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International Straits, Global Communications, and the Evolving Law of the Sea

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INTERNATIONAL STRAITS, GLOBAL COMMUNICATIONS, AND THE EVOLVING LAW OF THE SEA*

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I. INTRODUCTION

In the continuing law of the sea negotiations, strong support has developed among a majority of states for the extension of territorial seas to twelve miles.[1] In the absence of other provisions, codification of this extension in a new law of the sea treaty will cause over 100 straits, including many of the most heavily traveled and strategically important, to be overlapped by the territorial sea.[2] Be-

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* The views expressed herein are those of the authors and do not necessarily reflect those of the Department of Defense or the United States Government.

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1. The U.S. Delegation Report on the Third United Nations Conference on the Law of the Sea held in Caracas, Venezuela, from June 20 to August 29, 1974, contains the following statement on the territorial sea: "Agreement on a 12-mile territorial sea is so widespread that there were virtually no references to any other limit in the public debate. Major conditions for acceptance of 12 miles as a maximum limit were agreement on unimpeded transit of straits and acceptance of a 200 mile exclusive economic zone. A variety of articles have been introduced on the territorial sea regime which, for the most part, parallel the provisions of the 1958 Territorial Sea Convention." *See also* the statement of John R. Stevenson, 71 DEP'T STATE BULL. 389-90 (1974).

For a brief summary of positions on the territorial sea see Stevenson & Oxman, *The Preparations for the Law of the Sea Conference,* 68 AM. J. INT'L L. 1, 9-10 (1974).

2. Among the important straits which would be affected by this extension are the straits of Dover, Gibraltar, Hormuz, and Malacca. For a geographical description of the major straits affected see Kennedy, *A Brief Geographical and Hydrological Study of Straits which Constitute Routes for International Traffic, Preparatory Document No.* 6, I UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, GAOR 114, U.N. Doc. A/CONF. 13/37, at 198 (1958). A table showing the widths of most major straits may be found in II S. LAY, R. CHURCHILL, & M. NORDQUIST, NEW DIRECTIONS IN THE LAW OF THE SEA 885 (1973).

For a description of the straits which are of major importance to maritime commerce see Hodgson & McIntyre, *Maritime Commerce in Selected Areas of High Concentration,* in HAZARDS OF MARITIME TRANSIT (T. Clingan, Jr. ed. 1973). For a detailed description of four of the most important straits see the following

cause this will alter the pattern of international legal norms that has preserved freedom of navigation and overflight between ocean areas, considerable controversy has ensued over the question of what legal regime should govern the control and regulation of air and sea movement in these straits. This article focuses on the communications issues raised by the proposed extension of the territorial sea to twelve miles and suggests the contours of a legal regime for straits that will resolve the current legal controversies and provide continuity in the law governing international communications[3] through and over the oceans.

II. The Evolving Law of the Sea and the Straits Controversy

The roots of the current straits controversy lie in a series of complex changes that have occured within the last 25 years. The growth of world trade, the increased demand for petroleum, the evolution of shipping technology, and the heightened awareness of the need to protect the marine environment are some of the forces that have led to debate over the selection of a legal regime to govern air and sea communications through straits. The most immediate impetus for resolution of the straits dispute, however, has been the growing movement for change in the law of the sea. Therefore, an analysis of the dispute and the solution proposed by this article should be viewed against the background of the traditional and evolving legal patterns that form the bases of the dispute.

A. *The Customary Law of Straits*

1. *High Seas and Territorial Straits.*—Traditionally, the law of the sea has promoted development of reliable and continuous ocean communications by limiting the control exercised by coastal states over navigation and overflight.[4] The right of navigation and

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pamphlets produced by the Office of the Geographer, Department of State: *Strait of Hormuz* (1973); *Strait of Bab El Mandeb* (1973); *Strait of Gibraltar* (1973); and *Straits of Malacca and Singapore* (1974).

3. The term "communications" as used in this article refers broadly to intercourse between nations including the movement of goods, people and messages by air, land, or sea.

4. Professor McDougal refers to the "space-extension" resources of the ocean "whose distinctive characteristic is their utility as media of movement, transportation and communication." He notes "[i]t has been a principal function of the

overflight for vessels and aircraft of all states has been recognized in areas of the oceans beyond the limit of national jurisdiction. Under customary international law that developed in the late eighteenth and early nineteenth centuries, most coastal states claimed a territorial sea of three miles.[5] Because of this limit on the size of the territorial sea, most straits of major importance contained high seas corridors in which the right of navigation and overflight was established for the vessels and aircraft of all states under the customary legal regime of the high seas.[6]

Only in those straits that were so narrow that they were entirely overlapped by the territorial sea was the right of navigation and overflight open to doubt. For the most important of these straits, special legal regimes evolved that accommodated the interests of the coastal states with the interests of the states that relied on passage through the straits for communication with other parts of the world. The legal regimes governing the Danish Straits and the Turkish Straits are the principal examples of these special regimes.[7]

In 1857 tolls exacted by Denmark from ships passing through the Danish Straits were eliminated by treaty. Since that time, those straits have been open during peacetime for passage by the vessels and aircraft of all states under regulations established by decrees of the Swedish and Danish Governments.[8] Passage through the

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doctrine of the 'freedom of the seas' to maintain space-extension resources, within the inclusive domain, open for shared enjoyment by all." McDougal, *The Law of the High Seas in Time of Peace,* 25 NAVAL WAR COLLEGE REV. 35, 42 (1973).

5. For a history of the development of the three-mile territorial sea see P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION (1927). More recent developments in the law of the territorial sea are recounted in S. SWARZTRAUBER, THE THREE MILE LIMIT OF TERRITORIAL SEAS (1972).

6. For a discussion of the customary legal regime of the high seas see M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 730-1007 (1962) [hereinafter cited as MCDOUGAL & BURKE].

7. A special legal regime was also established in 1881 for navigation through the Straits of Magellan in the Treaty Between the Argentine Republic and Chile, Establishing the Neutrality of the Straits of Magellan, July 23, 1881, 12 MARTENS, N.G.R. 2d ser. 491 (1887), *reprinted in* 3 AM. J. INT'L L. SUPP. 121 (1909). Article 5 provides in part: "Magellan's Straits are neutralized forever, and free navigation is guaranteed to the flags of all nations."

8. H. WHEATON, ELEMENTS OF INTERNATIONAL LAW 226 (1866). The United States signed a separate treaty with Denmark in 1857. *See* Convention with

Turkish Straits has been governed by a series of treaties,[9] of which the most recent is the Montreux Convention,[10] which establishes the right of merchant vessels to navigate the straits in time of peace or war,[11] and recognizes a right of overflight for civil aircraft.[12] Navigation by military vessels is circumscribed by particular provisions designed to reduce the possibility of conflict in the Straits or Black Sea area.[13]

Denmark for the Discontinuance of the Sound Dues, April 11, 1857, 11 Stat. 719, T.S. No. 67, I MALLOY, 1776-1909, at 380 (1910). For discussion of regulations governing the passage of merchant ships, warships and aircraft in the Danish straits, see 9 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 323 (1968) [hereinafter cited as 9 WHITEMAN], and see Johnson, *The Baltic,* in III NEW DIRECTIONS IN THE LAW OF THE SEA 209, 217 (R. Churchill, K. Simmonds, J. Welch eds. 1973).

9. For a history of the struggles to control passage through the Turkish straits and the various international agreements which have from time to time governed passage see J. SHOTWELL & F. DEAK, TURKEY AT THE STRAITS (1940).

10. Convention concerning the Regime of the Straits (Montreux Convention), July 20, 1936, 173 L.N.T.S. 213, 7 HUDSON, INTERNATIONAL LEGISLATION 386 (1941) [hereinafter cited as Montreux Convention].

11. Montreux Convention, arts. 2-5. However, article 3 requires such vessels to stop for a sanitary inspection and article 2 permits Turkey to collect taxes and charges from passing vessels on a tonnage basis for services rendered, including maintenance of sanitary control stations, lighthouses and buoys, and lifesaving services.

12. Montreux Convention, art. 23. Turkey is required to designate air routes but is entitled to prior notification of flights.

13. Montreux Convention, arts. 8-22. In the preamble to the Montreux Convention, due notice is given to the importance of "regulating transit and navigation" within the framework of "the security, in the Black Sea, of the riparian States." In order to provide for the security of the Black Sea area, as well as Turkish security, navigation of warships through the straits is circumscribed by restrictions regarding types of vessels (art. 10); tonnage of vessels (arts. 14, 18); notification of passage (art. 13); and the belligerent status of Turkey (arts. 20-21). The capital ships of Black Sea powers entitled to pass are not subject to the tonnage limitations imposed on non-Black Sea powers (art. 11). Unlike non-Black Sea powers, Black Sea powers may in some circumstances send submarines through the Strait (art. 12). The ships of Black Sea powers are required, however, to give notice and are subject to other regulations (arts. 11-12). In keeping with the desire of signatories to prevent conflict in the Straits or Black Sea area, aggregate tonnage of non-Black Sea powers in the Black Sea is limited (art. 18). Turkey is, moreover, given the right to oversee the passage of warships and to report on their movements annually to the Secretary General of the League of Nations and the High Contracting Parties (art. 24).

In territorial straits[14] not governed by special legal regimes, the right of navigation and overflight has been much less clear. When such straits link one major ocean with another, a customary right of passage for merchant vessels has been traditionally recognized.[15] The right of passage for warships, however, has remained a subject of controversy,[16] and no right of overflight for aircraft in territorial straits was recognized in international law.[17]

2. *The Corfu Channel Case.*—In 1949 the International Court of Justice dealt with the question of the right of passage for warships in a territorial strait.[18] The *Corfu Channel Case* concerned an incident in the Albanian portion of the North Corfu Channel, a narrow territorial strait separating the Greek island of Corfu from the Albanian mainland. Two British warships passing through the Channel were damaged by mines allegedly placed with the knowledge of Albanian authorities. The Court was asked to determine *inter alia* whether the passage of British warships through the strait violated Albanian sovereignty. The Court held that the British warships were entitled to navigate the strait.[19] With regard to the customary right of warships to pass through straits, the Court declared:

> It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous

14. The term "territorial straits" as used in this article refers to straits overlapped by the territorial sea of adjacent coastal states.

