelago states in their proposal on access to those waters. As noted earlier, suspension of innocent passage through these waters would be permitted for security

103. Cyprus et al. (SC.11, L.18); Malta (SC.11, L.28); Fiji (SC.11, L.42 and Corr.1); Fiji, Indonesia, Mauritius, and The Philippines (SC.11, L.48) (on archipelagic waters). Several proposals did not address this issue at all.
reasons, but the coastal state would have to substitute other sea-lanes.104

Proposals in the 1974 Caracas session were for the most part simply reiterations of the 1958 provision,105 except for a novel change suggested by Poland, the GDR, Bulgaria and USSR. In this proposal (C.2, L.26) the coastal state could suspend innocent passage, subject to the additional condition "that the other shortest routes for innocent passage have at the same time been designated."106

The Single Text deals with suspension in the two different sections devoted to the territorial sea and straits used for international navigation. Article 22(3) of the former section is a verbatim copy of Article 16(3) of the 1958 Territorial Sea Convention, the provisions of which are summarized in the first paragraph of this section. The section on straits provides for a right of innocent passage, and also a right of transit passage, through certain straits, neither of which can be suspended. The scope of these rights of passage and the straits to which they do and do not apply are discussed in a later subsection.

Appraisal and Recommendation

Discernible sentiment in the law of the sea discussions appears still to be in favor of allowing the coastal state to protect its security by denying all passage through the territorial sea, albeit under limited conditions. A widespread understanding continues to exist, however, that the right of innocent passage through straits cannot be suspended even for security reasons. These trends continue to accord with desirable community policy.

It might be made clear in the Single Text that the prohibition in Article 21 against hampering or denying innocent passage is subject at least to Article 22, according to which all innocent passage can be suspended. The sense of the former article appears to be that in the absence of suspension which applies to all traffic, the coastal state is forbidden to hamper or deny innocent passage in particular instances, whether it seeks to accomplish this aim directly or by manipulating coastal

105. U.K. (C.2, L.3); Malaysia, Morocco, Oman, and Yemen (C.2, L.16); Fiji (C.2, L.19); Fiji, Indonesia, Mauritius, and The Philippines (C.2, L.49).
law governing events in the territorial sea.  

(c) Clarification of the concept of innocent passage: the definition of coastal interests; scope of coastal authority to prescribe laws and regulations; scope of coastal authority to apply laws and regulations

Definition of coastal interests

Dissatisfaction with the 1958 Convention provision on innocent passage is evident in the various LOS proposals for a new conception of this term. The major thrust for revision is to provide detailed specification of activities in the territorial sea that are prejudicial to the interests of the coastal state. All proposals retain the 1958 Convention definition that passage is innocent unless it is prejudicial to the peace, good order, or security of the coastal state. However, in seeking to provide a listing of acts considered prejudicial to these interests, a major difference is to be noted between lists which are exhaustive and those which are either illustrative or otherwise open-ended.

The major proposals tabled in the Seabed Committee, those by Fiji and by the straits states, fall into the latter category. Article 7 of the straits states proposal prefaces its list of prohibited acts by reference to "activities such as," suggesting that still other activities are also prejudicial and not to be allowed. The draft articles by Fiji provide, according to the explanatory note, an "objective test" for "determining what acts are in fact considered to be prejudicial to the peace, good order and security of the coastal state." Article 3(2) does contain what appears to be an exhaustive list except that the last item is "any other activity not having a direct bearing on passage." This all-embracing category assumes, apparently, that "any other activity not having a direct bearing on passage" must be prejudicial to important interests of the coastal state. Whatever the assumption in this regard, this open-ended category seems to vitiate in some degree the objectivity achieved by spe-

107. It perhaps goes without saying that Article 21 does not preclude enforcement of coastal laws. Violations of most of the laws listed would probably justify claiming passage as non-innocent and enforcement permissible. To the extent a vessel remains in innocent passage after or while violating coastal law, reasonable interpretation of Article 21 would not prohibit enforcement action.

cifying prejudicial acts.110

The other major proposals, presented in Caracas, were those by the United Kingdom111 and by a Soviet bloc group112 and each of these contains an exhaustive list of activities considered prejudicial.

The various prejudicial activities identified in the several proposals differ in detail but, with the exception noted in regard to Fiji, the differences are not major.113 Perhaps the only substantive difference of possible importance is that the Soviet bloc uses the term "deliberate" to qualify acts of interference with communication systems or any other facilities or installations. The effect of this is to re-introduce an element of subjectivity, since it raises the issue of intent or purpose, but it does so to reduce coastal authority and not to increase it.

110. The difficulty is that the vessel cannot know whether it is conforming with coastal interests or from what acts it must refrain. If a coastal state wishes to harass vessels in passage this category serves the purpose well.

On the other hand it is difficult to envisage what a vessel might do beyond those acts already prohibited and this catch-all provision may be simply an understandable method of compensating for imperfect foresight. Furthermore a coastal state interested in harassment does not have much need for colorable legal justifications when a long list of acceptable ones is already provided.

113. Perhaps what is major depends on the point of view. Both Fiji and the 4-power strait states list ten categories of acts while the UK mentions but six and the U.S.S.R. identifies seven. Half of the differences consist of references by the former two proposals to espionage and propaganda. The strait states would label the conduct of research as prejudicial; both the U.K. and U.S.S.R. provide for a requirement of authorization for such activity.

More important than these differences, in the view of some, at least, is the exculpatory clause in Art. 16(3) of the U.K. proposal. Canada thought this would provide excessive discretion to the vessel master. 11 Off. Rec. 130, para. 7.

According to this article the activities previously identified as "prejudicial" could not be so considered if it is "prudent for safe and efficient navigation in accordance with the normal practice of seamen; . . ." This need not be interpreted as conferring discretion on the master but more properly as a standard for reviewing his course of action.
The Single Text on this point appears to be a mixture of the various important proposals, taking part from those of states with a coastal or straits orientation and part from those of maritime states. The definition of innocent passage is that used in the 1958 Convention on the Territorial Sea coupled with a list of activities considered prejudicial that is drawn from all the proposals before the Conference. In fact the list includes virtually every item mentioned in proposals tabled at the Conference itself, omitting only the reference suggested by Fiji and the 4-power straits states to "warlike acts" and "any threat or use of force" which appear even to rule out legitimate acts of self-defense. One item mentioned, "any act of wilful pollution, contrary to the provisions of the present Convention," is not found in any previous proposal. Although it is comprehensive, the list is not exhaustive since its last item is "any other activity not having a direct bearing on passage."

The principal emphasis in the list of prejudicial activities (12 in number) is upon the coastal interest in security in the military sense, at least half of the activities directly relating to defense or security. Other items relate to security in a broader sense as well as in some instances to military security, including references to wilful pollution, the conduct of research or survey activities, and acts aimed at interfering with communications systems and other facilities and installations. Coastal concern for a number of value processes is involved in "the embarking or disembarking of any commodity, currency or person contrary to the customs, fiscal or sanitary regulations of the coastal states."

None of the activities listed is to be considered prejudicial, according to Article 16(2) of the Single Text, if authorized by the coastal state, and certain of the activities are not prejudicial if they are made "necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."115

114. Of the six activities in Article 16(2)(a)-(f) all but one refer to use of force, weapons, defense or security. 111 Off. Rec. at 184.

115. Activities excused by these circumstances are those involving aircraft, military devices, embarking or disembarking any commodity, currency or person, willful pollution, research or survey, interference with communications systems or any other facilities or installations, and any other act not having a direct bearing on passage. Id.
Scope of coastal authority to prescribe laws and regulations

The distinctions just noted regarding exhaustive versus illustrative listing are also relevant for characterizing proposals defining the competence of the coastal state to adopt laws and regulations for vessels in passage. In this instance, however, only the formulation advanced by the straits states (SC.II, L.18) to the Seabed Committee is open-ended and even this formulation is somewhat narrowly conceived. Article 6 provides:

The coastal State may enact regulations relating to navigation in its territorial sea. Such regulations may relate inter alia, to the following:

... 

Although this appears to limit coastal prescriptions to those relating to navigation, the illustrative list refers also to exploration and exploitation of resources, pollution and research. Still other matters could apparently be dealt with if the coastal state so wished.

Interestingly the proposal in Caracas by some of these same States (Malaysia, Morocco, Oman, and Yemen) (L.16) also contains a list of subjects for laws and regulations which is exhaustive, as well as a bit longer. Among the regulatory subjects specified is "[t]he installation, utilization and protection of navigational facilities and aids" which one observer believes clearly implies regulation of ship design and construction.116

A major difference in proposals regarding coastal prescriptive competence is that some specifically exclude from that competence certain subjects of particular import for navigation, as well as regulations having a particular effect on passage. The U.K. proposal (C.2, L.3), for example, itemizes the only permissible subjects for coastal regulation and then adds the following exclusion and prohibition:

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116. Miles, "An Interpretation of the Caracas Proceedings," in Christy, F.T., Jr., et al., eds., Law of the Sea: Caracas and Beyond 74 (1975). This interpretation seems doubtful on the basis of internal evidence. The other references in L.16 to navigational aids and installations appear to refer to the equipment emplaced by the coastal State. Article 7(6) and Article 23. In any event other components of coastal authority could more plausibly provide a basis for such a claim, such as the "safety of navigation and the regulation of marine traffic" and "the preservation of the marine environment of the coastal State and the prevention of pollution thereof."
2. Such laws and regulations shall not: (a) apply to the design, construction, manning or equipment of foreign ships or matters regulated by generally accepted international rules unless specifically authorized by such rules, (b) impose requirements on foreign ships which have the practical effect of denying or prejudicing the right of innocent passage in accordance with this Convention, and (c) discriminate in form or in fact among foreign ships.

The Soviet proposal is nearly identical on points (a) and (b). The Fiji proposal is less restrictive in that it would permit coastal regulations relating to design, construction, manning, or equipment if they are not "more restrictive than those provided by the International Convention for the Prevention of Pollution from Ships, of 1973, or of any subsequent international convention of general application."

In spelling out coastal prescriptive competences, it is noteworthy that all proposals mention, and some give strong emphasis to, the creation of sealanes and traffic separation schemes. Generally speaking, this question is muted in the proposals of maritime states such as the U.K. and U.S.S.R., but treated with great prominence in coastal and straits states proposals. The former proposals dispose of this matter simply as one of a list of items of coastal regulatory competence [U.K., C.2, L.3, Article 18(1)(a)] or a single short article (Bulgaria, German Democratic Republic, Poland, U.S.S.R., C.2, L.26, Article 21). In contrast, the similar proposals by Malaysia, Morocco, Oman and Yemen (C.2, L.16, Article 7) and by Fiji (C.2, L.19) spell out the basic coastal competence to designate sealanes and establish traffic separation schemes, indicate factors to be taken into account in doing so, and deal expressly with questions of publicity, substitution of new lanes, and applicable collision regulations.

117. The U.K. proposal distinguishes sharply between coastal competence in the territorial sea generally and in straits. There are no external constraints in the former instance but in the latter the approval of the "competent international organization" is required. U.N. Doc. A/CONF.62/C.2/L.3, Chap. II, Article 18(1)(a) and Chapter III, Article 3.

The Soviet proposal on straits does not even mention sealanes and traffic separation schemes but, following a provision in the 1971 U.S. straits proposal, does allow the coastal state to "designate corridors suitable for transit by all ships through such straits."

See discussion at 235-236, infra.
The major territorial sea proposals differ sharply in singling out special types of vessels for differing regulatory competence. The straits and coastal state proposals have special sections on "ships with special characteristics" and provide either for authorization or notification for certain classes of vessels. The major maritime state proposals, on the other hand, do not mention this matter prominently although they do contain provisions aimed at specific types of vessels. The proposal by Malaysia, Morocco, Oman and Yemen provides that "the coastal State may require prior notification to or authorization by its competent authorities for the passage through its territorial sea" of nuclear-powered ships or ships carrying nuclear weapons. Marine research and hydrographic survey ships may be required to give prior notice for passage except in designated sealanes. Oil and chemical tankers and ships carrying nuclear substances or materials may be required to use designated sealanes.

The proposal by Fiji contrasts sharply with the straits states' proposal because it does not envisage authorization for nuclear-powered ships or ships carrying nuclear weapons. But other provisions do envisage notification for "tankers and ships carrying nuclear or other inherently dangerous substances or materials" and permit the coastal state to require use of designated sealanes for certain types of vessels. The Fiji proposal, however, does not single out research or survey vessels for special regulation of passage.

One specific legislative action of special interest to straits states concerns the problem of navigational aids and assistance. The 1958 Convention on the Territorial Sea and Contiguous Zone dealt with this in Article 18:

1. No charges may be levied upon foreign ships by reason only of their passage through the territorial sea.
2. Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination.