15. For an exhaustive study of the development of international law regarding straits in the post-World War I period see I BRUEL, INTERNATIONAL STRAITS 113-195. For a more recent analysis of the international sea movement through straits see R. BAXTER, THE LAW OF INTERNATIONAL WATERWAYS, 159-168, 190-195, 205-216 (1964) [hereinafter cited as BAXTER]. *See also* Comment, *Peacetime Passage by Warships through Territorial Straits* 50 COLUM. L. REV. 220 (1950).

16. MCDOUGAL & BURKE, *supra* note 6, at 199-204.

17. The sovereignty of a state in the airspace above its territory is recognized to be complete and exclusive. *See* Convention on International Civil Aviation (Chicago Convention), December 7, 1944 (1947), art. 1, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 [hereinafter cited as Chicago Convention]. However, article 5 does establish a limited right of air passage as between the parties to the Convention. *See also* 9 WHITEMAN, *supra* note 8, at 322.

18. Corfu Channel Case [1949] I.C.J. 4.

19. [1949] I.C.J. at 32.

> authorization of a coastal State provided the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal state to prohibit such a passage in time of peace.[20]

Two aspects of this decision are particularly significant. First, the decision clearly recognizes the importance of straits for international communications. The Court's conclusion that the Channel "should be considered as belonging to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace,"[21] was based on a finding that the Corfu Channel was a strait linking two parts of the high seas that served as a "useful route for international maritime traffic."[22] Thus the Court's determination that a right of passage existed in the strait that could not be abrogated by the Albanian Government was inextricably linked to the Court's conception of the Channel as an "international highway."

The second aspect of the decision that is of particular significance is the clear reference of the Court to "the *manner* in which the passage was carried out"[23] as a criterion for determining whether the passage of the British ships was innocent. The Court emphasized the actions of the British ships as they passed through the Channel,[24] concluding that, under the circumstances, those actions were reasonable and did not support the Albanian contention that the passage was not innocent.[25] This approach suggests

20. [1949] I.C.J. at 28. The Court did, however, recognize that in view of the tension between Greece and Albania at the time of the incident, Albania would have been justified in regulating the passage of warships but could not have required such ships to obtain prior authorization for passage.

21. [1949] I.C.J. at 29.

22. [1949] I.C.J. at 28.

23. The Court first pointed out that the purpose of the passage of the British ships had been to affirm a right which had been illegally denied when Albanian batteries had earlier fired on British warships in the Corfu Channel. The Court then continued: "It remains, therefore to consider whether the *manner* in which the passage was carried out was consistent with the principle of innocent passage . . . ." [1949] I.C.J. 30.

24. The Court noted that the warships were not, as the Albanians had claimed, in combat formation, and that they passed through the strait with guns in fore and aft position and unloaded. [1949] I.C.J. 30-31.

25. The Court recognized that the British ships passed with crews at action stations, and that they conducted surveillance of the Albanian defensive posi-

that innocent passage hinges on the actual conduct of ships while in the territorial sea and that only when the conduct violates fundamental prescriptions such as the United Nations Charter is the passage non-innocent.[26]

B. *The 1958 United Nations Conference on Law of the Sea*

The decision in the *Corfu Channel Case* clarified certain aspects of the law governing passage through territorial straits. During the same period, however, other trends were developing in the law of the sea that were to form the foundation for the present straits controversy. In 1945 the United States issued the Truman Proclamation, which asserted a claim to jurisdiction over the resources of the seabed on the continental shelf adjoining United States coasts.[27] Other states rapidly followed the lead of the United States and issued claims of extended jurisdiction over neighboring ocean areas.[28] Not all of these claims, however, were limited to seabed resources; for example, Columbia, Ecuador, and Peru claimed a two-hundred-mile fishing zone off their shores.[29] Concurrently the three-mile territorial sea recognized in customary international

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tions. The Court, however, concluded that these actions were reasonable since British ships had previously been fired on in the Channel. [1949] I.C.J. at 31-32.

26. Commentators have differed over the significance to be attributed to the Court's attention to the manner of passage. Fitzmaurice interpreted the Court's opinion as establishing that: "Innocence depends primarily, though not exclusively, on the manner rather than the motive of passage." Fitzmaurice, *The Law and Procedure of the International Court of Justice: General Principles and Substantive Law,* 27 BRIT. Y.B. INT'L L. 1, 28 (1950). McDougal and Burke, however, see assessment of the purpose of passage as the primary test for determining the innocence of passage. MCDOUGAL & BURKE, *supra* note 6, at 243-246.

27. Presidential Proclamation 2667, 19 *Fed. Reg.* 12303 (1945); 13 DEP'T STATE BULL. 485 (1945).

28. Office of the Geographer, Department of State, *International Boundary Study, Limits in the Seas, National Claims to Maritime Jurisdiction* (Ser. A., No. 36, rev. March 1, 1973). This work includes a complete list of the claims of states to various jurisdictions in the oceans. Dates of claims are provided. *See also* MCDOUGAL & BURKE, *supra* note 6, at 669 n.314 for a list of claims made between 1945 and 1956.

29. U.N. Legislative Series, LAWS AND REGULATIONS ON THE REGIME OF THE TERRITORIAL SEA 723 (ST/LEG/SER.B/6,1956), *reprinted in* I S. LAY, R. CHURCHILL & M. NORDQUIST, NEW DIRECTIONS IN LAW OF THE SEA 231-234 (1973).

law was challenged by a growing number of states that claimed broader territorial seas—generally twelve miles.[30]

Amid these proliferating efforts for change in the law of the sea, the 1958 United Nations Conference on Law of the Sea was convened in the hope of clarifying the disputed issues. The Conference failed, however, to achieve agreement on the breadth of the territorial sea—one of its major objectives.[31] Despite lack of agreement on this issue, the negotiators worked to codify the rights and duties of states wishing to navigate through territorial seas. Unfortunately, in the course of this effort attempts to codify the principles—contained in the *Corfu Channel Case*—governing the right of navigation in straits became hopelessly intertwined with efforts to codify the customary right of innocent passage in the territorial sea. The Convention on the Territorial Sea and Contiguous Zone adopted at the Conference[32] deals with the issue of navigation through straits in the articles that pertain to the right of innocent

30. For a list of claims as of 1958 see Heinzen, *The Three-Mile Limit: Preserving the Freedom of the Seas,* 11 STAN. L. REV. 597 (1959). Heinzen concluded that as of 1958 three miles was still the maximum limit of the territorial sea under international law. *Id.* at 651. The Soviet Union was champion of a twelve-mile territorial sea. *See* W. BUTLER, THE SOVIET UNION AND THE LAW OF THE SEA 41-45 (1971).

31. *See* Dean, *The Geneva Convention on the Law of the Sea: What Was Accomplished?*, 52 AM. J. INT'L L. 607, 610 (1958) [hereinafter cited as Dean]. Dean, who headed the U.S. Delegation, wrote: "The United States, together with Great Britain, Japan, Holland, Belgium, Greece, France, West Germany, and other maritime nations, adopted as its first goal in the Conference the preservation of the traditional limit of the territorial sea at three miles except as modified by reasonably greater historical limits." *Id. See also Id.* at 613-617 where the failure of the 1958 Conference to reach agreement on the limit of the territorial sea is discussed. While no agreement was made on the limit of the territorial sea, the 1958 Conference on the Law of the Sea codified the customary principles governing use of the high seas in the Convention on the High Seas, April 29, 1958, [1962] 2 U.S.T., T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter cited as the Convention on the High Seas]. Article 1 defines "high seas" as "all parts of the sea that are not included in the territorial sea or in the internal waters of the States." Note that this area is defined in relation to the territorial sea whose limits were left ambiguous. Article 2 recognizes "freedom of navigation" and "freedom to fly over the high seas" for all nations.

32. Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter cited as Territorial Sea Convention].

passage in the territorial sea.[33] The Convention provides that in straits linking high seas or linking a high sea with a territorial sea, the right of innocent passage cannot be suspended.[34] Thus, except for the provision for non-suspension, the right of navigation in straits is characterized as the same right of innocent passage that exists in the rest of the territorial sea.

In addition to intertwining the issue of passage through straits with the issue of passage through territorial seas, the wording of the Territorial Sea Convention introduced a subjective element into the definition of innocent passage. The draft articles on innocent passage suggested by the International Law Commission for consideration at the Conference reflected the approach of the International Court of Justice in the *Corfu Channel Case.* Passage was defined as innocent "so long as a *ship* does not use the territorial sea for committing any *acts* prejudicial to the security of the coastal state or contrary to the present rules or to other rules of international law." (Emphasis added.)[35] American negotiators pro-

33. *Id.*, § III; Right of Innocent Passage, arts. 14-23. It should be pointed out that under this regime of innocent passage in the territorial sea there is no right of overflight as there is in the Convention on the High Seas, *supra* note 31, art. 2. Moreover, the Territorial Sea Convention, art. 14(6) provides that "submarines are required to navigate on the surface and show their flag." The status of warships in the territorial sea is also ambiguous. *See* art. 23. For a discussion of the meaning of innocent passage as applied to warships see Slonim, *The Right of Innocent Passage and the 1958 Conference on the Law of the Sea,* 5 COLUM. J. TRANSNAT'L L. 96, 115-21 (1966). See especially the contrast of Soviet and American views. *Id.* at 118.

34. *Id.*, art. 16(4) provides: "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State." *See also* Dean, *supra* note 31, at 621. In his discussion of article 16(4), Dean argues that this provision is based upon the decision of the International Court of Justice in the *Corfu Channel Case.* However, he notes that article 16(4) "goes further than did the decision in that case. It specifically determines the heated controversy between Israel and the Arab states as to the right of Israeli shipping to pass through the Strait of Tiran to the Gulf of Aqaba." *Id.* at 623. Dean also states that while the Conference adopted "a more liberal rule than that stated by the Court in the *Corfu Channel Case,* the advance made by the Conference was in the direction of the freedom of the sea." *Id.* at 623.

35. Int'l Law Comm'n Report, 11 U.N. GAOR, Supp. 9, at 6. U.N. Doc. A/3159 (1956), art. 15, *also found in,* 3 UNITED NATIONS CONFERENCE ON THE LAW

posed a change in the definition of innocent passage[36] that was largely adopted in article 14(4) of the Territorial Sea Convention. This article provides that passage in both straits and the territorial sea is innocent so long as it is not prejudicial to the "peace, good order or security of the coastal State."[37] This definition focuses on the innocence of the passage itself rather than the innocence of the acts of ships in passage as in the *Corfu Channel Case* and International Law Commission draft articles. This modification of the standard for innocent passage has since permitted coastal states to claim broad latitude in the determination of whether "passage" prejudices their "peace, good order and security."[38]

Although the Convention embodied the seeds of the present controversy, the future implications of these developments for air and sea communications through straits were not widely recognized.[39] No agreement limiting the breadth of the territorial sea had been reached; therefore states continued to claim whatever limit they felt desirable. Since the United States and a number of other states recognized three miles as the legal limit of the territorial sea,[40]

OF THE SEA, *Off. Rec.* 210, U.N. Doc. A/CONF.13/37 (1958) [hereinafter cited as CONF.].

36. CONF., *supra* note 35, *Off. Rec.* 216.

37. Territorial Sea Convention, *supra* note 31, art. 14(4) provides: "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law."

38. Article 14(4) defining innocent passage must be read in conjunction with article 16(1) which provides: "The coastal State may take necessary steps in its territorial sea to prevent passage which is not innocent." The latter provision may be read as confirming the right of the coastal state to determine the innocence of passage.

39. Among those recognizing the implications was Max Sorenson, who headed the Danish delegation. Sorenson noted that the Territorial Sea Convention extended the rights of coastal states by allowing them to interfere with passage on such grounds as the nature of the cargo and its ultimate destination. Sorensen, *The Law of the Sea*, November 1958 INT'L CONCILIATION 195, 234.

40. Dean, *supra* note 31, at 616. Dean maintains that in spite of lack of agreement on the limit of the territorial sea it is: "unwarranted to assume that the traditional three-mile limit of the territorial sea is no longer international law. All efforts to agree on a new figure failed. The fact that a two-thirds vote could not be obtained in favor of the three-mile limit shows merely a desire on the part of many nations to extend their territorial sea, not that such an extension in international law has been accomplished."

navigation and overflight through most major straits continued on a high seas basis.

C. *The Current Legal Controversy on Straits—Precipitating Events*

During the 1960's three related factors converged, bringing to the surface the latent problems that the Territorial Sea Convention posed for the right of navigation and overflight in straits. First, technological improvements in ships and aircraft, the closure of the Suez Canal, and increases in world trade brought an increase in the size, nature, and number of ships and aircraft using straits.[41] Secondly, coastal states became more concerned about the dangers of pollution and catastrophic accidents in straits.[42] Thirdly, the movement to extend territorial seas to twelve miles strengthened as coastal states concluded that expanded territorial jurisdiction was desirable.[43]

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41. *See generally* Lawrence, *Ocean Shipping in the World Economy,* 1969 WORLD AFFAIRS 118; Bates and Yost, *Where Trends the Flow of Merchant Ships* in LAW OF THE SEA: THE EMERGING REGIME OF THE OCEANS 249 (J. Gamble & G. Pontecorvo eds. 1974). On developments in shipping technology see Oliver, *Gargantuan Tankers: Privileged or Burdened,* 96 U.S. NAVAL INST. PROCEEDINGS 39 (1970); UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, REVIEW OF MARITIME TRANSPORT 20-23 (U.N. Doc. TD/B/C.4/82 1971). On the effects of the closure of the Suez Canal see UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, THE ECONOMIC EFFECTS OF THE CLOSURE OF THE SUEZ CANAL 28-34 (U.N. Doc. TD/B/C.4/104/Rev.1/1973) [hereinafter cited as UNCTAD SUEZ STUDY]. For a recent discussion of the nature and magnitude of seaborne trade see ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, MARITIME TRANSPORT (1972), 21-63, 105-137 (1973).

42. Particular attention was focused on these dangers by the wreck of the *Torrey Canyon* off the coast of Cornwall, England, and by the wreck of the *Ocean Eagle* off Puerto Rico in 1967. Then, in 1969, the blow-out on the Santa Barbara Channel and explosions in three huge supertankers, *Mactra, Marpessa,* and *Kong Haakon VII,* causing the loss of *Marpessa* and severe damage to the other two, further emphasized the danger. *See* N. MOSTERT, SUPERSHIP 60-64, 133-140 (1974). The concerns of coastal states are reflected in the proceedings of Subcommittee II of the Committee on Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction. *See, e.g.*, the statements of representatives from Malaysia, U.N. Doc. A/AC.138/SC.II/SR.11 at 88 (1971); Singapore, U.N. Doc. A/AC.138/SC.II/SR.16 at 180 (1971); and Indonesia, U.N. Doc. A/AC.138/SC.II/SR.31 at 111 (1972).

43. By 1972 over 50 states claimed a twelve-mile territorial sea with thirteen

Inevitably a number of coastal states asserted claims to a territorial sea of twelve miles[44] and argued that passage in straits overlapped by their territorial sea was subject to the regime of innocent passage. Moreover, because of their fears of accidents and pollution, some of these states claimed the right to regulate the manner and set the conditions for passage through the straits.[45] These claims of coastal states for broader control over movement through straits were rejected by the principal maritime states. The United States and Great Britain continued to recognize three miles as the lawful limit of the territorial sea and claimed a continuing high sea right of navigation and overflight in straits wider than six miles.[46]

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additional states claiming more than twelve miles and thirty-eight states still claiming less than twelve miles. Gutteridge, *Beyond the Three-Mile Limit: Recent Developments Affecting the Law of the Sea,* 14 VA. J. INT'L L. 195, 198 (1974).

44. Iran (1959), Yemen (1967), Sana (1967), Malaysia (1969), Morocco (1969), Yemen (1970), Aden (1970), France (1971), and Oman (1972). *See* the Department of State Study, *supra* note 28.

45. Malaysia, Singapore, and Indonesia claimed the right to control traffic in the Straits of Malacca in 1971. Leifer & Nelson, *Conflict of Interest in the Straits of Malacca,* 49 INT'L AFF. 190, 195 (1973). In 1972 Indonesia announced supertankers over 200,000 DWT would not be allowed in Malacca, but the declaration has had no effect. Both Indonesia and Malaysia have mentioned the idea of collecting fees from transiting ships to pay for navigational aids in the straits. Department of State, Office of the Geographer, *Straits of Malacca and Singapore* 4 (Jan. 1974).

Iran has proposed a plan to regulate traffic through the Strait of Hormuz into the Persian Gulf in order to prevent pollution and insure security. Ottaway, *Iran Seeks to Control Persian Gulf Entry,* Washington Post, March 23, 1973, at 1, col. 6; Hoagland, *Iran Moves to Control Gulf,* Washington Post, Jan. 3, 1975, at 1, col. 5.

46. *See* statement of John R. Stevenson to Subcommittee II of the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, July 25, 1973, *reprinted in, Hearings on Status Report on Law of the Sea Conference Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs,* 93d. Cong., 1st Sess. [hereinafter cited as *Hearings on Status Report on Law of the Sea Conference*]. Stevenson, Chairman of the American delegation, said in regard to use of straits: "We believe we now have—and have always had—full high seas freedoms such as freedom of navigation and overflight beyond a three-mile territorial sea. We find the existence of these rights in straits used for international navigation confirmed by their historical and continuing existence." *Id.*

The Soviet Union, which had supported a twelve-mile territorial sea, argued that customary international law had established a right of navigation and overflight for all kinds of ships and aircraft in straits connecting high sea areas of the ocean and used for international navigation.[47] As a result of American and Soviet claims, navigation and overflight continued in straits wider than six miles despite the protests of certain coastal states such as Indonesia and Spain,[48] which supported the twelve-mile territorial sea and an innocent passage regime for straits.

This standoff between coastal states and maritime states might have continued indefinitely. However in the mid and late 1960's, stimulated by reports of great wealth on the seabed, a strong movement began to develop for an overall revision of the law governing the oceans.[49] As the negotiations progressed, it became clear that international sentiment overwhelmingly favored recognition of an extension of the territorial sea to at least twelve miles. With this broad consensus on the extension of the territorial sea, a compelling need for a universal legal regime to govern air and sea movements in straits affected by the extension became apparent. In the negotiations the straits controversy centered on the question of

47. *See, e.g.*, statement of the Soviet representative to Subcommittee II of the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, U.N. Doc. A/AC.138/SC.II/SR.6 at 18 (1971) [hereinafter cited as the Seabeds Committee]. The Soviet view has been criticized as inconsistent with Soviet refusals to allow warships a right of innocent passage in the territorial sea. The representative of the People's Republic of China pointed out that the Soviet judge in the *Corfu Channel Case* ([1949] I.C.J. 4, 74) took the view that there was no right of innocent passage in the territorial sea for warships. The Chinese representative noted that the Soviet reservation to the 1958 Territorial Sea Convention claims a right for coastal states to regulate the passage of warships in the territorial sea. U.N. Doc. A/AC.138/SC.II/SR.36 at 22 (1972). The Spanish representative also criticized the Soviet view noting that the Soviets had denied passage to United States warships in the Vilkilsky Strait (Arctic Ocean) on the grounds that the Strait was part of the Soviet territorial sea. U.N. Doc. A/AC.138/SC.II/SR.28 at 52 (1972). The Soviet regulations governing innocent passage are reprinted in I S. LAY, R. CHURCHILL, & M. NORDQUIST, NEW DIRECTIONS IN THE LAW OF THE SEA 31 (1973).

48. *See, e.g.*, Leifer & Nelson, *supra* note 45.

49. Ambassador Arved Pardo of Malta formally proposed discussion of the allocation of the seabeds in the fall 1967 session of the United Nations General Assembly. In 1970 the United States introduced a draft United Nations Convention on the International Seabed Area. *See generally* 62 DEP'T STATE BULL. 737 (1970); 63 DEP'T STATE BULL. 209 (1970). In the fall of 1973 the United Nations General Assembly decided to convene a comprehensive law of the Sea Conference in 1973. *See* 64 DEP'T STATE BULL. 150 (1971).

whether movement through straits should be governed as a high seas right of navigation and overflight or as a territorial sea right of maritime innocent passage.