118. The U.K. refers to fishing vessels as a special subject for coastal regulation [Id., Article 18(1)(g)] and singles out research and hydrographic survey ships in prohibiting such activities during passage in the territorial sea (Article 19). Article 20 provides that "submarines and other underwater vehicles" may be required to navigate on the surface. The Soviet bloc articles make similar distinctions and references.
The effect of this arrangement is to place the general burden of navigational aids and assistance wholly upon the coastal state, presumably on the assumption that reciprocal provision of such aid evens out the burden. Some states are inequitably treated in this approach, especially in light of increased needs of assistance for safety of navigation due to increased size and numbers of vessels carrying bulk cargo such as oil.

Three principal approaches to this problem were advanced. One, by Fiji, would simply have repeated the 1958 provision quoted above. The other two suggestions would have retained this provision for the territorial sea outside straits, although the U.K. proposed the slight change of inserting "reasonable" before charges. In straits, the U.K. and straits states proposed assistance to the straits state under different terms and conditions. The U.K. called for cooperation "by agreement," while the straits states would "require" cooperation. The U.K. proposal, which appears in the Single Text, is:

User States and strait States should by agreement cooperate in the establishment and maintenance in a strait of necessary navigation and safety aids or other improvements in aid of international navigation or for the prevention and control of pollution from ships.119

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119. Dr. Pardo has commented on this problem, appearing to indicate a need for greater specificity in treaty arrangements: "We are all aware that many modern supertankers have drafts approaching one hundred feet and have difficulty in stopping in less than three or four miles and in maneuvering. It would require some changes in international law with regard both to standards in tanker construction and manning, and with regard to transit through straits and through shallow and heavily travelled seas. In particular, the duties of the coastal state can no longer be confined to refraining from obstructing passage or to permitting free or innocent passage, but must also include positive obligations such as deepening of navigation channels, providing appropriate aids to navigation, new detailed charts of waters less than twenty fathoms deep and other, often costly, measures. In short, it costs money to provide for the needs of modern navigation; coastal states will inevitably wish to recoup their expenditure in this respect. This means that we can expect that sooner or later charges will be levied for passage through some straits and shallow seas. Should such charges be levied unilaterally by the state concerned, or should there be treaty provisions specifying under what circumstances charges
As with the definition of coastal interests in terms of listing prejudicial activities, the Single Text again seems to reflect the details of every major LOS conference proposal on competence to adopt laws and regulations. The Text identifies the subject-matter of the laws and regulations as those "relating to innocent passage." This formulation comes from the United Kingdom and Eastern European proposals and differs from that of the four-power straits states ("navigation through the territorial sea") and Fiji ("relating to passage through the territorial sea"). It is not clear what difference is suggested by employing the legal term "innocent passage" rather than one that is more factual. It would not seem that the former term implies any limitation or restriction on coastal competence to take action to enforce the laws it prescribes, including measures that interfere with the passage of ships offending against coastal laws. Although the individual proposals use somewhat different words, terms or phrases in listing the specific matters within the scope of coastal authority, they appear to be in substantial agreement on these. The Text items sometimes are verbatim copies of individual proposals but some items differ from any proposal. There does not appear to be any substantial enlargement or diminution of coastal competence because of this except, possibly, in the omission of reference to ships of special characteristics. Even this omission, however, does not suggest that coastal regulatory authority cannot make distinctions between types or classes of vessels in promulgating local conservation of the living resources of the sea in the Fiji articles and passage of ships with special characteristics in the 4-power strait states' articles. Every other item in the various proposals was found in at least two other proposals, if in somewhat different language.
The Single Text follows the lead of the maritime states in including a specific exclusion from coastal competence. Article 16(2) declares that "[s]uch laws and regulations shall not apply to or affect the design, construction, manning, or equipment of foreign ships or matters regulated by generally accepted international rules, unless specifically authorized by such rules." This provision appears to go beyond any other proposal in forbidding even any effect upon the excluded subject areas. A further and somewhat broader protection for community use is offered in Article 21(2) which forbids application of laws and regulations that "impose requirements on foreign ships which have the practical effect of denying or prejudicing the right of innocent passage; . . . ."

The Single Text emphasizes coastal competence to prescribe for navigation safety by mentioning sealanes and traffic separation schemes both in the general article listing the permissible subjects of coastal laws and in another article which expressly provides that the coastal state may require vessels in innocent passage to use them where the coastal state "considers it necessary having regard to the density of traffic concentration." Authority over certain vessels is perhaps even broader in light of the provision, which would otherwise seem somewhat redundant, that "tankers and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such sealanes." However, the coast-

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122. However it does suggest that the specific competences claimed must actually be regulation and not prohibition, such as in the trait states' proposal (Article 8).

123. None of the proposals contained the term "affect." Soviet use of the verb "relate" perhaps is not much different and could be more inclusive than "affect."

124. As in the U.K. proposal, the Single Text permits greater coastal authority in the territorial sea generally than in straits. See discussion at 250-51 infra.

125. Article 20 also might create some confusion. It states: "Foreign nuclear-powered ships and ships transporting nuclear substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements." Since the obligations mentioned are already specified in other agreements, it is difficult to see what is added by this provision. It might be deduced that if a vessel does not have the documents or take the measures established that it is no longer in innocent passage. This seems to be an improbable interpretation, although it suggests the hazard of incorporating unneeded provisions.
al state does not have carte blanche in this aspect of its competence to prescribe. Article 19(4) provides:

In the designation of sealanes and the prescription of traffic separation schemes under the provisions of this article the coastal state shall take into account:

(a) the recommendations of competent international organizations;
(b) any channels customarily used for international navigation; and
(c) the special characteristics of particular ships and channels.

Scope of coastal authority to apply laws and regulations

The 1958 Convention on the Territorial Sea and Contiguous Zone contains two quite different provisions that deal with coastal competence to enforce its laws governing events occurring in the territorial sea. The most direct and explicit of these provides that "[t]he coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent." [Article 16(1).] In accordance with this provision, a vessel infringing a local law and regarded as not innocent may be subjected to the "necessary steps" to prevent further passage. This is a highly specific form of enforcement, and it concerns only such activities by a vessel as are so prejudicial to the coastal state that passage is no longer innocent.

Other than this specialized provision, the only relevant provision states that "foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal state . . . ." While this language does not in so many words recognize coastal enforcement competence, observers have construed its use in the 1958 Convention as implicitly establishing such competence.126

In some respects the current proposals on authority in the territorial sea do not differ much from the 1958 Convention. Each major proposal repeats the above provisions verbatim and none contains clear and express provision for enforcement. Nonetheless it is difficult to read the various proposals without concluding that coastal enforcement competence is implicitly assumed in a variety of provisions. Illustrative in this respect

126. For reference to such interpretations, see McDougal and Burke 272-73.
is the new provision in several proposals that coastal states shall ensure that the application of their laws and regulations conforms to the Convention (C.2, L.3, L.16, L.26). It seems permissible to infer too from provisions authorizing criminal and civil jurisdiction in certain circumstances (every territorial sea proposal contains similar provisions on this) that the states concerned assume the existence of an enforcement competence for violations of coastal laws by vessels in the territorial sea. Of the various proposals, however, only that of the four-power straits states expressly provides for certain enforcement action in this instance. Article 5(4) thereof provides that "[t]he coastal State may require any foreign ship that does not comply with the provisions concerning regulation of navigation through the territorial sea to leave it by such route as may be directed by the coastal State." The following article then lists eight categories of navigation regulations.

The Single Text closely resembles the 1958 Convention by incorporating its two provisions that deal, arguably in one instance, with enforcement. It also contains a new provision, reflecting all the major proposals, that the coastal state is responsible for any loss or damage which results if, in the application of its laws and regulations, it acts contrary to the Convention.

**Appraisal and Recommendation**

Dissatisfaction with the 1958 definition of innocent passage appears sufficiently widespread to assure that a new law of the sea convention will effect some improvement. The direction is toward a more explicit understanding of what constitutes passage that is prejudicial to coastal interests, and accordingly what passage is innocent, and also toward a more precise identification of coastal competence to legislate for events in the territorial sea. On the former point the Single Text would be measurably improved by removing the catch-all category of "any other activity not having a direct bearing on passage."
The Single Text provisions for coastal competence to prescribe have no counterpart at all in the 1958 Convention. Important protections for community use are embodied in the prohibition against laws for or affecting construction, design, manning, or equipment.

Most proposals and the Single Text on enforcement in the territorial sea appear to provide the necessary coastal authority although they do not adequately spell out this important element. It is left to inference to conclude that violations of coastal laws may entail a decision that passage is prejudicial and therefore can be prevented. This point could usefully be addressed with more clarity than in the Single Text. Article 5(4) of the straits states proposal might be adapted for this purpose.

(d) Special right of passage through straits

It is familiar knowledge that a major impetus toward the convening of a new law of the sea conference lay in the dissatisfaction of the superpowers over the continued expansion of territorial seas and national jurisdiction, with their possible undesirable impacts on naval uses of the ocean. Both the U.S. and the U.S.S.R., the latter being a recent convert to this view, were apprehensive that general recognition of a 12-mile (of which have a direct bearing on passage) and that the acts involved have harmful impact on the coastal state. The aim would be to permit some leeway in judgments about what is prejudicial but retain the advantages of objective conduct and minimize the subjective element.

129. The mere fact of statement seems to be an advance both for the coastal state and the general community. Despite the 1958 Geneva Convention's reticence on this subject there can hardly be question about coastal authority to regulate, but it still reinforces this authority to make express provision for it. At the same time the community interest is served by an unequivocal delineation of coastal authority to prescribe.

130. The importance of this provision is in its indication of the link between coastal prescriptive authority and innocent passage. It would not be desirable to provide for expulsion from the territorial sea for every violation of coastal law.

131. See the remarks by Chile, II Off. Rec. 138, para. 41.

territorial sea would threaten their access to, and movement about, the world ocean through straits which already were, or would become, subject to the sovereignty of the adjacent state or states. As noted earlier, the worry was that the right of innocent passage through straits was inadequate because it did not include aircraft, submarines would have to transit on the surface, and the concept itself was highly subjective and allowed the coastal state excessive discretion to judge the innocence of passage. Ironically, the U.S. bore major responsibility for this last condition due to its influence on the unfortunate formulation of the doctrine of innocent passage, adopted at the 1958 Convention.133

It is not surprising, therefore, that one of the earliest proposals tabled in the Seabed Committee was that of the U.S. to preserve high seas freedom of navigation and overflight within straits used for international navigation.134 This extremely brief, but explicit, U.S. provision was followed the next year by a similar but longer proposal by the U.S.S.R.135 Both states, then and subsequently, have left no doubts that their views on this issue would have to be accommodated if they were to accept the results of the negotiations.136 Indeed, the prominence and

133. It was the United States which successfully proposed deletion of the phrase which tied decisions about innocent passage to the commission of acts in passage. For comment on this episode and the effect of the deletion in enlarging coastal discretion see McDougal and Burke n.220 at 258.
The other provisions of the U.S. draft articles dealt with the unfinished business of the 1958 and 1960 conferences, the breadth of the territorial sea and fisheries beyond.
135. The Soviet proposal in its first paragraph is nearly identical to the U.S. version, the principal difference being that the Soviets do not include straits which connect the high seas with a territorial sea. The remaining provisions on ships (aircraft were treated separately in similar provisions) concern the rules applicable to transit. 1972 Report 162.
The U.S.S.R. has made its intentions equally clear by explicit reference to a package deal according to which settlement
emphasis placed on this issue by the U.S. in the seabed negotiations caused substantial domestic problems within the U.S. and its delegation.\textsuperscript{137}

By the time the LOS Conference convened in Caracas, however, the U.S. had adopted a less prominent position on this issue, and its initial proposal was never formally developed or promoted as such. The major proposals were four in number: the U.K.\textsuperscript{138} (surrogate for the U.S. in effect), the Eastern European\textsuperscript{139} (an expanded and refined version of the earlier U.S.S.R. proposal), a four-power straits states proposal,\textsuperscript{140} and, finally, a Fiji proposal.\textsuperscript{141} The two former proposals represent the views of the maritime states while the latter two, though different in important ways, are weighted more toward the interests of the coastal straits states.\textsuperscript{142}


\textsuperscript{137} Of course the obvious predominance of the territorial sea and straits issues might have suggested to some that the U.S. placed less weight on its resource interests. The statement of John R. Stevenson sought to redress this supposed imbalance. Statement to Plenary Meeting of the Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction, August 10, 1972, at 2.


The sponsors of this are Malaysia, Morocco, Oman, and Yemen. Except for Oman, these states joined in the 8-power straits' proposal tabled before the Seabed Committee, U.N. Doc. No. A/AC.138/SC.11/L.18,"1973 Seabed Committee Report III," at 3. The 1974 proposal is substantially more complete than the 1973 one and is used here for purposes of comparison and discussion.