D. *The Parameters of the Controversy*

With the important exception of the claims of certain archipelago states,[50] most discussion of the legal contours of a straits regime concerns those straits less than 24 miles in width and overlapped by an extension of the territorial sea to twelve miles.[51] Essentially, legal arguments have focused upon the application of two distinct trends in the law of the sea: the claim for retention of high seas

50. A number of island nations, including the Philippines, Indonesia, Fiji, and the Bahamas, have claimed a right to draw baselines connecting the outermost islands of the archipelagic state from which the territorial sea is to be measured. Under the archipelagic principles proposed by Fiji, Indonesia, Mauritius, and the Philippines, the waters enclosed by these baselines are subject to the sovereignty of the archipelagic state and passage through those waters is permitted as a right of innocent passage in sealanes designated by the archipelagic state. U.N. Doc. A/AC.138/SC.II/L.15 (1973) *also found in*, Report of the Committee on the Peaceful Uses of the Sea-bed and Ocean Floor Beyond the Limits of National Jurisdiction, 28 U.N. GAOR, Supp. 21, Vol. 3, at 1, U.N. Doc. A/9021 (1973) [hereinafter cited as 1973 Report of the Sea-bed Comm.], *reprinted in*, 12 INT'L LEGAL MATERIALS 581 (1973). For a brief discussion of the archipelagic claims as they affect the straits issues see Stevenson and Oxman, *supra* note 1, at 12-13.

51. Most straits proposals, including those of the United States, the Soviet Union, and Italy, would not apply to straits governed by specific international agreements (*e.g.*, the Turkish straits). *See* USA: Draft Articles on the Breadth of the Territorial Sea, Straits, and Fisheries, U.N. Doc. A/AC.138/SC.II/L.4 (1971), *reprinted in*, 65 DEP'T STATE BULL. 266 (1972) [hereinafter cited as U.S. Draft Articles]; USSR: Draft Articles on Straits Used for International Navigation, U.N. Doc. A/AC.138/SC.II/L.7 (1972), *reprinted in*, 12 INT'L LEGAL MATERIALS 40 (1973) [hereinafter cited as USSR Draft Articles]; Italy: Draft Article on Straits, U.N. Doc. A/AC.138/SC.II/L.30 (1973), *also found in*, 1973 Report of the Sea-bed Comm., *supra* note 50, vol. 3, at 70, *reprinted in*, 12 INT'L LEGAL MATERIALS 1230 (1973).

Both the Soviet and the American proposals apply to straits under six miles in width which have previously been governed by the 1958 Territorial Sea Convention. The United States proposal would apply to straits "used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State." (This is the same formula used in article 16(4) of the Territorial Sea Convention.) The Soviet proposal would apply to straits used for international navigation between one part of the high seas and another part of the high seas.

rights emphasizes the need for all nations to communicate with each other; and the claim for application of territorial sea rights emphasizes the need for coastal states to protect their interests. These trends represent alternative legal schemes for the allocation of the authority to control the ships and aircraft that may pass through straits and the conditions of their passage.

1. *Legal Arguments for Application of a Right of Innocent Passage in Straits.*—A number of states, including many coastal and island states, have contended that straits overlapped by their territorial sea form an undifferentiated part of that sea. These states argue, therefore, that sea movement through straits should be governed as a right of non-suspendible innocent passage such as that recognized in the 1958 Territorial Sea Convention, and that air movement should be regulated by the provisions of international agreements applicable to aviation within the territorial airspace of states.[52] Their concern is that a high sea regime for straits would merely cater to the interests of large maritime states while providing coastal states with insufficient protection from dangers of accidents and pollution and from threats to their national security.[53]

The proposals of these states explicitly recognize the right of non-suspendible, innocent passage in straits, but they also confer on coastal states (including straits states) broad competence to interpret and implement this right and to prescribe and enforce regulations.[54] For example, the draft articles submitted by Cyprus,

52. Among the leading proponents of this view have been Spain, the Philippines, Indonesia, and the Peoples Republic of China. For a typical exposition of this rationale see J. de Yturriaga, *Navigation Through the Territorial Sea Including Straits Used for International Navigation,* in HAZARDS OF MARITIME TRANSIT 85 (T. Clingan, Jr. ed. 1973).

53. *See, e.g.*, statement of the Spanish representative before Subcommittee II of the Seabeds Committee, U.N. Doc. A/AC.138/SC.II/SR.6 at 27 (1971) and U.N. Doc. A/AC.138/SC.II/SR.42 at 53 (1972); statement of the Indonesian representative, U.N. Doc. A/AC.138/SC.II/SR.31 at 111 (1972).

54. *See* Cyprus, Greece, Indonesia, Malaysia, Morocco, Philippines, Spain, and Yemen: Draft Articles on Navigation Through the Territorial Sea, Including Straits Used for International Navigation, U.N. Doc. A/AC.138/SC.II/L.18 (1973), *also found in,* 1973 Report of Seabed Comm., *supra* note 50, vol. 3, at 3, *reprinted in,* 12 INT'L LEGAL MATERIALS 573 (1973) [hereinafter cited as Cyprus, Greece, Indonesia, *et. al.* Draft Articles]. *See also* China: Working Paper on Sea Areas Within the Limits of National Jurisdiction, U.N. Doc. A/AC.138/SC.II/L.34 (1973), *also found in,* 1973 Report of the Sea-bed Comm., *supra* note 50, vol. 3,

Greece, Indonesia, and others empower coastal states to regulate virtually all facets of navigation in straits, including designation of sea lanes, establishment of safety requirements, and regulation of maritime transport. In addition, they would control the passage of ships with special characteristics,[55] thus permitting coastal states to establish conditions for passage and to require prior authorization for the movement of special categories of ships including warships and nuclear-powered ships.[56] These articles would also allow the authorities of coastal states to require that ships carrying petroleum, liquified natural gas, or other hazardous substances through straits give prior notification, use designated sea lanes, and possess international insurance against possible damage resulting from the transit.[57] Implicit in this approach is the view that the coastal state has a legal right to determine in each case whether the passage of a vessel is prejudicial to its security and to deny passage when it is. Moreover, the breadth of the regulatory powers given coastal states in the proposal clearly indicates a broad conception of innocent passage that includes as a criterion

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at 71, *reprinted in*, 12 INT'L LEGAL MATERIALS 1231 (1973) [hereinafter cited as China: Working Paper].

The draft articles of Cyprus, Greece, Indonesia, *et. al.*, and the Chinese working paper have been characterized as establishing a regime of innocent passage more restrictive of navigation than that established by the 1958 Territorial Sea Convention. Stevenson and Oxman, *supra* note 1, at 11.

Fiji has also proposed draft articles establishing an innocent passage regime for straits. Fiji: Draft Articles Relating to Passage Through the Territorial Sea, U.N. Doc. A/AC.138/SC.II/L.42 (1973), *also found in*, 1973 Report of the Seabed Comm., *supra* note 50, vol. 3, at 91, *reprinted in*, 12 INT'L LEGAL MATERIALS 1251 (1973) [hereinafter cited as Fiji: Draft Articles]. These articles are designed to provide objective standards for innocent passage. The regime established by these articles is less restrictive than that established by the articles of Cyprus, Greece, Indonesia, *et. al.*, but it is considerably more specific than the innocent passage regime of the 1958 Territorial Sea Convention.

The Organization of African Unity has also expressed a preference for a regime of innocent passage but has recognized a need for "further precision of the regime." Organization of African Unity Declaration on the Issues of the Law of the Sea, U.N. Doc. A/AC.138/89 (1973), *also found in*, 1973 Report of the Sea-bed Comm., *supra* note 50, vol. 2, at 4, *reprinted in*, 12 INT'L LEGAL MATERIALS 1200 (1973).

55. Cyprus, Greece, Indonesia *et. al.* Draft Articles, art. 6.

56. *Id.*, arts. 14-18, 21.

57. *Id.*, art. 16.

for innocence the protection of coastal state interests from injury caused by pollution or serious accident. Advocates of this approach assert that it protects the fundamental right to communicate through straits while permitting coastal states to protect their legitimate interests.[58]

2. *Legal Arguments for a High Seas Right of Navigation and Overflight in Straits.*—States that rely on air and sea passage through straits for their communications with the rest of the world have argued that the right of navigation and overflight should be retained in straits overlapped by the proposed extension of the territorial sea.[59] They maintain that the law governing navigation and overflight in straits has traditionally been distinct from the law governing innocent passage in the territorial sea, and that the right of all states to navigate and overfly straits should be recognized even in those straits overlapped by extension of the territorial sea.[60] These states contend that the subjectivity in the definition of innocent passage and the lack of a right of overflight or submerged passage would give coastal states too much authority to control and regulate the use of straits. Furthermore, an extension of the territorial sea regime allowing coastal state jurisdiction in straits might become a vehicle for unwarranted interference with the right to navigate and overfly straits, and would prejudice

58. Throughout the debate in the Seabeds Committee, coastal states argued that the regime of innocent passage combined with the air regime established by the Chicago Convention, *supra* note 17, is sufficient to protect and facilitate global communications. These states frequently emphasized this point by asserting that there have been no incidents in time of peace where straits regulated under a regime of innocent passage have been arbitrarily closed. *See, e.g.*, U.N. Doc. A/AC.138/SC.II/SR.28 at 52 (Greece 1972); U.N. Doc. A/AC.138/SC.II/SR.58 at 4 (Philippines 1973); U.N. Doc. A/AC.138/SC.II/SR.62 at 15 (Malaysia *re* Strait of Malacca, 1973).

59. The principal proponents of this view have been the United States and the Soviet Union, but this approach has also been supported in varying degrees by other states that have maritime interests (*e.g.*, United Kingdom and France) or that are dependent on trade and movement through straits (*e.g.*, Singapore and Poland). The views of the two nations—Japan and the United Kingdom—with the largest maritime interests after the United States and the Soviet Union are influenced by their positions as major coastal states (U.K.: Strait of Dover; Japan: Straits of Tsushima, Tsugaru, and La Perouse).

60. *See, e.g.*, statement of the representative from the Soviet Union before Subcommittee II of the Seabeds Committee, U.N. Doc. A/AC.138/SC.II/SR.6 at 17 (1971); statement of the United States representative, *supra* note 46.

the economic, political, and military interests of states that have relied on use of straits in the past.[61] Accordingly, certain of these states have proposed that a specific legal regime, preserving their right of navigation and overflight of straits, be included as a fundamental provision of a new law of the sea treaty extending territorial seas to twelve miles.[62] With the exception of the United Kingdom draft articles, these proposals would preclude coastal states from regulating or interfering with air and sea movement in straits.[63]

While maritime states would deny coastal states the authority to prescribe regulations governing the use of straits,[64] the American and Soviet proposals envision a regulatory role for the appropriate international bodies. For example, the United States has proposed

61. *See, e.g.*, statement of Soviet representative before the Seabeds Committee: "On the other hand, it was hardly possible to claim that a regime of innocent passage would suffice for international straits. Experience in recent years had shown that the regime was sometimes interpreted in different ways; it might result in attempts by States to regulate the passage of ships unilaterally and to obstruct freedom of navigation. In practice, control of those important straits would be in the hands of a small group of States, which would be prejudicial not only to international navigation but also to the entire international community." U.N. Doc. A/AC.138/S.R.83 at 28 (1972).

62. U.S.A.: Draft Articles; U.S.S.R.: Draft Articles; Italy: Draft Article on Straits, *supra* note 51. These articles each provide that in applicable straits ships and aircraft shall enjoy for the purposes of transit the same freedom of navigation and overflight as exists on the high seas. The United Kingdom has submitted a series of draft articles on "passage of straits used for international navigation." United Kingdom: Draft Articles on the Territorial Sea and Straits, U.N. Doc. A/Conf.62/C.2/L.3 (1974) [hereinafter cited as U.K.: Draft Articles]. These articles provide for a right of "transit passage" essentially similar to the right of passage in the United States and Soviet proposals (U.K. Draft, arts. 1,2). However, the U.K. Draft Articles are more detailed and confer on coastal states limited competence to enforce international regulations pertaining to discharge of pollutants and to enforce internationally approved traffic separation schemes (U.K. Draft, arts. 3, 4).

63. Under a high seas regime coastal states would be entitled to exercise their right of self-defense under the U.N. Charter and would also be entitled to exercise in appropriate circumstances their rights under the international agreements pertaining to the high seas such as the International Convention Relating to Intervention on the High Seas in Cases of Oil-Pollution Casualties, *done* November 29, 1969, *reproduced in*, 9 INT'L LEGAL MATERIALS 25 (1970).

64. The U.K.: Draft Articles, *supra* note 62, permit coastal states to prescribe sealanes and traffic separation schemes, but they become effective only after approval by the competent international organization (U.K. Draft, art. 3).

that flag states require that their surface ships transiting straits comply with traffic separation schemes initiated under the auspices of the Intergovernmental Maritime Consultative Organization (IMCO).[65] The Soviet proposal for a straits regime suggests similar requirements in more general phraseology.[66] In addition, the United States has proposed strict liability for damage caused by deviations from international regulations and procedures,[67] and the Soviet Union has proposed flag state responsibility for damage caused to coastal states by transiting vessels and aircraft.[68]

Obviously, the proposals of maritime states limit the jurisdictional authority of coastal states over air and sea movement in straits. Under these proposals, no single state has the authority to control or to regulate the conditions under which other states exercise their right to navigate and overfly straits.[69] Regulatory authority is placed under international auspices, and individual states are responsible for insuring that their vessels and aircraft comply with international standards. States favoring this approach to control of air and sea movement in straits contend that it promotes international communications and lessens the possibility of open conflict over the right of passage through straits while adequately protecting the interests of coastal states.

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65. Statement of the United States representative, Mr. John R. Stevenson, before Subcommittee II of the Seabeds Committee, U.N. Doc. A/AC.138/SC.II/SR.37 at 26 (1972). *See also* statement of Mr. John Norton Moore, 70 DEP'T STATE BULL. 397, 398-99 (1974).

66. U.S.S.R.: Draft articles, *supra* note 51.

67. *See* note 65 *supra*, at 27.

68. U.S.S.R.: Draft Articles, *supra* note 51, at 7.

69. For example, the U.S.S.R.: Draft Articles provide in part:

"No state shall be entitled to interrupt or stop the transit of ships through the 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.

". . . .

"No state shall be entitled to interrupt or stop the overflight of foreign aircraft, in accordance with this article, in the airspace over the straits.

III. COMMUNICATIONS AND LAW OF THE SEA—THE NATURE OF THE STRAITS PROBLEM

The legal arguments advanced in the straits controversy are manifestations of how states use international law to advance their particular interests. It is necessary, therefore, to understand the nature of these interests and the impact that an extension of the territorial sea will have on them. Fundamentally, the extension of the territorial sea in straits poses a communications problem because it involves potential changes in the legal norms that have promoted growth of the vast global air and sea communications system. Because the straits controversy is essentially a choice of laws conflict, the principal question to be resolved is the allocation of authority to control and regulate air and sea communications in a legal regime for straits that balances the interests of states relying on the use of straits for air and sea communications with the interests of coastal states, which may be affected by such use. Thus, analysis of the straits controversy as a communications problem requires an understanding of the factors that characterize the role of straits as channels for international air and sea communications, as well as the relationship of those factors to the contrasting national interests of states using straits for communications and of coastal states. These factors are (1) the physical setting of straits linking ocean areas; (2) the importance of movement through straits for the maintenance of global air and sea communications; and (3) the impact of international air and sea traffic in straits upon the interests of adjacent coastal states.

A. *The Position and Role of Straits in Ocean Communications*

Straits are of central importance to the maintenance of international air and sea communications because they provide channels for air and sea movement between different ocean areas and the nations bounding those areas.[70] For some states, including many states bordering the Baltic Sea, the Black Sea, the Persian Gulf, and the Mediterranean Sea, the use of straits is essential if they are to have access to the high seas and to the ocean communica-

70. Wheaton refers to straits as forming "the channel of communication between different seas." WHEATON, *supra* note 8, at 264.

tions system as a whole.[71] For those states, such as Japan, straits are central links in the routes of supply of vital resources and commodities.[72] Still other states, such as the Soviet Union and the United States, depend upon the use of straits to maintain their global security interests.[73] Moreover, in the interdependent mod-

71. Because they are the only ocean routes into and out of these semi-enclosed seas, the Danish Straits, the Turkish Straits, the Straits of Hormuz, and the Straits of Gibraltar are particularly important to the countries bordering those seas. For discussion of geographic characteristics of straits see note 2 *supra*.

72. Eighty per cent of the oil needed for the Japanese economy in fiscal 1972 was imported from the Middle East. Most of this oil was transported through the Straits of Malacca and Singapore or the Straits of Lombok and Sunda. Japan is also heavily dependent upon ocean transport for importing other natural resources and food. For discussion of Japan's dependence upon imports see Okita, *Natural Resource Dependency and Japanese Foreign Policy,* 52 FOREIGN AFF. 714 (1974). The particular problems for Japan posed by Indonesia's archipelago doctrine are considered in Miller, *Indonesia's Archipelago Doctrine and Japan's Jugular,* 98 U.S. NAVAL INSTITUTE PROCEEDINGS 26 (Oct. 1972); and Oliver, *Malacca: Dire Straits,* 99 U.S. NAVAL INST. PROCEEDINGS 26 (June 1973).

73. The Soviet Union maintains four naval fleets, each dependent upon use of narrow waterways for strategic mobility in the world's oceans. The Soviet Northern Fleet, located in the Barents Sea, must pass through the Greenland-Iceland-United Kingdom gap to reach the open Atlantic Ocean. Soviet fleets stationed in the Baltic and Black Seas rely upon passage through the Danish and Turkish Straits. One squadron, stationed in the Mediterranean Sea and drawn from the Black Sea and Northern Fleets, depends upon use of the Straits of Gibraltar. Finally, the Pacific Fleet, located in the Sea of Japan, must pass through various straits, depending upon destination, to reach open ocean. The most important of these are the Tsushima Strait, the Tsugaru Strait and La Perouse Strait. *See* Smith, *The Meaning and the Significance of the Gorshkov Articles,* 26 NAVAL WAR COLLEGE REV., 18, 21 (March-April 1974). The Soviet presence in the Mediterranean after the June 1967 Arab-Israeli war has made control of the Turkish Straits and the Straits of Gibraltar particularly important to the maintenance of secure supply lines. *See* Gasteyger, *Moscow and the Mediterranean,* 46 FOREIGN AFF. 676, 682 (1968). The Straits of Malacca and Singapore are important to the Soviets should they desire to move elements of the Pacific Fleet into the Indian Ocean. *See* Kruger-Sprengel, *International Security and Navigation,* Hearings on Status Report on Law of the Sea Conference, *supra* note 46, at 776. (This article originally appeared in 29 INDIA QUARTERLY 120 (April-June 1973).

American air, surface, and subsurface transit of straits has been viewed as essential to national security. John Norton Moore stated: "Our national security interests as well as economic interests are involved in assuring free movement of vessels and aircraft on the high seas and through international straits." Statement of John Norton Moore, U.S. Representative to the United Nations Seabed

ern world, even those states that do not directly use or rely on the use of straits for communications benefit indirectly from the efficient low cost sea transportation system made possible, in part, by use of straits.[74]

The importance of individual straits for international air and sea communications varies considerably depending on such factors as

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Committee, Department of State. *Hearings on H.R. 216 and 296 Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Relations,* 93rd Cong., 1st Sess., at 4 (1973). Mr. Leigh Ratiner, then Chairman of the Defense Advisory Group on the Law of the Sea, argued that there is an essential connection between American willingness to recognize a twelve-mile territorial sea and her position on free transit through international straits as announced in the May 23, 1970 statement by President Nixon on United States Policy for the Seabed (*supra* note 49). Ratiner stated: "We do not recognize the 12-mile territorial sea and it is doubtful that if we fail to obtain the necessary protection through international straits at a conference, that we could accept the 12-mile territorial sea. We would as a matter of high national security priority have to maintain that we are only bound to recognize the 3-mile limit if we were unable to obtain the necessary protection through straits." *Hearings on Territorial Sea Boundaries Before the Subcomm. on Seapower of the House Comm. on Armed Services,* 91st Cong., 2d Sess., at 9291 (1970).