\textsuperscript{142} Other, partial proposals were that by Algeria which dealt with free transit to or from a coastal state bordered a semi-enclosed sea, U.N. Doc. No. A/CONF.62/C.2/L.20, III id. at 198, and two proposals which dealt with straits in archipelagic waters. One of these is that by the archipelagic states, U.N.
The major features of these proposals and the Single Text, and the differences in them, can be described most easily in terms of (i) the types of vehicles accorded or denied certain rights; (ii) the definition of a strait to which rights are applicable; and (iii) the definition of passage in terms of the permissible behavior of the vessel and the allocation of competence to prescribe and to apply policy in straits.

(i) Type of vehicle

The primary difference among the proposals concerns the treatment of aircraft and warships. The straits states and Fiji proposals would leave aircraft subject to present law, i.e., without any right of access in customary law and by treaty only in the case of military craft and scheduled international air services, and the straits states could deny innocent passage both to warships and to some nuclear-powered ships and ships carrying nuclear weapons. However, if the latter were mer-
chant vessels, a term not defined in the proposal, they would be entitled to innocent passage, and passage through straits would be presumed to be innocent.146

Both the Soviet and U.K. proposals provide that all aircraft enjoy the special right of passage over straits, and neither proposal distinguishes among ships in providing special rights for them. The Fiji proposal on ships also accords rights to vessels without distinction (but not the right of transit passage)147 but treats certain vessels somewhat differently. Submarines must navigate on the surface and show their flag unless prior notice of passage has been given and, if required by the coastal state, passage is confined to designated sealanes. The U.K. and Soviet proposals permit submerged transit without condition. In addition, Fiji would require tankers and ships carrying nuclear or other inherently dangerous or noxious substances or materials to give prior notice of passage and to use sealanes designated for that purpose.

The Text follows the maritime state view on this issue in providing that all ships and aircraft are entitled to the right of transit passage. No distinctions are made in the Text between types or functions of vessels, except for singling out fishing vessels for mention in connection with coastal authority to prescribe laws for transit.148

(ii) The definition of a strait

All major proposals affecting straits, whether for transit or innocent passage, stipulate that they must be "used for international navigation," but Canada suggests adding the term may require notification or authorization for these vessels.

146. According to article 22(1) the passage of foreign merchant vessels through straits shall be presumed to be innocent." Id. It is not clear how this relates to Article 8. One interpretation might be that the coastal state could not withhold authorization. A more plausible interpretation is that the presumption of innocence applies only to ships for which no authorization of passage is required.

147. See, however, the discussion infra at 247-48, which questions how much difference there is between the Fiji conception of innocent passage and that of transit passage provided in the Single Text.

148. In providing that the coastal state may regulate to prevent fishing, including the stowage of gear, the Text underlines that fishing vessels are entitled to the right of transit passage.
"traditionally," apparently in order to exempt straits such as those in the Arctic area near Canada that have been seldom used, if ever. A group of Arab states would stipulate that the phrase itself means "customarily used." Otherwise this requirement of use does not operate to exclude any passageways except those which only connect internal waters with the high seas. In addition the U.K. would withhold the right of transit passage in such straits and permit only innocent passage where (1) a suitable high seas route exists in the strait and (2) a strait is formed by an island of the coastal state and a suitable high seas passage exists seaward of the island.

Both the U.K. and East European drafts would limit the new right of transit passage to straits connecting areas of high seas. In both proposals, if the strait connects the high seas with the territorial sea of a foreign state there would be a right of innocent passage which cannot be suspended.

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149. U.N. Doc. No. A/CONF.62/C.2/L.83, III Off. Rec. 241. Algeria also submitted a proposal to this effect. U.N. Doc. A/CONF.62/C.2/L.20, III Off. Rec. 198. The Canadian representative seemed to argue for the addition of this term by asserting, incorrectly, that the ICJ in the Corfu Channel case had adopted a frequency of use criterion for determining what straits were "used for international navigation." The Court instead insisted that the criterion was "essentially geographical." Of course reference to the Corfu Channel case conveniently overlooks the 1958 Conference which rejected efforts to provide a use criterion that referred to frequency or normalcy of use.

See McDougal and Burke 204-14 for discussion of the Corfu Channel case and of subsequent consideration of this point by the International Law Commission and the 1958 Conference.

See also the comments by Chile, II Off. Rec. 138, para. 41 ff.

150. Algeria, Bahrain, Iraq, Kuwait, Libya, Qatar, Saudi Arabia, Syria, Tunisia and United Arab Emirates, U.N. Doc. No. A/CONF.62/C.2/L.44, III Off. Rec. 221. This provision also would limit such straits to those "connecting two parts of the high seas," thus eliminating of the Strait of Tiran from consideration.

Oman stated in regard to L.16 that Article 20 referred to straits as defined by the ICJ in the Corfu Channel case and therefore it did not apply to straits which historically had not been used for international navigation. This too is a misreading of that case if it suggests that the Court there stipulated a long period of prior use. II Off. Rec. 135-36, para. 13.

151. Insofar as a strait which is used for international navigation connects the high seas with the territorial sea of a
The proposal of the straits states applies to a strait which is used for international navigation and forms part of the territorial sea of one or more states.152
Most proposals contain provisions which leave untouched the situation in straits which are already the subject of specific international agreement.153
The Single Text basically incorporates the U.K. proposal for the type of waterways to which transit passage and innocent passage are applied, respectively.154 One very noticeable difference, however, is the addition, wherever the term "high seas" appears, of the concept of "exclusive economic zone." This is made necessary because of the provision elsewhere that the exclusive economic zone is not part of the high seas and that the latter refers to the sea beyond the zone. This addition might in one instance make a substantive difference in the type of strait concerned, and it is worth noting in passing here (and in more detail in the following section) that freedom of navigation in the economic zone is not necessarily the same legal concept as freedom of navigation on the high seas. Transit

152. This does not exclude straits connecting the high seas with the territorial sea of a foreign state. See preceding footnote.
153. But the strait states proposal (L.16) contains nothing on this nor does that by Fiji, L.19. The terms of the provisions in the U.K. and East European provisions are somewhat different. Compare Article 10 of Chapter III in L.3 with Article 1(3)(c) of L.11. See also the Algerian provision L.20.
154. Several particular points deserve explicit mention. The Text provides that the rights of transit or innocent passage apply in a strait although the specific area concerned might be internal waters rather than territorial sea or economic zone. However, this appears to be true only where the waters were considered high seas or territorial sea prior to the drawing of straight baselines in accordance with Article 6. Article 35 thus appears to provide for a point made by Dr. Pardo in commenting on the results from Caracas. Pardo, supra note 119, at 395.
Second, the Single Text does not accept the views of Finland and Sweden that free transit ought not to apply to straits whose status is not changed by the 12 mile limit, i.e., straits 6 miles wide or less. See Statements of Finland, II Off. Rec. 124-25, and Sweden, IT Off. Rec. 129.
passage applies in straits used for international navigation (the term "traditional" as proposed by Canada and Algeria is not used) between areas of high seas or exclusive economic zones or between one and the other. However none of the provisions on straits are applicable to such a strait if it contains a high seas or zone route of "similar convenience." In addition, transit passage does not extend to a strait formed by an island of the coastal state if a high seas or zone route of "similar convenience exists seaward of the island."

The latter situation is not particularly clear and the addition of the zone language does not help. There are, first, no indications of criteria for "similar convenience" in a context by necessity involving a detour of some length. Second, the use of the alternative concepts "high seas route" and "exclusive economic zone route," could imply a judgment that these are necessarily of "similar convenience," a conclusion that is both arbitrary and unreasonable. The high seas route seaward of an island would be at least 188 miles further seaward than the nearest economic zone route. It does not seem very likely that apart from the abstract judgment of those who drafted the Text there will be found anywhere in the world a "high seas" route in this context which is of "similar convenience," when its use requires several hours additional sailing time, and perhaps additional hazard. The effect of this could be to enlarge the category of strait to which transit passage applies. A contrary conclusion would narrow this category.

The Text does not alter the arrangements for straits (called "legal status" in Article 35) "in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits." A contrary conclusion would narrow this category.

(iii) Definition of transit passage

The essential elements of the proposed new right of transit passage through straits consist of the permissible activity vessels may engage in during passage and the extent of

155. But of course the reverse also pertains. If it is insisted that the high seas route is similarly convenient, even if it means additional transit time of several hours, then the right of transit passage applies to fewer straits.

156. Whether or not intended to do so, the addition of the words "long-standing" would appear to rule out inter alia any newly arranged "sweetheart" agreements between straits states or others which would impose restrictions not countenanced by the LOS treaty.
coastal authority to prescribe and apply law relating to such passage. The following discussion deals with these separately, to the extent possible.

The differences among the proposals are in the different conceptions of innocent passage offered in the two, which would extend this right to straits, and between these conceptions and the right of transit passage suggested by the maritime states. Consideration of the extent of these differences may also help to clarify the Single Text provisions.

The straits states proposal would carry over to straits the nonexhaustive list of prejudicial activities, in effect continuing the previous broad discretion of the coastal state, and would deny any right of access to aircraft, warships and nuclear-powered ships and ships carrying nuclear weapons. The Fiji proposal, in contrast, would recognize the right of innocent passage for all ships but not aircraft, and would require submarines to pass on the surface. The Fiji listing of prejudicial activities is also open-ended but in a somewhat less serious way.

Both the U.K. and the Soviet proposals define the right of transit passage as the exercise of the freedom of navigation and overflight through and over certain straits, which right is not to be impeded. The U.K. specifies that this freedom is "solely for the purpose of continuous and expeditious transit of the strait," a specification that is perhaps not adequately conveyed by the Soviet proposal's reference to "freedom of navigation for the purpose of transit passage through the straits."

The U.K. proposal goes further in describing the meaning of the right of transit passage to declare that ships and aircraft "shall proceed without delay through the strait and shall not engage in any activities other than those incident to their normal modes of transit." The Soviet proposal seems to contain a similar substantive point, although quite differently phrased, in declaring that "In the event of any accidents, unforeseen stops in the strait or any acts rendered necessary by force majeure, all ships shall inform the coastal States of the straits; . . . ."

The two proposals differ in some degree in forbidding conduct relating to coastal security. The U.K. version is that vessels and aircraft shall "refrain from any threat or use of force in violation of the Charter of the United Nations against the territorial integrity or political independence of an adjacent straits State."157 The Soviet version does not mention the U.N. Charter and it also adds an open-ended list of acts pro-

157. III Off. Rec. at 186. It is difficult to see what this adds to coastal security since the Charter prohibition exists independently in any event.
hibited for warships: "[s]hips in transit through the straits shall not cause any threat to the security of the coastal States of the straits, or to their territorial inviolability or political independence. Warships in transit through such straits shall not in the area of the straits engage in any exercises or gunfire, use weapons of any kind, launch or land their aircraft, undertake hydrographical work or engage in any other similar acts unrelated to transit." The major difference here is the U.N. Charter reference, which might be construed to narrow the proscribed conduct to acts which reach a higher level of coercive impact than in the Soviet conception. However, the U.K. proposal probably covers much the same ground in ruling out any activities not incident to the normal mode of transit. This proscription, however, might not rule out the use of aircraft by vessels during passage through straits, which does seem prohibited by the Soviet draft.

The real question about these definitions, however, is how much they differ from the new definitions of innocent passage which, by listing prejudicial activities, appear to rule out virtually everything a passing vessel could do except pass on the surface. It might be objected that while transit passage must not be impeded so long as the vehicle refrains from doing any of the specifically proscribed acts, the straits state proposal does not actually mention all of the proscribed acts and, accordingly, assurance of unimpeded passage cannot be given or derived from such provision. Although this objection is cogent in relation to the strait state proposal, it is somewhat tenuous when applied to the Fiji definition of innocent passage, which is open-ended only because it refers to "any other activity not having a direct bearing on passage." Although this might be construed to include even the most innocuous conduct, such as a sailor blowing his nose on deck during transit or flipping a cigarette over the side, it does seem to be rather precious to distinguish between these definitions on such a thin basis. In any event, if this item were deleted, and it should be, the two views would be virtually the same in their conceptions of passage that must be allowed.

In the end, the only substantial distinction between behavior during transit passage and innocent passage as defined in the Fiji text is that the latter does not permit aircraft overflight and does not unconditionally permit submarines to navigate submerged. Insofar as actual conduct by vessels is concerned, there seems to be no material difference between transit passage and innocent passage. In practical terms the subjectivity of innocent passage appears to have been eliminated sufficiently in the Fiji text to make this concept vir-
tually the same on this point as the right of transit passage.