The importance of the Straits of Gibraltar to the operation of the American Sixth Fleet in the Mediterranean cannot be overstated. Because United States allies would not cooperate, the only avenue of re-supply for Israel during the October 1973 Middle East crisis was through the Strait of Gibraltar. *See* Gelb, *U.S. Jets for Israel Took Route Around Some Allies,* N.Y. Times, Oct. 25, 1973, at 1, col. 2; *id.* at 18, col. 1. Similarly, use of the Straits of Malacca and Singapore is essential for speedy transfer of elements of the Seventh Fleet into the Indian Ocean. *See also* notes 84 and 85 *infra.* The Strait of Hormuz, which provides access into the sensitive Persian Gulf area with its extensive oil fields has ever increasing strategic significance for the United States and the Soviet Union as well as for the countries bordering the Gulf. *See* Middleton, *Persian Gulf Emerging as Military Focus,* N.Y. Times, Jan. 22, 1975, at 2, col. 1.

74. The impact of transport costs upon terms of trade and inflation and deflation in domestic economies is explained in standard texts on international trade. Generally, closure of specific straits that lie along major trade routes raises the costs of transport, which affects the price of goods delivered to consumers. Some developing countries, however, feel that the monopolistic practices of ocean shippers of developed nations make ocean transport particularly costly for developing countries. *See* Valente, *The Participation of Developing Countries in Shipping,* Shipping and Developing Countries, INT'L CONCILIATION 27, 37, (March 1971). *See also* notes 79-81 *infra* and accompanying text. For an overall discussion of the modern ocean transportation industry see S. LAWRENCE, INTERNATIONAL SEA TRANSPORT: THE YEARS AHEAD (1972).

geographical location, physical characteristics, and availability of alternative routes. Except where straits lie along major international trade routes, it is difficult to establish general criteria for distinguishing which straits are of particular communications importance because of varying national perspectives on this question, and because the importance of particular straits may shift with the vicissitudes of shipping technology, trade patterns, and other political, economic, and strategic factors.[75]

The air and ocean areas of straits serve as media for the movement of vessels and aircraft. Traffic in straits is, however, distinguished from traffic in most other ocean areas by two factors. First, because straits are relatively narrow bodies of water, air and sea traffic in these areas tends to be relatively dense, and in some straits, traffic is quite congested.[76] The problems of maritime navigation are often further compounded by the physical features of the straits, which may include strong currents, shallow waters, shoals, and rapidly changing underwater contours, and by the lack of maneuverability and deep draft of many of the large ships transiting the straits.[77] Secondly, the flow of air and sea traffic through

75. Closure of the Suez Canal obviously changed the importance of the Strait of Gibraltar and the Strait of Bab el Mandeb for ocean transport between the Middle East and Europe. Construction of very large super-tankers to transport oil around the globe has changed the importance of the Straits of Malacca and Singapore because the waters of these straits are too shallow for safe navigation by these ships. The Straits of Lombok and Sunda have consequently risen in importance as they lie along alternative routes to Japan from the Persian Gulf. In addition, changes in sources of supplies of resources either because of new mineral discoveries or because of unstable local political conditions could at any time alter the importance of different straits around the globe.

76. Hodgson & McIntyre, *supra* note 2. *See also* Thompson, *Establishing Global Traffic Flows,* 25 J. OF NAVIGATION 483 (1972) which considers current maritime traffic flows and projects traffic flows for 1980. Thompson projects much more dense traffic for the Straits of Malacca in the future. *Id.* at 490.

Concerning density of traffic in the Straits of Dover and the incidents of accidents in the strait see Beattie, *Two Years of Routing in the Dover Strait,* 22 J. INST. NAVIGATION 442 (1969); Beattie, *Traffic Flow Measurements in the Dover Strait,* 24 J. INST. NAVIGATION 325 (1971); Johnson, *Traffic in the English Channel and Dover Strait I—Traffic Surveys,* 26 J. OF NAVIGATION 75 (1973).

77. For an analysis of the problems of shallow water, shoals, currents, and local weather conditions see Charts and accompanying commentary in STRAIT OF GIBRALTAR, STRAITS OF MALACCA AND SINGAPORE, STRAIT OF HORMUZ, AND STRAIT OF BAB EL MANDEB prepared by Office of Geographer, Department of State, *supra*

straits takes place in close proximity to the land of neighboring coastal states. It is this proximity combined with the dense traffic flow that has made the use of straits a major concern for coastal states.

B. *Interests of States Relying on the Use of Straits for Communications*

The role of straits as linking channels for international air and sea

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note 2. Of particular interest are the current traffic patterns in the Straits of Gibraltar and the shallow waters of the Straits of Malacca. Traffic separation schemes for particular straits are designed to take physical characteristics into account. Oudet, *The Ordering of Seaborne Traffic,* 22 J. INST. NAVIGATION 57, 63 (1969).

On weather problems see Burger & Evans, *The Efficacy of Weather Routing in Reducing Damage,* 24 J. INST. NAVIGATION 284 (1971). Analysis of the impact of waves, storms, tides, currents, and shallow water on navigation can be found in Deacon, *Oceanography and Navigation,* 22 J. INST. NAVIGATION 77 (1969). The need to detect and chart wrecks and sand waves that occur to a height of sixteen feet in the English Channel and the North Sea, is discussed in Winstanley, *Navigation of Deep Draught Vessels in the Southern North Sea,* 22 J. INST. NAVIGATION 426 (1969). Changes in both contours pose great threats to supertankers operating in shallow waters, particularly in heavy weather. *See* Brogan, *The Admiralty Chart—IV,* 22 J. INST. NAVIGATION 419, 435 (1969). Mr. Brogan asserts that because the tankers are so mammoth, a one degree difference in pitch would increase draught by ten to twelve feet. The relationship between fog, radar, and the incidence of collisions is discussed in Wheatley, *Traffic in the English Channel and Dover Strait II—Circumstances of Collisions and Strandings,* 26 J. INST. NAVIGATION 92 (1973). *See also* Frecker, *Three Classic Collisions,* 26 J. INST. NAVIGATION 299 (1973).

The technical problems of navigating large ships in shallow waters are described in Hooft, *Manuevering Large Ships in Shallow Water—II,* 26 J. INST. NAVIGATION 311 (1973). This article explains why it is more difficult to steer and control a large ship in shallow water than in deep water. Because shallow water causes a phenomenon known as "squat," a ship may draw more water in shallow areas than in deep areas. Squat is a particularly serious problem for very large ships or tankers operating in shallow straits. *See* Paffett, *Ship Maneuvering Characteristics,* 26 J. INST. NAVIGATION 113, 118 (1973). The problems of steering and stopping a supertanker and the devastating potential for directional instability and lack of rudder response under certain conditions are also discussed in this article. *See also* Watt, *Collision Involving Very Large Ships,* 25 J. INST. NAVIGATION 103 (1972). The problems of navigation in the Straits of Dover are further magnified by new types of ships such as hydrofoils whose great speed and maneuverability present different types of hazards. *See* Draysey, *High-Speed Vessels and the Collision Regulations,* 25 J. INST. NAVIGATION 263 (1972).

communications explains why many states have come to consider the maintenance of a right of navigation and overflight through these areas as vital to their national interest. Obstructions or restrictions of the right of navigation and overflight can have serious effects on the economic, political, and military interests of states that rely on passage through straits to sustain or facilitate their communications with the rest of the world. Such obstruction can substantially increase the cost of moving goods in international trade; in extreme cases, it could preclude some seaborne or airborne trade entirely.[78] Increases in transportation costs, or outright cessation of trade, may, in turn, cause serious economic dislocations to certain nations that would reverberate throughout the entire world economy.[79] Moreover, restrictions on straits transit

78. For example, it has been estimated that closure of the Indonesian straits to tankers bound for Japan would raise the cost of crude oil delivered to Japan from the Middle East by as much as two dollars per barrel. Miller, *supra* note 72, at 33. The economic effects of extended coastal claims of jurisdiction have been stressed by both the United States and the Soviet Union. In his statement before the Seabeds Committee on August 13, 1973, Mr. John Norton Moore emphasized the potential adverse economic effects that might be expected from extended coastal state jurisdiction for pollution control. 69 DEP'T STATE BULL. 410, 412 (1973). A more extensive analysis of the possible economic costs of extended coastal state jurisdiction is found in the statement of the Soviet representative, Mr. Khlestov, before Subcommittee II of the Seabeds Committee on July 30, 1971. Mr. Khlestov emphasized, in particular, the potential adverse effects on the economies of developing countries that might follow from such an extension. He argued that under a regime of innocent passage, coastal states might make regulations that could interrupt shipping. Khlestov claimed that such interruptions, whether created by overt interference or simply non-uniform standards, could cause shipping difficulties resulting in higher freight and other rates, to the detriment particularly of nations highly dependent on trade. U.N. Doc. A/AC.138/SC.II/SR.6, at 9 (1971).

79. The deleterious effects that might be expected if restrictions on seaborne trade moving through straits were to result in markedly higher costs can be predicted to some extent by examining the results of the increased cost of petroleum. For example, the increased cost of petroleum which has raised the price and curtailed the production of fertilizer since October 1973, will probably result in lower food production in developing countries. Moreover, industrial countries faced with inflated costs are buying fewer imports from developing countries and providing less aid and food to those nations. At the same time, developing nations faced with higher costs for energy have fewer resources to devote to acquiring desperately needed technology essential for economic growth. Oberdorfer, *Japan Cuts Fertilizer Exports,* Washington Post, May 23, 1974, at 35, col.1; Morgan,

would probably have negative effects on developed and developing countries alike.[80] For example, among the nations hardest hit by the closure of the Suez Canal were the developing countries of East Africa and South and East Asia, which experienced significant trade losses while being forced to pay higher prices for imports.[81]

Poor Nations Face Starvation as Rich Ones Delay Aid, Washington Post, July 15, 1974, at 3. *See also* Paust & Blaustein, *The Arab Oil Weapon—A Threat to International Peace,* 68 AM. J. INT'L L. 410, 434-37.

80. The Soviet representative in his statement to Subcommittee II of the Seabeds Committee analyzed the issue as follows: "The considerable extension of their territorial waters being proposed by some States would therefore greatly increase the navigational and commercial risks to shipping and inevitably reduce the carrying capacity of vessels, increase freight and insurance rates, increase the price of goods carried c.i.f., and lower the prices of goods carried f.o.b. As the developing countries generally exported their goods f.o.b., the outcome would be a fall in the prices of their exports and a rise in the prices of their imports, which, as a rule, were carried c.i.f." U.N. Doc. A/AC.138/SC.II/SR.6, at 21 (1971). However, the Soviet analysis over-simplifies the issues. The allocation of transportation costs in a trading transaction depends not on the terms of shipment, but on the relative elasticities of supply and demand of the goods being transported. *See* Report by the UNCTAD Secretariat, Level and Structure of Freight Rates, Conference Practices, and Adequacy of Shipping Services, U.N. Doc. TD/B/C.4/38/Rev.1, at 71 (1969) [hereinafter cited as UNCTAD Study on Freight Rates]. Nevertheless, a number of studies and authorities have concluded that increases in freight rates on the balance fall most heavily on developing nations because the demand elasticities of the primary commodities they produce are relatively greater than the supply elasticities, whereas the supply elasticities of the manufactured goods they must import are relatively greater than the demand elasticities. UNCTAD Study on Freight Rates, at 71-76; Report by the UNCTAD Secretariat, Terms of Shipping, U.N. Doc. TD/B/C.4/36/Rev.1, at 12-14 (1969); Rajwar, *Trade and Shipping Needs of Developing Countries,* INT'L CONCILIATION, 13-14 (March 1971). This analysis is not accepted by all authorities. *See* Report of the Committee on Shipping on its Third Session, 9-15 April 1969, U.N.C.T.A.D. TRADE AND DEVELOPMENT BOARD, OFF. REC., NINTH SESSION, Supp. 3, U.N. Docs. TD/B/40, TD/B/C.4/55, at 8 (1969). Moreover, in the case of petroleum and liquified natural gas, which are likely to be affected by higher transportation costs as a result of coastal state restrictions on navigation through straits, it would appear that the elasticity of demand is likely to be lower than the elasticity of supply (because there are relatively few suppliers organized in monopoly fashion with a large demand and relatively few suitable substitutes) thus placing the burden of increased transport costs on oil-consuming nations, which are predominantly but not exclusively developed nations.

81. The trade loss for East Africa and South East Asia is estimated at 560 million dollars during 1967-1970. "For South-East Asia the estimated trade loss due to the Suez Canal closure represented 9 and 11 per cent of Western Europe's

As a result, domestic industries were adversely affected and overall economic growth in those countries was inhibited.[82]

Obstruction or restriction of air or sea passage through straits may also have important political and strategic implications. Such obstruction can interrupt the movement of resources necessary to modern industrial economies and military forces.[83] In addition, many states rely on the right of navigation and overflight in straits for the movement of naval forces and military aircraft. Restrictions or threatened restrictions on the movement of these forces may endanger the security of lines of communication considered vital by these states.[84]

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actual imports from that region in 1969 and 1970, respectively. East Africa's relative trade loss was higher, amounting to 19 per cent (1969) and 17 per cent (1970) of Western Europe's actual imports from this area in these years. UNCTAD SUEZ STUDY, *supra* note 41, at 26. Besides direct trade losses resulting because higher transportation costs rendered goods from these areas non-competitive in Western Europe, the closure had other less direct effects on trade. For example, Somalia's export of bananas (the country's principal export) was seriously curtailed in part because of the increased cost of packing material obtained mainly from Italy and the increased wastage at sea caused by the longer transit time. *Id.* at 27. The closure also resulted in higher insurance rates (due to the longer transit time and the risks of passage around the Cape of Good Hope), higher cost for commercial credit (due to longer transit time), requirements for higher stock levels of imports, and increased prices for second-hand tonnage. *Id.* at 21.

82. *Id.*, at 1, 26-27.

83. Petroleum is the most prominent example at this time because of its widespread importance as a source of energy. *See, e.g.*, B. ABRAHAMSSON & J. STECKLER, STRATEGIC ASPECTS OF SEABORNE OIL in 2 INTERNATIONAL STUDIES, No. 02-017, (1973). For a description of the principal straits used by tankers and some of the alternative routes see NATIONAL PETROLEUM COUNCIL, LAW OF THE SEA 61-75 (1973). The sealanes are also important in the movement of other essential minerals such as natural gas, iron ore, bauxite, copper, chromium, nickel, asbestos, cobalt, platinum, manganese, and tin. *See* Middleton, *NATO Studying Vulnerable Sea Lanes,* N.Y. Times, July 24, 1974, at 2. *See also* OFFICE OF THE CHIEF OF NAVAL OPERATIONS, U.S. LIFELINES (1972) (describing the sources and volume of imports of essential materials in the years 1966 to 1969).

84. For example, the importance of the nuclear submarine to American national security has become clearer in recent years because of the vulnerability of surface ships and potential vulnerability of land-based missile systems. Soviet and American submarines necessarily use straits as they pass from one ocean to another. This greatly enhances the strategic importance of straits to these states. On the importance of submarines see Cohen, *The Erosion of Surface Naval Power,* 49 FOREIGN AFF. 330 (1971). For general information on nuclear submar-

C. *Interests of Coastal States Bordering Straits*

The concerns and perspectives of many coastal states differ substantially from those of the states relying on straits for communications. The primary concerns of the adjacent states are the proximity and density of traffic in the straits and the possible effects of this traffic on their interests. These states fear that accidents and pollution in adjacent straits will endanger lives of their citizens and seriously damage their property and resources.[85] Dense traffic or increasing use of a strait may also make it difficult or impossible for coastal states to exploit fully their fisheries and seabed resources in straits areas.[86] Moreover, coastal states contend that the

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ines and anti-submarine warfare see Scoville, *Missile Submarines and National Security,* 226 SCIENTIFIC AMERICAN 15 (1972); Garwin, *Anti-Submarine Warfare and National Security,* 227 SCIENTIFIC AMERICAN 14 (1972). In part, the significance of straits in strategic calculations stems from their potential use as chokepoints where the nuclear missile submarines of one state may be detected and then trailed by the anti-submarine warfare elements of opposing states. *See* A. QUANBECK & B. BLECHMAN, STRATEGIC FORCES: ISSUES FOR THE MID-SEVENTIES 81 (Brookings Institution Staff Paper) (1973); B. BLECHMAN, THE CHANGING SOVIET NAVY 17-18 (Brookings Institution Staff Paper) (1973).

In his discussion of military interests in the law of the sea, John Knauss stresses the importance of sealanes as military lines of communication that permit deployment and logistic support of troops in locations remote from the home country. Knauss, *The Military Role in the Ocean and its Relation to the Law of the Sea,* in LAW OF THE SEA: A NEW GENEVA CONFERENCE 77, 81-82 (L. Alexander ed. 1971).

On straits that are of particular strategic significance see note 71 *supra.*

85. For example, the Malaysian representative, speaking before Subcommittee II of the Seabeds Committee, noted that were a disaster similar to the *Torrey Canyon* incident to occur in the Strait of Malacca, "a large proportion of Malay's inhabitants would be deprived of their staple diet. Tourism would also be seriously affected. Wild-life would be gravely endangered and the high ambient temperatures would create a risk of ignition of uncontrolled oil fuel." U.N. Doc. A/AC.138/SC.II/SR.11, at 88 (1971). Events have demonstrated that these fears are not unrealistic. On Aug. 9, 1974 the tanker *Metula* ran aground in the Strait of Magellan leaking between 9 and 14 million gallons of oil into the waters of the Strait. Wall Street J., Sept. 11, 1974, at 1, col. 3. On Jan. 5, 1975 the tanker *Showa Maru* ran aground at the southeastern end of the Strait of Malacca leaking 3,300 tons of oil into the Strait. N.Y. Times, Jan. 7, 1975, at 1, col. 4; *Japanese Fear Reaction to Big Oil Leaks,* N.Y. Times, Jan. 8, 1975, at 4, col. 2.

86. The Indonesian government has blamed the decline of that nation's fishing industry in the Straits of Malacca on the increased traffic, particularly of supertankers in the Strait. U.N. Doc. A/AC.138/SC.II/SR.31, at 111-12 (1972).

present legal regime, which relies on international regulation and flag state enforcement, is inadequate to protect their legitimate interests.[87] Some coastal states also believe that traffic in straits imperils certain of their security interests. Such claims apparently result either from fears of attack, infiltration, or military intelligence activities conducted by transiting vessels and aircraft, or from fears of military confrontations centering on strategic straits.[88]

Discovery of petroleum or natural gas in straits areas could present the substantial difficulties of accomodating offshore drilling and navigation. For a brief description of such difficulties in the Gulf of Mexico see Legg, *Fairways Regulations: Jurisdiction and Effect,* 26 JAG J. 205, 209-11 (1972).

87. The Canadians have been among the most articulate spokesmen for this view. *See, e.g.*, Statement of the Canadian Representative before Subcommittee II of the Seabeds Committee, U.N. Doc. A/AC.138/SR.63, at 32 (1971). Beesley observed that "the concept of freedom of the high seas . . . had become tantamount to a roving jurisdiction—sovereignty following the flag for those powerful enough to make their wishes felt." He further asserted: "The ingenious doctrine of flag state jurisdiction was one example of the "tyranny" of the traditional concept [of freedom of the seas], but an equally compelling example was the manner in which the freedom of the high seas had been transformed into a license to pollute and a right to over-fish. Nobody could still be unaware of the dangers of continuing to condone *laissez-faire* on the high seas." *Id.*, at 32. The Canadians have been particularly concerned over the prospect of passage through arctic straits by supertankers. The voyage of the S.S. *Manhattan* in 1969 through the Northwest Passage crystallized this concern and led to the declaration of a Canadian anti-pollution zone beyond the territorial sea. *See* Milsten, *Arctic Passage—Legal Heavy Weather,* 15 ORBIS 1173 (1972). *See also* note 100 *infra.*

88. The Indonesian representative speaking before Subcommittee II of the Seabeds Committee asserted that a free transit regime for straits "could turn Indonesian waters into an area of confrontation and conflict between opposing naval Powers in which the only part played by Indonesia would be that of victim." He also commented, "that the passage of warships, including submarines through the waters of a country affected that country's political stability. The history of his own country showed that foreign warships and submarines could be used for such subversive activities as smuggling arms to dissident groups within its territory. In fact, the mere presence of foreign warships and submarines in Indonesian waters could set off domestic political reactions." U.N. Doc. A/AC.138/SC.II/SR.31, at112-13 (1972). Spain has asserted that submerged passage, particularly of nuclear submarines, poses a serious danger to its security though the danger contemplated is evidently that of accidents rather than intelligence, subversion, or offensive military action. Spain also opposes overflight of straits, contending that it will amount to overflight of national territory. U.N. Doc. A/AC.138/SC.II/SR.42, at 53 (1972). On Iran's concern about the Strait of Hormuz see notes 44, 71 *supra.*

Finally, coastal states are aware of the potential locational resource value of straits, and some may foresee an opportunity to manipulate the right to navigate and overfly straits as a source of wealth or a means for achieving particular political objectives. To date, coastal states have not overtly endeavored to control air and sea movement through straits for political purposes,[89] nor have they used straits as a source of domestic revenue.[90] Clearly, however, in the absence of a new regime to govern the straits, these remain distinct possibilities.[91]

IV. Implications for a Legal Regime for Straits

Since the straits controversy centers on alternative plans to control and regulate communications movement through narrow ocean areas, it is reasonable to examine the legal issues from the perspective of the large body of law that has developed to support and promote reliable and continuous systems of global communi-

89. Leifer and Nelson assert that one of the factors motivating Indonesia to claim control over transit through the Indonesian straits and the Strait of Malacca is a desire to acquire leverage with which to secure additional economic assistance from Japan. Leifer & Nelson, *supra* note 45, at 192. Furthermore, Miller points out that Japan has taken steps to increase Indonesian reliance on Japanese goodwill and thereby establish some reciprocal leverage by providing aid and capital and by purchasing large amounts of Indonesian exports. Miller, *supra* note 72, at 32.