The concept of transit passage in the Single Text is drawn verbatim from the U.K. text with only minor changes. Transit passage is the exercise of freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait. Vessels and aircraft are to proceed without delay, refrain from threats or use of force in violation of the U.N. Charter, and "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress." As noted, this varies from the Soviet proposal by referring to the Charter and excluding the list of acts found in the Soviet text.

Turning to the question of prescriptions governing the activities of vessels in transit passage, both the U.K. and Soviet drafts severely limit the scope of coastal competence by providing that only internationally prescribed regulations extend to transit. The U.K. draft in fact contains no provision for any independent coastal prescriptive competence. It states that ships in transit are to adhere to "generally accepted international regulations, procedures and practices for safety at sea" and for "prevention and control of pollution." While in the U.K. proposal the coastal state may designate sealanes and prescribe traffic separation schemes, these must first be referred to and approved by "the competent international organization." In an article that strains credulity (and not because the beginning clause reads "Subject to the provisions of this article, a straits State may make laws and regulations..."), no independent prescriptive authority is mentioned. The only laws and regulations the coastal state may "make" are those mentioned in Article 3 (which deals with sealanes and traffic separation schemes that can take effect only when and if approved by a "competent international organization") and those which give "effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait." The meaning of these provisions is simply that the straits states would be unable to adopt inde-

158. Article 39(1)(c). The Text adds, however, "in any other manner in violation of the Charter of the United Nations." It is not obvious what this adds that is helpful to the coastal state.

A useful deletion is the reference to actions "without... justification under international law," which is in the U.K. proposal. The problem with this passage is its vagueness and the possibility of creative interpretation it affords to justify otherwise prejudicial acts.
pendently any laws respecting vessels in the strait. All of
the applicable law must be found either in the LOS Convention159
or other treaties.

If anything, the Soviet articles are even more restric-
tive on this score and appear to envisage very little law of any
to kind to govern transit, other than the LOS treaty itself. The
coastal state "may designate corridors suitable for transit by
all ships," but nothing is said about any obligation of compli-
ance. Another section, however, would allow the coastal state
to establish traffic separation schemes which ships must observe,
but such schemes may be implemented only "on the basis of recom-
mendations by IMCO." No mention is made of any other coastal
competence. The only reference to law, other than the treaty it-
self, is that ships shall comply with international rules on
prevention of collision between ships or other accidents. With
respect to pollution there is no reference to existing agree-
ments or to coastal law, but simply that ships are to "take all
precautionary measures to avoid causing pollution. . . or any
other damage. . . ." Supertankers are to take "special precau-
tionary measures" regarding safety of navigation and avoidance of
pollution.

The paucity of these provisions for laws regulating trans-

159. One very important provision is that providing for
State responsibility to the coastal State if a ship or aircraft
entitled to sovereign immunity acts contrary to provisions on
strait or laws and regulations adopted in accordance with
Article 41. The responsibility is for loss or damage to the
"strait State or other State in the vicinity of the Strait."

This provision differs in detail from all proposals al-
though the principle is common to all. The straits State pro-
posals and Fiji define the objects of harm to include the
coastal State and "its environment and any of its facilities,
installations or other property, or to any ship flying its
flag. . . ." Responsibility might arise from harm due to vio-
lation of "other rules of international law." U.N. Doc. A/CONF.

The U.K. proposal refers simply to "any damage to a
strait State" but the Soviet proposal mentions also "their
citizens or juridical persons." The latter proposal also ap-
pears to require that the liability of the ship be established
as well as a failure to proof before the flag state is liable.
(U.S.S.R.).
it passage are of course in marked contrast to both other proposals. As noted in earlier discussion these contain lists of subjects for possible coastal laws. The straits state proposal would permit laws regarding the passage of ships with special characteristics; in context, this means that some of these ships would have no right of access at all. Furthermore the coastal competence to establish sealanes and traffic separation schemes would be unrestricted in this conception.

The Fiji proposal on laws and regulations is a very moderate one, however, and does not differ materially from either the U.K. or Soviet drafts on the territorial sea outside straits. The regulations it would authorize would have very little, if any, impact on legitimate passage in the territorial sea and, in all probability, would not affect transit passage appreciably either. Again, it should be noted that under the Fiji proposal the coastal authority is substantially unrestricted in setting up sealanes and traffic separation schemes. Instead of prior approval by an international organization, its recommendations are only to be taken into account.

In sum the difference between the Fiji conception of laws applicable to straits and the maritime states are very large in terms of the scope of coastal competence to prescribe. A substantial range of coastal laws could be prescribed, according to the one view, while literally none, in the U.K. conception. It is a different question whether passage would or even could be more affected by the Fiji conception than by the U.K.

The designation of coastal prescriptive competence in the Text differs substantially from that in the U.K. Text but is not as extensive as the straits states or Fiji suggest. Coastal competence to prescribe laws and regulations for safety of navigation and the regulation of marine traffic is limited to that concerning sealanes and traffic separation schemes. Before acting on these measures the strait state is to refer proposals to the competent international organization which may only adopt such sealanes and schemes "as may be agreed with the strait State, after which the strait State may designate or prescribe them."\(^{160}\) This has the effect of allowing the organization to frustrate the straits state's measure, but does not permit it to impose another system on that state.

\(^{160}\) Insofar as the coastal state's participation is concerned this does not differ from current practice of IMCO which is to take into account the views of all states and parties. For discussion of this practice and recent developments see Brown and Couper, in Christy, supra note 80, 288-93.
Additional coastal laws may include those for the prevention of pollution, however apparently only in order to give "effect to applicable regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait," for fishing, and for "taking on board or putting overboard of any commodity, currency or person in contravention of the customs, fiscal, immigration, or sanitary regulations of the strait State."

It is provided that laws must be nondiscriminatory among foreign ships and, perhaps of more importance, shall not "in their application have the practical effect of denying, hampering or impairing the right of transit passage. . . ."

Perhaps the most critical provision on the scope of coastal competence is one which has the apparent effect of extending the normal laws governing events in the territorial sea. Article 38(4) provides that "Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of the present Convention." Among other things, this would appear to extend coastal prescriptions to activities by a vessel which are not within its right of exercise of transit passage. With the addition of this provision, the articles on transit passage seem to bear a reasonable resemblance to the essential elements of the major proposals, with the important exception of the vessel and aircraft exclusions and special treatment of ships with special characteristics in the straits states' and Fiji proposals.

In major respects the Text is fairly close to the Fiji draft as well as that of the U.K. and, to a lesser degree, the U.S.S.R.

Turning to the enforcement of laws and regulations in straits, it should not be surprising to find rather laconic proposals on this, in light of the severe limitations in proposals for coastal prescriptive competence. The U.K. proposal appears to envisage coastal enforcement of the laws and regulations on sealanes and traffic separation systems as well as on pollution, at least as long as the latter merely give effect to in-
ternal discharge regulations.\textsuperscript{162} It is not clear who is to enforce regulations for safety at sea, including collision, and prevention and control of pollution, nor is it evident from this proposal who is to take action in the event some vessel actually uses force in violation of the U.N. Charter.\textsuperscript{163} Presumably the coastal state would be authorized to take enforcement action, especially against a prior use of force, but this allocation of competence is not explicitly set out in this proposal.

The Soviet proposal on straits is no more forthcoming; it contains one provision which implies severe limitations on any enforcement action. Article 2(e) provides:

\begin{quote}
No State shall be entitled to interrupt or suspend the transit of ships through straits, or engage therein in any acts which interfere with the transit of ships, or require ships in transit to stop or communicate information of any kind.
\end{quote}

This combination of prohibitions, and especially the one referring to communications, probably would make any significant enforcement impossible.

The Fiji and straits states' proposals do not make separate provision for enforcement in straits, although the latter does enjoin the coastal state not to hamper passage and to attempt to ensure "speedy and expeditious passage." The basic enforcement competence appears to be the same as in the territorial sea, namely to prevent noninnocent passage and to enforce the coastal laws and regulations governing events in this area.

The enforcement provisions of the Text are expressed in the indirect fashion that seems to characterize provisions on this aspect of laws concerning navigation. It is not expressly stated who is to enforce the proscription against unlawful use

\textsuperscript{162} Article 4 does not expressly provide that the coastal State is authorized to enforce but this seems to be a permissible deduction. It does provide that the straits state may make laws and regulations in conformity with Article 3 which deals with sea lanes and traffic separation schemes. Paragraph 4 states that foreign ships shall comply with the laws and regulations. This can be reasonably interpreted to provide for strait state enforcement.

\textsuperscript{163} These matters are dealt with Article 2 and are not referred to in Article 4 which concerns enforcement of specific coastal laws.
of force, although it can be presumed that the coastal state is permitted to exercise self-defense and generally to take actions permitted by the U.N. Charter. Nothing is included regarding enforcement of safety, collision and pollution regulations although, again, it is to be assumed that coastal state authority may be exercised for this purpose in accord with the treaties establishing these laws.

Article 41 regarding coastal laws and regulations contains the provision that has often been interpreted to authorize coastal enforcement: "Foreign ships exercising the right of transit passage shall comply with such laws and regulations of the coastal State." Beyond this usual treatment, however, Article 38(4), which refers to "activity not in exercise of the right of transit passage," would seem to extend normal coastal enforcement competence in the territorial sea to apply coastal laws to any activity that infringes such law. In this sense full coastal enforcement authority appears to be recognized in straits for those specified activities.

Appraisal and Recommendation

The Single Text appears to go beyond the policy recommendations advanced earlier by allowing passage by submerged submarines. Although this is in the direction of promoting inclusive use, and may have some safety features, it is at the cost of denying the straits state authority over a particular class of ship that might reasonably be perceived as a threat. This circumstance would be unexceptionable if community institutions were adequate to protect coastal interests in territorial integrity and political independence, but they are not. In other respects the Text appears to be a combination of suggestions that is better than any single source thereof, whether maritime or straits oriented. The broad conception of straits is commendable in employing the simple criterion of use, without qualification as to customary practice, duration, or frequency.1 The extreme insulation of passage proposed by the maritime states is considerably attenuated and more solicitude, displayed toward coastal interests. The concept of "transit passage" is adopted, but the scope of coastal authority to prescribe and to apply law is much greater than that demanded by the U.S. and U.S.S.R. and approximates the views of the moderate straits position advocated by Fiji. Hence, even a

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164. Article 37 refers to straits which "are used" for international navigation, connoting the simple fact of use without regard to time period.
modest amendment of Fiji's territorial sea proposal would allow for an acceptable compromise on a straits provision.

D. Ocean Areas Adjacent to the Territorial Sea

Claims to authority beyond but adjacent to the territorial sea are and have been expanding over the past quarter century. Essentially these claims have been directed at resource use, but increasingly since about 1970 assertions are that other activities should be governed by the coastal state exclusively. Earlier, the typical coastal state claim related to a specific problem of use, extending coastal authority for that particular purpose and accommodating it to minimize interference with other uses. Some proposals in the LOS negotiations, however, go beyond this approach of use-by-use extension of control to lay claim to an area within which virtually all authority would be allocated to the coastal state and the only inclusive uses permitted are those specifically reserved to the community.

1. Clarification of Policy

There are two principal policy issues involved. They are (1) the scope of coastal authority to prescribe and to apply laws affecting passage in an area beyond the territorial sea because such passage has or can have an effect upon coastal interests in the area and (2) the coastal authority to make use of the area in ways that substantially interfere with and exclude access either of vessels or of other instrumentalities. In the former instance it is assumed that navigation of vessels will occur and the issue concerns interference with that activity on a vessel-by-vessel basis. In the latter instance the question is one of priority of uses in a particular context, i.e., should any navigation or other use for movement of objects be permitted.

With respect to the first question, the most important factor for policy about navigation is that the community interest in maintaining an efficient and smoothly functioning global transportation system continues to be intense while the

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165. It should be noted that the nature and extent of these claims have changed in the period since 1965 because of the continuing process of enlarging the territorial sea beyond three and six miles. The extension of this belt to twelve miles meant in numerous instances that special claims to limited authority beyond the territorial sea were now simply an accepted component of authority over the latter area.
weight of coastal (exclusive) interests in this area is less than that experienced in areas closer to land. Transportation by ship requires access to the region adjacent to the territorial sea and use of the zone by vessels is both usual and customary. This fact inheres in the nature of the ocean and its use for transportation purposes. Moving from port-to-port around the globe means that large parts of the ocean near land masses must be utilized for this purpose.166

While the high priority assigned to free access for transport is familiar, this use is changing not only in intensity but also in the technologies involved. The main item now being moved around the globe is petroleum and the ships used for this purpose have changed enormously over the past decade.167 The principal difference is in the size of the vessels used, permitting them to carry enormous quantities of bulk cargo. Occasional catastrophes involving accidental discharge of oil into the ocean coupled with large estimated intentional discharges

166. Various calculations have been made of the costs to the U.S. of avoiding 200 mile pollution control zones. A U.S. Treasury Study of Persian Gulf-Philadelphia and Persian Gulf-San Francisco placed the cost, on the figures they assumed, at 8 cents and 26 cents per barrel round-trip, respectively. This (apparently unpublished) study is entitled "Comparative Costs for Oil Shipped by Alternative Routes from the Persian Gulf to the United States" (May 24, 1974). A Federal Energy Office Study set forth a fanciful scenario which appears to project a greater discrepancy in cost. "Maritime Transportation of Energy Study" (1974) (unpublished).

Studies limited to U.S. conditions omit a good deal. A recent report states that tankers over 200,000 dwt and 18.9m in draft will be banned from the Strait of Malacca. (A similar prohibition in 1972 has not been enforced.) The report states that a diversion of Japanese tankers to Lombok Strait would mean an 8% increase in the cost of Crude oil in Japan. LXXX Marine Engineering/Log 10 (April 1975).


But these very large crude carriers are now being laid up in great numbers and the world tanker market is badly depressed, due mainly to high oil prices leading to decreased consumption. See Blenkey, "The Year that the Bottom Dropped Out," LXXX Marine Engineering/Log 91 (June 15, 1975). See also "World Shipbuilding - 1974 A Record Year; Future Looks Grim," id., at 125.
have increased concern among coastal states for preservation of the marine and coastal environments. The policy question is whether or not coastal authority to interfere with vessel movement, or to preclude it altogether, ought to be recognized in order to protect its interests. Interference might take the form, for example, of stopping vessels for inspection, search, and investigation either in connection with identifiable episodes of discharge or for more general purposes and, perhaps, arrest of a vessel or officer for a violation of coastal or other law.168

168. A study by the U.S. Federal Energy Office asserts that many of the following forms of interference are already being experienced daily by tanker operators:

1. Prohibition on transit of vessels of a certain category, presumably for environmental or safety reasons:
   a. Oil tankers which exceed a certain tonnage.
   b. Nuclear-powered vessels, or vessels carrying nuclear arms or radio-active materials.
   c. Vessels carrying certain hazardous cargoes (chemicals, etc.).

2. Rules and regulations for the construction or design of vessels with which most merchant ships cannot reasonably comply:
   a. Requirement for double-bottomed oil tankers.
   b. Requirement for segregated ballast tanks.
   c. Requirement for specific construction materials, e.g., hull composed of certain strength steel.

3. Rules and regulations for the construction or design of vessels which can be met but which require an unavoidably high cost of installation.

4. Standards for operational discharges of oil by vessels which in effect require different vessel construction.

5. Operational standards and other requirements which unjustifiably impede navigation:
   a. Manning standards which would require that vessel crews be certified by the coastal state itself.
   b. Requirements that vessels not transit during certain climatic conditions, or at night.
   c. Requirements that vessels not exceed a certain speed.

6. Abuse of coastal state enforcement powers for political, economic or overzealous environmental reasons:
   a. Forcing vessels to stop in order to inspect construction certificates.
   b. Boarding vessels for inspection purposes.
For vessels in movement through the zone the only coastal authority that ought to be recognized would be that to enforce laws about intentional discharge of oil in the zone. This would exclude any coastal interference with passage in connection with laws relating to construction, design, manning or equipment, or with events occurring outside the zone or unintentional discharges within the zone. In all these latter cases the impact upon inclusive use seems well out of proportion to the protection afforded to coastal interests. In fact attempts at interference with large tankers in transit may have a very undesirable effect not only on passage but also possibly on the interest in environmental protection. The occasion for this should be limited to the maximum extent possible.

c. Arresting vessels for supposed violations of standards and taking them into coastal state port.
d. Detention of vessels in port pending prosecution.
e. Exorbitant fees for violations of coastal state controls.
f. Prosecuting vessel crew for criminal charges.
g. Confiscation of cargo.
h. Demands that vessels undergo unwarranted repairs at shipyard of coastal states.

7. Discriminatory treatment for political reasons of vessels of different nations or vessels carrying different cargoes.

8. Economic incentives for controlling navigation could include:
   a. Levying of tolls for use of area as a means to increase domestic tax revenues.
   b. Requiring use of national port facilities in order to generate additional revenues or to encourage international trade.
   c. Requiring use of other facilities such as refineries, shipyards, etc.

9. Use of navigational controls to exact strategic, political and other economic concessions from user states.

If coastal states have already engaged in such interference in recent years at a time when there was widespread recognition that the legitimacy of these actions was under negotiation, there is good reason to believe these actions will increase when it becomes clear that the negotiation has failed. Federal Energy Office, Maritime Transportation of Energy Study 6-8 (1974). Apparently this study is not published, nor is it classified.
With respect to conflicting uses, balancing the interests at stake should recognize both the high importance of navigation and the possibility that in some context other uses might require preference. In all instances of potential conflict there should be no substantial impairment of effective exercise of the freedom of navigation in the zone. This balance of interests would permit a degree of coastal exclusive use in specific contexts where the effect on vessel transportation was minor either because it is limited in time or requires only slight deviation in course. For example, emplacement of artificial structures for a variety of purposes ought to be a permissible activity when it serves an important coastal interest so long as there is no serious impact on access of vessels. It is conceivable that some type of coastal exclusive use might even be permissible when it works only a very short, if total, disruption of passage. Provision of adequate notice would assure that the degree of disruption could be minimized even in this circumstance. This latter policy would extend, for example, to hazardous uses connected with military or perhaps space operations.

The other major policy question concerns use of the seabed for movement of goods or messages by pipeline and cables. It seems appropriate to recognize a right of such use for purpose of crossing the zone by other states but to defer to coastal state authority to decide upon initial location and routes. Once a cable or pipeline is installed the coastal state must also be afforded such authority over its continued use as is consistent with recognition of its paramount authority over resource extraction.

2. Trend in decision

It is well known that for decades coastal states have acted, mostly unilaterally, to extend their authority beyond the territorial sea to deal with perceived problems which they thought demanded such authority to safeguard local value processes. By and large these extensions, which took a variety of forms and served a number of different purposes, did not meet with vigorous objection, and as time passed they came to be accepted under the general doctrine of the contiguous zone. During the period after World War II through the 1960s this process intensified and the purposes of extending authority

169. For an account of the period through the 1960 LOS conference, see McDougal and Burke 565 ff., especially 584-607, 612-21, 623-30.
came to include issues of generally appreciated importance such as the oil resources of the shelf\textsuperscript{170} and the fisheries resources of waters adjacent to the territorial sea.\textsuperscript{171}

It was clear by the time of the 1958 LOS Conference that this unilateral process of extending coastal authority would continue if the general community of states did not devise and widely accept internationally prescribed regulations for such important matters as marine fisheries. The 1958 Conference did not succeed in adopting any effective regulations in this regard, partly because the regulations they did adopt failed to confront the genuine problems involved.\textsuperscript{172} Within less than a decade, so many states had acted unilaterally to extend their authority to acquire exclusive fishing rights that this extension just as quickly came to be regarded as customary international law.\textsuperscript{173}

\begin{itemize}
  \item \textsuperscript{170} The claims to the continental shelf are of course another form of extending limited coastal authority for particular purposes and in this sense represent only a new form of the contiguous zone claim.
  \item \textsuperscript{171} Claims to living resources beyond the territorial sea were not frequent but still also not unknown before the 1958 LOS conference. See McDougal and Burke 647-50.
  \item \textsuperscript{172} The adoption of the Convention on Fishing and Conservation of the Living Resources of the High Seas has not been widely ratified nor has it been employed as between ratifying states. One reason for this is that the Convention does not attempt to resolve the problem of allocating resources or the benefits of resources, although this issue is the major divisive influence concerning living resources. And, of course, the attempt at international agreement on an exclusive fishing zone failed, if only barely.
  \item \textsuperscript{173} In 1966 the U.S. extended its fisheries jurisdiction to 12 miles and in the process testified to the evolution of law on this point. See Hearings before the subcommittee on Merchant Marine and Fisheries of the Senate Committee on Commerce, 89th Congress, 2d Session, on Senate Bill 2218, May 18-20, 1966, Serial No. 89-65; Statements by D. MacArthur II, at 2, and Stewart L. Udall, Secretary of the Interior, at 3.
\end{itemize}

By 1974 the I.C.J. was able to declare, in the Fisheries Jurisdiction Case, that the concept of the fishery zone beyond the territorial sea had "crystallized as customary law in recent years arising out of the general consensus revealed" at the 1960 Conference on the Law of the Sea, 13 \textit{Int'l Legal Materials} 1049, 1059 (1974):
Although in this latter respect it failed, the 1958 Conference did adopt several provisions extending coastal authority beyond the territorial sea. The most significant of these is the Continental Shelf Convention which provided that beyond the territorial sea to 200 meters or to the depth admitting of exploitation the coastal state has sovereign rights for the purpose of exploring and exploiting the seabed and subsoil. The Convention also made provision for accommodating these rights with those of inclusive use of the waters above and of the seabed and subsoil. It is not the purpose at this point to discuss this agreement in detail, but simply to note that it dealt with the problem of coastal resource use and the accommodation of this use with navigation. Discussion of the 1975 LOS Single Text below will point out the provisions of the 1958 Convention which relate to navigation.

The other main provision in the 1958 Convention concerning coastal competence that relates to access for navigation is Article 24 of the Convention on the Territorial Sea and Contiguous Zone. This article concerns the "contiguous zone" which is used here (and also in the 1974 LOS negotiations) as a legal concept of fixed and narrow meaning. This article states:

In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

(a) Prevent infringement of its customs, fiscal, immigration or sanitary regulation within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within its territory or territorial sea.

The notion that the contiguous zone concept as formulated in the 1958 treaty did, or could, express the full scope of coastal authority beyond the 12 mile zone rested on a very fragile basis at the time; subsequent events demonstrated this rather quickly. As noted above, beginning in the 1960s coastal states unilaterally adopted measures that were not accepted at the 1958 Conference when they extended exclusive fishing authority beyond the territorial sea. This movement toward satisfying this coastal interest no doubt reinforced a later but rather weak trend toward an expansion of authority for still other purposes, principally environmental protection. The Canadian Arctic Pollution Prevention Act is the principal impetus in this movement that was intended to establish new cus-
By the time the Seabed Committee began preparatory work for the conference, there had developed a widespread feeling that coastal authority ought to be extended for a variety of purposes (not limited to resources) over an extended area of adjacent ocean. This expansion has been sought and defended not in terms of an enlarged "contiguous zone" as such but rather as an "exclusive economic zone" or "patrimonial sea." At the same time this latter label was being invented and discussed, some states continued to use the term "contiguous zone" as a doctrinal expression for a certain scope of coastal authority within a part of the economic zone.

The present purpose is not to examine the proposed economic zone as such, but rather to take note of decisions on comparable issues on the continental shelf and to consider LOS proposals concerning access to the zone for navigation and other movement. The discussion centers about, first, the general scope of authority in the zone and shelf in relation to inclusive uses for transportation and communication, including specific provisions for safeguarding these latter uses, and, second, more detailed provisions for accommodating inclusive with exclusive uses and authority. A third subject concerns the relationship between navigation rights and potential coastal authority in the zone over vessel activities affecting the marine environment.

(1) General Scope of Authority in the Zone and Inclusive Use for Transportation and Navigation

It may be recalled that the International Law Commission and the 1958 LOS Conference confronted the same general issue when attempting to formulate what came to be the 1958 Convention

174. But Canadian officials and others now agree it has not done more than bring the issue before the international community. See statements by Alan C. Beesley and Louis Henkin in Perspectives on Ocean Policy 352-53 (1975). The Single Text provides that in limited circumstances, not unlike those prevailing in the Arctic, the coastal State may unilaterally establish in the economic zone "appropriate nondiscriminatory laws and regulations for the protection of the marine environment. . . ." Part III, Article 20(5), U.N. Doc. No. A/CONF.62/MP.8, at 8.

175. The economic zone concept is associated with the African States while the patrimonial sea concept came from some Latin American nations. The former label appears now to be used most frequently and is employed here.
The problem then, however, was a broader one involving all inclusive or open uses of the shelf and the waters above. The result in the 1958 Convention is composed of several brief but significant provisions.

In reconciling enlarged coastal authority over the shelf as seabed and subsoil, Article 3 of the Convention declares that the new coastal rights "do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters." The effect of this is to preserve all high seas rights and freedoms in the waters above the shelf subject to accommodation with coastal rights and activities. The alternative to this general formulation was to name certain specific freedoms, such as navigation, and omit others. This choice was rejected.

Since high seas rights continued to exist above the shelf, the problem still remained of providing for their specific accommodation with coastal authority. The most general provision on this states that "[t]he exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation. . . ." As noted elsewhere, this directive is quite general in nature and provides little specific guidance to those concerned, although a later provision [Article 5(6)] indicates how the interests are to be balanced in one situation by providing: "neither the installations or devices, nor the safety zones around them, may be established where interference may be caused to the use of recognized sea lanes essential to international navigation." Other, more detailed articles (discussed below) deal with accommodation of navigation with fixed installations.

It can be seen that the 1958 Continental Shelf Convention maintained the traditional legal separation of the ocean into the territorial sea and the high seas, with nothing in between. Thus, even as coastal authority was enlarged by the Continental Shelf Convention to include shelf resources, and later as customary law permitted coastal control over living resources, the region adjacent to the territorial sea retained its character as part of the high seas.

There is now a vigorous move to change this traditional

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176. See McDougal and Burke at 693-704 and sources there cited.

177. In 1958 only narrow coastal rights to the shelf were involved, in contrast to the rather broad coastal authority now being discussed in relation to the waters and the bottom.

178. McDougal and Burke at 703-04. This, of course, is precisely the approach now being recommended in the Single Text.

179. Id., at 706-09.
conception by providing that the high seas do not include the region to be called the economic zone.\(^{180}\) Apparently the notion of working a drastic reduction in the high seas while enlarging coastal state authority began early in the Seabed Committee, if not before. Certainly the formal records indicate this view by early 1972 when Kenya introduced its draft articles. Shortly thereafter, the Declaration of Santo Domingo in June 1972 recommended that the high seas not include the patrimonial sea. Prior to the Caracas session, the patrimonial sea proposal by Mexico, Colombia, and Venezuela was introduced to implement this Declaration. This proposal clearly indicated the view that the patrimonial sea and high seas were entirely separate areas.\(^{181}\) Also, the Ecuador, Panama, Peru proposal, which would establish a 200 mile territorial sea but call it an "adjacent sea," lent some fuel to this fire by providing that the term "International seas" replace "high seas" and that it refer to all areas beyond the part subject to coastal state sovereignty and jurisdiction. Moreover, the Chinese working paper, which dealt with the territorial sea, exclusive economic zone, and continental shelf, does not even mention the term "high seas" or any equivalent thereof, would establish only a truncated version of freedom of navigation in the economic zone by excluding navigation below the surface, and would recognize a far-reaching coastal authority to regulate all activities in the zone.\(^{182}\) In another working paper China placed the "international sea area" beyond the limits of national jurisdiction.\(^{183}\)

At the Caracas session the only specific proposals on this point were by El Salvador to place the high seas beyond the zone,\(^{184}\) and by the U.S., expressly to extend the concept

\(^{180}\) There is no doubt that this effort is one component of a broader spectrum of actions which are intended to enlarge the rights of coastal developing nations and to diminish those of developed countries. Mr. Njenga of Kenya spelled this out quite explicitly during the spring 1972 meetings of the Seabed Committee, even before proposals were made to effect the change. U.N. Doc. No. A/AC.138/SC.11/SR.29 (28 March 1972).

\(^{181}\) There is no specific provision on this. The proposal, however, has separate sections on the patrimonial sea and high seas and each contains provision for the freedoms to be recognized therein. U.N. Doc. No. A/AC.138/SC.11/L.21, Articles 9 and 16.


\(^{184}\) There are two pertinent proposals by El Salvador on this point. One, on the economic zone, would include pro-
of the high seas to the economic zone. The Main Trends contained four alternatives on this point, two of which would remove the zone from the high seas and another (reflecting the Chinese view and the Ecuador-Panama-Peru 200 mile "adjacent sea") would provide that the "international seas" denotes the area not subject to coastal sovereignty and jurisdiction. Only one alternative embodied the present law.

The Single Text is strongly oriented toward affirming coastal rights in the zone at the expense of community uses. In addition to directly subordinating community use for transportation and navigation to coastal rights, without employment of qualifying terms protective of such uses, Article 47 coupled with Article 73 create a no-man's land which is neither state territory nor part of the high seas. Article 73 defines the high seas as "all parts of the sea that are not included in the economic zone." Article 47(2) concerning the zone incorporates by reference a total of twenty articles on the high seas and excludes only three, one of which recognizes the various freedoms of the sea exercised on the high seas. Given Article

vision for coastal jurisdiction over other economic uses of the waters, residual rights and competences in the coastal state, and "indication that the exclusive economic zone is contiguous to the high seas." U.N. Doc. No. A/CONF.62/C.2/L.60, III Off. Rec. 232. The other proposal is on the high seas and it expressly provides that the high seas are parts of the sea outside the exclusive economic zone. U.N. Doc. No. A/CONF.62/C.2/L.68, id., at 235.

185. Formula B: "The waters situated beyond the outer limits of the patrimonial sea - economic zone - constitute an international area designated as high seas. Formula D: "The term 'high seas' means all parts of the sea that are not included in the internal waters, the territorial sea, or the exclusive economic zone of a State."

Provision 136, A/CONF.62/C.2/WP.1, id., at 84.

186. Formula C: "The term 'international seas' shall denote that part of the sea which is not subject to the sovereignty and jurisdiction of the coastal State." Ibid.

187. Formula A: "The term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State." Ibid.

188. See infra TAN 203.

189. For further discussion see the text infra at 281-84.

190. Article 75 is a new version of Article 2 of the High Seas Convention. Articles 98 and 99 are directed at parts of the ocean beyond the economic zone.
73, it is sensible that Article 47(2) would exclude high seas freedoms as such from the zone, even when these are subject to the qualification in Article 47(2), "insofar as they are not incompatible with the provisions of this Part."

Article 47(4) strongly underscores the priority attached in this Text to coastal interests by declaring that in exercising rights to navigation and overflight "States shall have due regard to" coastal rights and duties and shall also "comply with the laws and regulations enacted by the coastal State in conformity with the provisions of this Part and other rules of international law." The emphasis is upon the need to defer to coastal rights and duties and laws and regulations. Article 45 does require the coastal state to have due regard to the rights of other states, but these are elsewhere made subject to the rights of the coastal state.

Turning to provisions expressly dealing with navigation, beginning with the introduction of the first draft articles on the economic zone in 1972 by Kenya, most proposals contained provisions to protect free navigation and overflight in the area. Even proposals which either created a 200-mile territorial sea or left the width to coastal discretion sought to provide some formula that at least appeared to safeguard the general community's interest in transportation by vessel and plane.

191. Article 45 thus offers cold comfort to those concerned about community rights in the zone. The rights to which Article 45 says the coastal state owes due regard are those which are already qualified by subjection to coastal rights. Thus, "due regard" would apparently mean whatever the coastal state wants it to mean.


193. The purpose in making such provision for the economic zone was at least twofold. First, there is a genuine need to protect navigation in the economic zone and such provision takes that into account. Second, and perhaps more important is the context, the careful affirmation of freedom of navigation in the zone is intended to demonstrate that it is community, not coastal state, rights which need explicit mention. This further demonstrates that it is coastal authority in the zone which is plenary and dominant. In other words affirming some high seas freedoms, without calling them that, is a means of confirming that the area is not high seas. See the statement by Mr. Njenga, II Off. Rec. 183, para. 18.


A difficulty faced even by the most vigorous supporters of freedom of navigation arose from the general scope of authority being conferred on the coastal state in the zone. The problem was to provide protection for navigation and overflight while recognizing coastal predominance in resource (and sometimes other) uses. A number of approaches to this were promoted. One is illustrated in the proposal by Colombia, Mexico, and Venezuela (SC.11, L.21) that in the patrimonial sea ships and aircraft shall enjoy the right of freedom of navigation and overflight 'with no restrictions other than those resulting from the exercise by the coastal State of its rights within the area.' 196 Another formula, in contrast, contained a much narrower statement of coastal state rights. 197 Despite these differences the notion was clear that coastal states' rights were paramount and could involve restrictions of an unidentified nature on freedoms of navigation and overflight.

At the Caracas session a proposal by an influential group of coastally oriented states offered a somewhat clearer expression of the intent of this approach to subordinate community, to coastal interests. Article 14 of this working paper declared:

In the economic zone, ships and aircraft of all States, whether coastal or not, shall enjoy freedom of navigation and overflight subject to the exercise by the coastal State of its rights within the area, as provided for in this Convention. 198

The following article serves to emphasize the view that coastal rights have higher priority by providing that "the coastal state shall exercise its rights and perform its duties in the economic zone without undue interference with other legitimate uses of the sea...." No criteria are offered for determining what


"undue interference" might be.199

Another conception of a way to emphasize the primacy of coastal rights was offered by Nigeria. This proposal affirms that all states have the rights of freedom of navigation and overflight in the economic zone200 and declares that the coastal state "is under an international duty not to interfere without reasonable justification" with these freedoms.201 No criteria are offered for "reasonable justification," and it is worth noting that the interference contemplated here is not expressly tied to coastal rights over resources and other activities.

Another proposal which places strong emphasis on coastal rights is that by a large group of African States. Article 5, paragraph 2, of this proposal states that in the zone all states "shall enjoy" freedom of navigation and overflight and that these freedoms shall be exercised "in such a manner as not to interfere with the rights and interests of the coastal State."202 In introducing this proposal, although not claiming to speak for all sponsors because of lack of time to consult, Mr. Warioba of Tanzania emphasized the subordinate nature of the freedoms mentioned in Article 5 by stating that this Article "ensured that in the future they would be regulated freedoms."203 This appears to be an interpretation of Article 5(2).

The U.S. and U.S.S.R. proposals stress protection of freedom of navigation and overflight, but the former may have stronger emphasis. It simply states that coastal rights in the zone "shall be exercised without prejudice to the rights of all other States. . . as recognized in this Convention and in international law," including the freedoms of navigation and overflight.204 The phrase beginning "as recognized" appears to refer to the rights of other states. The U.S. proposal in Article 7 states

201. Article 3, ibid. Israel commented that this was a "catchall phrase" which "could open the door to all sorts of abuses." II Off. Rec. 179, para. 120.
203. II Off. Rec. at 297, para. 11.
that "Nothing in this chapter shall affect the rights of freedom of navigation and overflight, and other rights recognized by the general principles of international law, except as otherwise specifically provided in this Convention." This affirmation requires reference to and interpretation of other provisions. The following article, however, would limit the scope of coastal authority to affect other uses: "The coastal State shall exercise its rights and perform its duties in the economic zone without unjustifiable interference with navigation or other uses of the sea, and ensure compliance with applicable international standards established by the appropriate international organizations for this purpose." The implication of this is that the coastal state does not have discretion to determine how it may affect navigation and other community uses in the zone while carrying out its own rights but must follow internationally prescribed standards. The theory of this arrangement is commendable, but it does not mention what the coastal state is expected to do or can do while awaiting action by the 'appropriate organization' to guide its decision-making. It could be a long wait.

The Single Text adapts the coastal state approach of L.4 to the problem of the accommodation of rights in the zone. Article 47(1) states:

"All States, whether coastal or landlocked, shall, subject to the relevant provisions of the present Convention, enjoy in the exclusive economic zone the freedoms of navigation and overflight and of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to navigation and communication." (emphasis added)

The subjection of navigation to coastal rights is reinforced by Article 47(4) which declares that states exercising their rights in the zone "shall comply with the laws and regulations enacted by the coastal state in conformity with the provisions of this Part and other rules of international law." It may be recalled

205. U.N. Doc. No. A/CONF.62/C.2/L.47, 111 Off. Rec. 222. 206. Id. 207. This provision not only gives priority to coastal rights but it circumscribes other rights by limiting other lawful uses to those related to navigation and communication. This is in contrast to the U.S. and Soviet references to other rights recognized by international law. In the Single Text provision there are no such other rights except as they relate to navigation and communication.
that the phrase "States shall comply with the laws and regulations" is commonly taken to mean that the coastal state may enforce its laws. Since according to paragraph 1 the freedom of navigation is a right in the zone, Article 47(4) appears to confer on the coastal state an authority, even beyond that derived from Article 45, to promulgate and to enforce laws and regulations for navigation and overflight in the economic zone.

(ii) Specific arrangements for accommodating inclusive use

Cables and Pipelines

Cables continue to be critically important means of communication across the vast distances of the earth's surface, and it is still necessary to protect their use. For much shorter distances pipeline transmission of commodities is also highly useful, if not essential, and its employment also warrants proper safeguard.

The general principle of freedom to lay cables and pipelines under the ocean has long been accepted in international law without any question. The problem of reconciling these instrumentalities with coastal use of the shelf for seabed and subsoil exploration and exploitation arose very early in the consideration of the shelf issue, even prior to the discussion of the matter in the International Law Commission. The recommendation of the Commission was ultimately adopted by the 1958 LOS Conference, with only the addition of the word "pipelines":

Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables on the continental shelf.

The precise operational meaning of this language has not apparently been the subject of controversy. The Commission in its deliberations expressed or heard the view that the coastal state could determine the route to be followed by cables, but if an existing instrumentality had to be moved before exploitation could be undertaken this would be at the expense of the coastal state. It is unknown whether these expectations have been generally recognized and acted upon.

There are few differences among the current LOS proposals

208. McDougal and Burke 704-06.
209. Id. at 705.
concerning the cables and pipelines in the economic zone and continental shelf. All proposals appear to recognize freedom to lay cables and pipelines in the zone or on the shelf, subject to the rights of the coastal state. China noted a need for coastal consent to the route but this is generally understood to be a condition implicit in and compatible with the freedom involved.

The U.S. zone and shelf proposal repeats in Article 29(1) the 1958 Continental Shelf Convention provision which affirms the priority of the coastal state's rights to explore and exploit, but also declares that it "may not impede the laying or maintenance of submarine cables and pipelines on the continental shelf." Article 29(2) appears, in part at least, unnecessarily to emphasize the obvious, although perhaps it also usefully clarifies the relationship between coastal authority over "installations" and, over cables and pipelines.

The Single Text refers to cables and pipelines in the zone in the articles on the shelf, where the latter is defined to extend from the territorial sea "throughout the natural prolongation of its land territory to the outer edge of the continental margin" or to 200 miles where the shelf does not extend that far. In an apparent effort to accommodate as many as possible, the Text is more extensive than the 1958 Treaty and expresses what appears to have been assumed in the latter. Thus Article 65 both declares that states are "entitled" to lay cables and pipelines on the shelf and that the coastal state may not impede such activity, subject to its right "to take reasonable measures" concerning exploration and exploitation and (a new addition) prevention of pollution from pipelines. Article 65(3) states that coastal consent is necessary for the course of pipelines but does not mention cables. Article 65(4) is the same as the U.S. proposal mentioned in the paragraph above but refers more broadly to the "operations of artificial islands, installations and structures under its jurisdiction."

Article 65(5) concerns the problem of existing cables and pipelines and the installation of new ones. The meaning is not clear. States are to "pay due regard to cables and pipe-

212. "Nothing in this article shall affect the jurisdiction of the coastal State over cables and pipelines constructed or used in connexion with the exploration or exploitation of its continental shelf or the operations of an installation under its jurisdiction, or its right to establish conditions for cables or pipelines entering its territory or territorial sea." Id.
213. Article 62.
lines already in position" and shall not prejudice "possibilities of repairing existing cables or pipelines." Presumably this directive establishes liability in the event that any prejudice is caused. The "due regard" requirement similarly indicates a priority position for the pre-existing facilities.

Artificial Islands and Installations

With the exception of that of the U.S., proposals for accommodating installations in the economic zone with navigation are quite brief, almost perfunctory. The amount of attention devoted to this topic appears to reflect the degree of concern over navigation as opposed to coastal resource interests. The African proposal (L.82) provides simply that the coastal state can establish safety zones around offshore islands and installations within which it can regulate, while Nigeria (L.21) provides that in safety zones a coastal state may "take appropriate measures to ensure safety of installations and of navigation." The slightly more elaborate East European zone proposal (L.38) would place limitations on coastal authority. According to this proposal international standards are to govern the breadth of the safety zones and also navigation which, though beyond the limits of the safety zones, is close to installations and other facilities.

The U.S. proposal (L.43) authorizes safety zones which are to be "reasonably related to the nature and function of the installation." The breadth of those zones is to conform to existing international standards or to those prescribed by IMCO and, where no standards apply, the zones are to be 500 meters around installations for exploration and exploitation of the non-renewable resources of the seabed and subsoil. No breadth is mentioned concerning other types of installations contemplated in these articles. As in the Soviet proposal, international

214. The discussion here does not consider the whole question of regulating these instrumentalities but is limited to the question of accommodating their use with navigation.


standards are to govern "regarding navigation outside the safety zones but in the vicinity of such offshore installations." As in the 1958 Convention, "[i]nstallations and safety zones around them may not be established where interference may be caused to the use of recognized sealanes essential to international navigation." Provision is also made for due notice of construction, warning signals, and removal of installations.

The Single Text provisions draw mainly upon the U.S. and Soviet proposals. The coastal state can fix the breadth of safety zones but cannot exceed 500 meters "except as authorized by generally accepted international standards or as recommended by the appropriate international organizations." Other paragraphs of Article 48 do not differ in any material way from the U.S. proposal insofar as they relate to navigation.

(iii) Scope of coastal authority over vessel source pollution

Apart from treaty there is no general expectation that a coastal state may lawfully prescribe and apply policy concerning marine pollution beyond the territorial sea.\(^{217}\) Article 24 on the contiguous zone is interpreted by some as authorizing such coastal competence,\(^{218}\) and the Continental Shelf Convention contains a minimal recognition of a limited coastal authority around

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\(^{218}\) The United States appears to have acted on this assumption. 84 Stat. 91.

It is probably irrelevant what Article 24 expressly provides. One court has now interpreted the Convention to be permissive and not restrictive, such that States are free to establish zones for other purposes. US v. F/V Taiyo Maru, U.S. v. Masatoshi Kawaguchi, U.S.D.C. Maine, Southern Division, Civil No. 74-101-SD, Criminal No. 74-46-SD (1975).

In any case it is as obvious now as it was in 1960 that the attempt to provide rigid limitations on extension of coastal authority for specific purposes was not to succeed. See McDougal and Burke 604-07.
its shelf installations. Generally speaking the international agreements on this point provide for enforcement measures by flag states, although the 1973 Convention on the Prevention of Pollution provides for coastal enforcement within its "jurisdiction" as defined by applicable treaty or by customary international law.

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219. Article 5(7) provides that "The coastal State is obliged to undertake, in the safety zones, all appropriate measures for the protection of the living resources of the sea from harmful agents." In commentary upon the extreme concern thus displayed for possible pollution, it was noted in 1962 that "This significant provision awaits its appropriate interpretation." McDougal and Burke 713. States now consider that it might be helpful to undertake appropriate measures even outside a 500 meter safety zone. Part III, Article 48 of the Single Text deals with prescriptive competence on this point.


Data concerning flag state or coastal state enforcement is exceedingly difficult to locate. Information reported to I.M.C.O. regarding penalties imposed by states is very uneven in quality and content. See, e.g., I.M.C.O. "Reports on prosecutions for contraventions of the International Convention for the Prevention of Pollution of the Sea by Oil," 1954 (as amended 1962) containing reports from Australia, Canada, Chile, Hong Kong, Ireland and Italy. I.M.C.O. Doc. No. MEPC/Circ.17, 30 May 1975.

The difficulties of successful enforcement probably account for the lack of information on efforts. The observations by the United Kingdom in Committee III are revealing:

"Additionally, in the case of pollution offences, you have the problem of violations at sea, and what action one can take. The enforcement of discharge regulations is particularly difficult.

"The UK is very active in trying to bring prosecutions both on its own ships and on foreign ships in its territorial waters on entering UK ports, and by pursuing cases with foreign governments. We have wide powers and can impose very heavy penalties. But despite that we have been unable to get suffi-
It is not intended here to discuss in detail the issues of vessel source pollution and coastal state jurisdiction to prescribe and to apply policy.221 The subject is dealt with rather generally in economic zone proposals considered by Committee II but the burden of this work has been in Committee III where marine pollution is one of the major agenda items.

The gist of the problem so far as navigation might be affected concerns the scope of coastal authority in the zone to prescribe for construction standards and for discharge of pollutants and the extent of coastal authority to enforce applicable standards relating to either construction or discharge.

Three different positions seem apparent in pollution provisions found in proposals for the economic zone. At one end of the spectrum are proposals most favorable to coastal state interests and these provide that the coastal state has exclusive jurisdiction to prescribe and to enforce measures for prevention and control of pollution.222 Although these provisions do not spell out their applicability to vessel source pollution, there is no basis for believing this source is excluded from the ambit of such provision.

Another approach is to provide that the freedom of navigation is subject to rights in the zone and to include among these rights that of taking the necessary measures to prevent marine pollution.223 Sometimes this approach is used along with provision for exclusive coastal jurisdiction concerning marine pollution in the zone.224

Scientific evidence for many successful prosecutions in the UK or by a foreign government. In the last five years we were able to link 203 spillages off our coasts with particular vessels out of the 900 spillages sighted, but there were only 18 successful prosecutions at home or abroad as a result.

"Thus we must get the matter into perspective. The great bulk of enforcement happens before a ship commits a violation: bringing successful prosecutions is, and can only be, a tiny fraction of the total picture." Statement by Sir Roger Jackling in the Third Committee, 26 March 1975, at 4.

221. For views on specific policies see Burke, Woodhead, and Legatski, at 75-86, 102-111.


A third approach, most solicitous of the community interest in free navigation, is to provide that the coastal state authority is limited to prescriptions which are in accord with international agreements or standards or are permitted by the anticipated LOS Convention itself. Coastal enforcement would be limited to that provided for in the LOS Agreement itself. The U.S. proposal illustrates this approach.

Committee III is the forum to which states have presented their detailed pollution proposals. Here it suffices to note that these range, in similar fashion to the general provisions in the economic zone proposals, from heavy emphasis on coastal state authority for both prescription and application of laws in the zone, to recognition of only internationally prescribed regulation with no coastal enforcement action in the zone at all. Some intermediate proposals recognize coastal competence to prescribe and to enforce in the zone in specific and limited situations.

The Single Text in Committee III devotes substantial attention to the pollution issue. Its greater weight is on the navigational interest rather than that of the coastal state's concern over pollution.

Provisions concerning the setting of standards in the economic zone are not models of clarity. As a general proposition, the prescriptions for the economic zone are to be established by international agreement. Article 20 is the provision that deals with standards for vessel source pollution. In paragraph 1 it is provided that "States, acting through the competent international organization or by general diplomatic conference, shall establish as soon as possible and to the extent that they are not already in existence, international rules and standards for the prevention, reduction and control of the marine environment from vessels." Flag states are also, according to paragraph 2, to establish "effective" prescriptions for this same purpose, containing requirements that are "no less effective than generally accepted international rules and standards referred to in paragraph 1."

Paragraphs 4 to 6 concern the economic zone; they es-

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226. The numerous proposals are reviewed in some detail in Burke, Woodhead and Legatski, supra note 220, at 75-86.
tablish a measure, not altogether certain or clear, of coastal prescriptive competence that (presumably) can be enforced by that state. Paragraph 5 is particularly in need of clarification or revision if it is considered desirable to provide for extension of coastal law to the zone. It appears to be intended to allow the coastal state to promulgate discharge regulations, although the term "measures for prevention of pollution from vessels" is not necessarily so limited, when certain conditions are met. However the paragraph does not actually say the coastal state may so prescribe. Rather, it says that in the absence of any, or any adequate, internationally agreed rules and standards to meet "special circumstances," and where the coastal state reasonably believes a part of its zone needs special mandatory measures because of specific conditions,\textsuperscript{228} such a state "may apply to the competent international organization for that area to be recognized as a 'special area.'" But the paragraph does not say what happens if this recognition is conferred.\textsuperscript{229} Apparently it is intended that in such a designated area the coastal state can adopt preventive measures, but it might also be intended that these be promulgated by the competent organization. In fact a private proposal, made available to the Committee Chairman and selected delegations, and from which paragraph 5 is drawn, has a further paragraph, not carried over into the Single Text, which calls for just such adoption of international regulation for the special area.\textsuperscript{230} But in the Text the more reasonable interpretation appears to be that the coastal state is competent to act. This appears especially persuasive in light of paragraph 6 which provides:

\begin{enumerate}
\item \textsuperscript{228} These conditions are: "for recognized technical reasons in relation to its oceanographical and ecological conditions its utilization, and the particular character of its traffic." Apparently there should be a comma after "conditions" but I would not swear to this. The draftsmanship at this point is rough.
\item \textsuperscript{229} The sequence of acts simply stop\-at the point of application, as if it is simply to be assumed that coastal prescriptive competence somehow automatically follows.
\item \textsuperscript{230} Article 33: "... States, acting through the competent international organization, shall adopt as soon as possible and to the extent they are not already in existence, international regulations for the prevention, reduction and control of pollution by vessels in all 'special areas' recognized as such in application of the above paragraph." "Draft Articles Relating to the Rights Which May Be Exercised by Coastal States to Prevent Marine Pollution," dated 2 May 1975.
\end{enumerate}
Laws and regulations established pursuant to the internationally agreed rules and standards referred to in paragraph 4 of this Article, shall not become applicable in relation to foreign vessels until six months after they have been notified to the competent international organization.

This seems to assume adoption of laws by the coastal state, at least where the internationally agreed rules and standards are inadequate. 231

However ambiguous is paragraph 4, the next one clearly establishes that under some circumstances, not coextensive with those mentioned in paragraph 4, the coastal state is competent to legislate unilaterally for pollution in the zone. It reads:

Nothing in this Article shall be deemed to affect the establishment by the coastal State of appropriate non-discriminatory laws and regulations for the protection of the marine environment in areas within the economic zone, where particularly severe climatic conditions create obstructions or exceptional hazards to navigation and where pollution of the marine environment, according to accepted scientific criteria, could cause major harm to or irreversible disturbance of the ecological balance.

The limited scope of coastal authority conferred by paragraph 5 is worth emphasis. The laws are to be non-discriminatory and are to relate to areas within the zone, not to all of that zone. The only occasion for coastal enactments is "where particularly severe climatic conditions create obstructions or exceptional hazards to navigation," which is not a widespread condition around the globe. In addition the coastal state, it would appear, could provide relevant law only where shipping in the area carried cargo or substances that could cause "major harm or irreversible disturbance of the ecological balance." The combination of these circumstances is likely to be extremely localized, so that the authority conferred is not relevant for most coastal states.

Turning to the Text articles on enforcement, none of the numerous provisions expressly confer such authority on the

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231. Nothing is said about the time of coming into force of coastal laws where there are no internationally agreed rules and standards, which is the other contingency envisaged by paragraph 4.
coastal state, to be exercised in the economic zone through exclusive laws and regulations pursuant to Article 20(4) and (5). Indeed it seems likely, to the extent that these obscure provisions yield to meaningful interpretation, that coastal states are accorded very little competence to take enforcement action in the economic zone. Not one single article on vessel source pollution deals with coastal enforcement action of national laws in the economic zone, although Article 20 would permit coastal prescription in the limited circumstances there specified. Articles 30 and 31 do deal with enforcement measures in the economic zone but only in respect of international rules and standards. Article 30 permits the coastal state to require a vessel in the zone to give certain information (its identification, port of registration, last and next ports of call, and any other information required by the relevant international regulation), where it has reasonable grounds to believe a vessel has violated international rules and standards on discharges. This is the only step permitted to the coastal state in this situation except for two instances, provided in

232. Article 20(4)-(6) can be interpreted to cover both prescription and application although Chapter Six, in which they are found, is entitled "Standards" and Chapter Seven is supposed to deal with "Enforcement."

It perhaps needs special note that the text statement refers only to coastal prescriptions embodying local policy and not to international rules and standards which are embodied in coastal law. In this latter situation there are modest actions permitted the coastal state which aim at effective enforcement.

233. Articles 27 and 28 appear to deal with port state and coastal state territorial sea competence respectively. The latter includes a competence to arrest not only for violations by foreign flag vessels in the coastal state's territorial sea but also for certain violations in a requesting state's territorial sea or economic zone. However proceedings beyond arrest can be pre-empted by the flag state by commencing proceedings during a 6-month period, or thereafter, by commencing proceedings before the coastal state has done so. It is not clear how, if at all, these provisions accord with Articles 16 and 18 concerning innocent passage and coastal prescriptive competence. According to Article 16 "any act of wilful pollution, contrary to the provisions of the present Convention" is prejudicial, but Article 28, Part III, refers to pollution in another's area of jurisdiction. Article 18 confers regulatory authority only for "preservation of the environment of the coastal State," not for some other State's.
Article 31, in which the vessel may be stopped and boarded for inspection: where the 'violation has been of flagrant character causing severe damage or threat of severe damage to the marine environment, or the vessel is proceeding to or from the internal waters of the coastal state.' If the violation is actually confirmed the coastal state cannot take further action, other than to inform the next port of call which can arrest the vessel.234 This latter procedure can apparently be requested by a coastal state for any violation of discharge regulations in the economic zone, not just those which threaten or cause severe damage. But except as noted, the coastal state is not authorized to take enforcement action in the economic zone. It is fair to say that the only other significant enforcement action is arrest and trial. The occasions for this are limited to apprehension of vessels which are in the territorial sea or are voluntarily in port, although the events may have occurred in its economic zone or that of some other state.235

Appraisal and Recommendation

If the Single Text proposed by the Committee II Chairman in Geneva truly reflects the consensus in the conference, there are ample grounds to fear that the continued effective use of the ocean for transportation may be in some jeopardy.236 These grounds are as follows: (1) the economic zone to be created by the treaty will not be a part of the high seas and, therefore, rights of navigation and any other high seas freedom would not be available as part of customary law; (2) any community uses which will be recognized will be subject to coastal rights established in the Convention; and (3) it would appear that rights of navigation will be subjected to coastal regulation inde-

234. Article 27(3) allows for port state arrest for a discharge "in the area extending to X miles from the baseline from which the territorial sea is measured...." Presumably this means such an area anywhere and not just that of the port state.

235. It is not clear that these provisions permit the coastal state to arrest in its territorial sea for violations in its own economic zone although it may arrest there for violations in another state's zone. This interpretation seems unlikely, but Article 31 in conjunction with Article 28 lend themselves to this view. Perhaps Article 28(1) is intended to take care of this situation.

236. An especially useful analysis of the problems in recognizing coastal rights and preserving freedoms is the statement of Mr. Jeannel of France, II Off. Rec. 184-86.
dependent even of the coastal rights otherwise conferred upon that state.

Comment upon the first difficulty noted above is reserved to the section on the high seas which follows. The hazards of subjecting navigation to coastal rights in the zone, as established in Article 45, is that the implementation of this by the coastal state is left without any guidance from the Convention other than the obligation to have due regard for the duties of other states. It would be for each coastal state to determine for itself how to mesh its new bundle of sovereign rights and exclusive jurisdiction with navigation in the zone, having only the understanding that the latter is subject to the former and that "due regard" should be shown in exercising coastal rights and jurisdiction. It is not clear what amount of interference and inconvenience, or perhaps worse, can be inflicted while still having due regard for another's rights. A greater solicitude for community rights than this does not seem unreasonable.

The recognition in Article 47(4) of a coastal regulatory authority affecting navigation even beyond its other rights in the zone raises serious questions. It may be that poor drafting is responsible for this apparent grant of authority. Whether or not this is the case, nothing in desirable policy has been suggested which would support this allocation of competence.

The Single Provisions on pollution confer some, but very little, authority on the coastal state to extend its laws into the zone for environmental purposes. Article 45 in Part II recognizes coastal jurisdiction, but it is non-exclusive and, in accordance with the allocation of tasks to Committees, left without specification in this Part. The text in Committee III leaves a strong impression of hasty preparation which may account for its lack of clarity in allocating authority. The provision for a limited prescriptive competence in the zone, whose aim is commendable, is muddled and the section on enforcement contains nothing on the allocation of authority to apply coastal law. Generally speaking the pollution provisions are tied very strongly to international prescriptions, and the only enforcement competence is for application of international measures. Desirable policy, balancing environmental and navigation concerns, would recognize somewhat greater coastal authority than these articles permit, but insofar as unimpeded navigation is concerned they cannot be faulted.
E. Claims to Use of the High Seas for Transportation and Communication

1. Clarification of Policy

There can be no serious question that it continues to be in the community interest to provide for shared and unimpeded access to the high seas for transportation by vessel and aircraft and for communication by cables. It similarly continues to be in the common interest not to tie freedom of use to specific modalities of use but to recognize that such freedoms are to be promoted and protected in light of whatever instrumentality serves the purpose at a particular time.

To place highest priority on inclusive use for transportation and communication in an area as vast as the global sea does not signify that an occasional exclusive use is always beyond the pale and always impermissible. Freedom of navigation is not an absolute and this activity might wisely, on occasion, be required to defer to another use that requires some degree of exclusivity. There are ample indications that this can be achieved in practice without any irremedial problem, with the exploitation of the continental shelf providing the most dramatic experience.

One ingredient of necessary policy is that the high seas extend to all parts of the ocean beyond national territory, moderately defined, so that the maximum area continues to be regarded as open to use in accord with generally agreed prescriptions. Contraction in the area of high seas and expansion of the area of exclusive coastal authority means transferring decision-making authority from the general community, with inclusive authority exercised through multilateral institutions and processes, to single political units each acting largely independent of the other. Authority over the ocean would become divided among numerous units, all coastal states, and community use for transportation would become either impossible or vastly more difficult.

2. Trend in decision

The 1958 Geneva Conference has little difficulty in agreeing on the necessity of maintaining freedom of navigation, overflight, and cable-laying in the ocean. Article 2 of the Convention on the High Seas records what is usually considered customary law on this by stating that the freedom of the seas "comprises inter alia, both for coastal and non-coastal States: (1) Freedom of navigation; (2) Freedom of fishing; (3) Freedom to lay submarine cables and pipelines; (4) Freedom to fly over
the high seas." The Convention then goes on to indicate that there are other freedoms than those listed and that they are not absolute freedoms: "These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas."

In the Third LOS Conference there has been no controversy over providing that in areas conceded to be high seas there should be freedom for navigation, overflight, and cable-laying and pipeline. There are two matters of controversy, however, that are worth remarking. One, already alluded to, is that there is now some opinion that the high seas should be severely reduced in area by defining it as the area beyond the economic zone. This alone would not necessarily affect, at least not immediately, provision for freedom of navigation, overflight and cable-pipeline laying in the zone, since the proponents of this course make specific provision for these freedoms in the zone, though subject to coastal rights and regulation.

The other difference is whether or not the enumeration of freedoms ought to be exhaustive. Two proposals on the definition of the high seas offer such a listing while others would retain the present open-ended enumeration.

The Single Text is an amalgam of the various proposals, on the one hand, adopting the extreme position that severs the economic zone from the high seas while, on the other, suggesting an enlarged list of freedoms of the sea which is open-ended. Although the conception of the freedom of the sea

237. The U.S. proposal might be so classified but, for whatever reason, it does not say much beyond affirming that the economic zone is part of the high seas and that the high seas regime, whatever it still is, will continue to pertain except as it may be changed by other provisions. U.N. Doc. No. A/CONF. 62/C.2/L.79, 111 Off. Rec. 239.


239. Article 75 includes the four freedoms listed in Article 2 of the High Seas Convention and adds freedom to construct artificial islands and other installations permitted under international law and freedom of scientific research. The entire list "comprises inter alia the freedom of the high seas." Paragraph 2 of Article 2 is replaced by a new one stating that "These freedoms shall be exercised by all States, with due consideration for the interests of other States in their exercise of the freedom of the high seas."
thus is more expansive than that in the 1958 Convention, the freedoms enumerated (and others not listed) are not directly available in the economic zone except as specific provision is made elsewhere for their exercise in the zone. Article 47(1) makes such provision for navigation, overflight, cable-pipeline laying "and other internationally lawful uses of the sea related to navigation and communication," but subjects the freedoms mentioned to coastal rights elsewhere established in the Convention. According to the Text the economic zone would not be a part of the high seas nor would it be a portion of national territory. So what status does it have? Article 47(3) is an apparent attempt to resolve this dilemma:

In cases where the present Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole. The apparent intention of this is to provide guidance for resolving conflicting claims when there is no provision to fall back upon to resolve the difficulty, as there would be if the area were either a part of national territory or a part of the high seas. Insofar as navigational interests are concerned, however, it is worth emphasis that the residual authority is already provided for in many instances. Thus, Article 47(1) stipulates that enjoyment of the various freedoms there mentioned is subject to the provisions of the Convention which confers extensive rights on the coastal state in the zone. This emphatic tilt in the direction of a territorialist conception of the zone not only might prejudice navigation uses directly as a result of their subjection to so many coastal rights but could affect the interpretation of Article 47(3) by lending weight to importance of coastal interests as against those of the other party and the international community as a whole. Furthermore, the threat to long-term community interests in navigation is placed in realistic context by considering that the "conflict" envisaged in paragraph 3 is likely to occur because the coastal state has already asserted a jurisdiction based on its view of its interests in the zone. The
formula recommended in Article 47(3) thus is likely to operate only after some impact on community interests has been felt. That impact will probably not be beneficial.

Appraisal and Recommendation

While the provisions concerning freedoms of the high seas are unexceptionable in the Single Text, there can only be apprehension about the removal of the zone from the high seas. The effect of this is to create a new legal part of the ocean where the law applicable, if the treaty is widely accepted, is only that specified in the treaty. More importantly it seems very likely that widespread adherence to a new law of the sea treaty establishing an economic zone will lead to the expectation that the zone is also recognized by customary law and that in customary law, as well as treaty, the usual freedoms of the sea do not extend to the zone. In other words, the treaty law would come to be considered also as customary law. If this should occur, the international law protection and priority accorded to the shared use of the sea will be withdrawn from about one-third of the ocean, and such use will be subject to coastal law and regulation. The substitution of a wholly decentralized authority, fragmented amongst over 100 coastal nations, does not represent an improvement and could lead to serious impediments to continued efficiency in transport of commodities around the globe.