90. The Montreux Convention provides for the collection of tolls from passing ships in the Turkish straits, but these are based on the cost of services provided and are not payments for the right of passage. *See* note 11 *supra*.

91. While no coastal states have asserted such claims, it is possible that they might do so on the grounds that the straits constitute a locational natural resource. For example, Panamanians have argued that Panama should be permitted to raise tolls for passage through the Panama Canal to the point where Panama receives the maximum economic benefit. They justify this argument on the grounds that the Canal is simply the means by which Panama can exploit its most precious and primary natural resource—its geographic position. *See Panama Assails U.S. on Canal,* Chicago Tribune, July 11, 1974, at 6; speech of Dr. Jorge Illeuca at the University of Panama, Dec. 12, 1972, in *Hearings on United States Relations with Panama Before the Subcomm. on Inter-American Affairs of the House Comm. on Foreign Affairs,* 93rd Cong., 1st Sess. at 27, 43-47 (1973). Moreover, the Arab oil embargo is a precedent that might at some future point be invoked by coastal states as a means for gaining political objectives similar to those sought by the Arabs.

cations.[92] Unlike law of the sea, which has traditionally applied specific principles to well-defined areas of the oceans, the law governing international communications, including transportation and trade between nations, has developed around the functional characteristics of various media used for communications and the need to accommodate the interests of states desiring to use these media with the interests of other states affected by use of the media. Because of this the general legal trends supporting global communications and the different approaches to the control and regulation of communications are particularly relevant to resolution of the communication issue raised by the proposed extension of the territorial sea in straits.

A. *General Trends in the Law Governing Communications*

The Covenant of the League of Nations and the Charter of the United Nations recognize the fundamental importance of reliable systems of global communications to the international community. Article 23(e) of the Covenant provided that members of the League would "make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League."[93] The Charter of the

92. For a survey of the law governing communications generally see C. ALEXANDROWICZ, THE LAW OF GLOBAL COMMUNICATIONS (1971). For a more specific survey of the law governing communications through international waterways see BAXTER, *supra* note 15.

93. LEAGUE OF NATIONS CONVENANT art. 23, para. e. Article 23 provides in part:

> Subject to and in accordance with the provisions of international conventions existing or hearafter to be agreed upon, the Members of the League:
>
> . . . .
>
> (e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connection, the special necessities of the regions devastated during the war of 1914-1918 shall be borne in mind . . . .

For a description of the conferences held and international agreements concluded as a result of this provision and other provisions of the Treaty of Versailles see Secretariat of the United Nations, Question of Free Access to the Sea of Landlocked Countries; I United Nations Conference on the Law of the Sea, OFF. REC. 306, 313-15, 321-27 U.N. Doc. A/CONF.13/37 (1958). *See also* U.S. DEP'T OF STATE, THE TREATY OF VERSAILLES AND AFTER 687-89 (1947).

The Treaty of Versailles also contained numerous provisions pertaining to air,

United Nations, while not directly referring to the importance of communications, emphasizes the necessity of promoting economic and social cooperation and friendly relations among states.[94] The salient role of global communications in facilitating these conditions has been established in a succession of international acts and agreements that are based upon the general principles enunciated in the Charter.[95] In addition, the maintenance of reliable and con-

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rail, and water communications, including article 380, which provided: "The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."

In the case of the S.S. *Wimbledon,* the Permanent Court of International Justice held that by virtue of this provision the Canal "ceased to be an internal and national navigable waterway" and became "an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world." Case of the S.S. *Wimbledon* [1923] P.C.I.J., ser. A, No. 1, at 22.

94. U.N. CHARTER art. 1, paras. 2, 3, art. 55. The provisions of article 23 of the League Covenant and of articles 1(3) and 55 of the U.N. Charter focus on the need to create economic and social conditions favorable to world peace and security. *See* L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS, 370-71 (3rd rev. ed., 1969). For an appraisal of this approach see I. CLAUDE, JR., SWORDS INTO PLOWSHARES, 379-407 (4th ed. 1971).

95. Many of the international agreements pertaining to global communications are associated with specialized agencies affiliated with the United Nations under the provisions of article 57 of the U.N. Charter. These include the International Civil Aviation Organization (ICAO), the Intergovernmental Maritime Consultative Organization (IMCO), the Universal Postal Union (UPU), and the International Telecommunication Union (ITU). The importance of global communications is also recognized in the General Agreement on Tariffs and Trade, Oct. 30, 1947, art. V, [1948] 61 Stat. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT, and in the Convention on Transit Trade of Landlocked States, July 8, 1965 art. 2, [1968] 3 U.S.T. 7383, T.I.A.S. No. 6592, 597 U.N.T.S. 42. The importance of air and sea communications through and over the oceans is clearly reflected in the conventions formulated at the 1958 United Nations Convention on the Law of the Sea. The Convention on the High Seas, *supra* note 31, recognizes freedom of navigation and overflight (art. 2) and establishes a responsibility for coastal states to negotiate agreements permitting landlocked states transit rights and equal treatment (art. 3). The Convention on the Territorial Sea and Contiguous Zone, *supra* note 31, recognizes a right of innocent passage for navigation in the territorial sea (sec. III) that is nonsuspendible in straits connecting high seas areas or connecting high seas with the territorial seas of a foreign state (art. 16(4)). The Convention also provides that in waters enclosed by the establishment of straight baselines which had previously been considered part of the territorial sea, the right of innocent passage shall continue to exist (art. 5(2)).

tinuous global communications has been recognized as critically important to the preservation of international peace and security.[96]

A trend toward promoting international communications is also evident in the numerous legal regimes that have been devised to govern the use of land, sea, air, and space areas as media for communications.[97] These international regimes are highly distinctive and uniquely adapted to the situations in which they apply and are organized in a variety of legal forms. Each of these diverse legal arrangements is designed to prevent international conflict, to accommodate diverse national interests, and to facilitate wide ac-

96. The importance of reliable communications to the maintenance of world peace and security has been clearly illustrated by events in the Middle East. The British, French, and Israeli intervention in Egypt in 1956 was motivated in large part by fears that Egypt would close the Suez Canal to shipping. *See* Friedmann & Collins, *The Suez Canal Crisis of 1956*, in INTERNATIONAL LAW AND POLITICAL CRISIS 91, 107 (Scheinman & Wilkinsen eds. 1968); A. NUTTING, NO END OF A LESSON 49-51, 92-94, 100-09 (1967) [hereinafter cited as NUTTING]. The behavior of the British in this situation illustrates the extreme importance to states of access to and use of important communications links. The British apparently participated from fear that their shipping through the Canal would be interrupted (*see* NUTTING, *supra*), even though no actual interference with their shipping had taken place and even though the Egyptian government had pledged to respect freedom of transit through the Canal (*see* 3 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1104 (1964)). The Egyptians have denied the right of Israeli shipping or of ships with cargoes bound to or from Israel to pass through the Straits of Tiran and the Suez Canal on the grounds that a state of war continues to exist between Egypt and Israel. This has been a source of controversy and conflict. *See* Friedmann & Collins, *supra*; Dinitz, *The Legal Aspects of the Egyptian Blockade of the Suez Canal*, 45 GEO. L.J. 169 (1957); Gross, *Passage Through the Suez Canal of Israel-Bound Cargo and Israeli Ships*, 51 AM. J. INT'L L. 530 (1957); Gross, *Passage Through the Strait of Tiran and in the Gulf of Aqaba*, 53 AM. J. INT'L L. 564 (1959). Recognizing the importance of communications through critical waterways to the maintenance of peace in the Middle East, Security Council Resolution 242 (1967) on the Middle East affirmed "the necessity . . . for guaranteeing the freedom of navigation through international waterways in the area . . . ." 22 U.N. SCOR, Supp. Nov. 1967, at 8, U.N. Doc. S/8247 (1967).

The tension over access to Berlin and the confrontation that resulted in the Berlin airlift also illustrate the sensitivity and importance of communications rights. *See* Bathurst, *Legal Aspects of the Berlin Problem*, 38 BRIT. Y.B. INT'L L. 255 (1962). Currently the Strait of Hormuz, which provides access into the oil-rich Persian Gulf area, is emerging as a focal point of global tension. *See* Middleton, *Persian Gulf Emerging as Military Focus*, N.Y. Times, Jan. 22, 1975, at 2.

97. For discussion of these legal regimes see notes 105-19 *infra* and accompanying text. *See also* ALEXANDROWICZ, *supra* note 92.

cess to reliable systems of global communications. The magnitude and diversity of these legal agreements indicate that states realize the importance of communications in an interdependent world and illustrate the determination of the international community to strengthen the principles of international cooperation enunciated in the United Nations Charter.

B. *Legal Approaches to the Control of Communications*

The allocation of authority to control and regulate communications is one of the primary elements in the organization of legal regimes to govern communications media. In devising legal regimes to govern use of oceans, rivers and lakes, land, air, outer space, and electromagnetic space for international communications and movement, the international community has had to establish how, and by whom, the movement of vehicles and transmissions through media should be controlled and regulated.[98] Essentially, the role of law has been to prescribe the conditions under which these media might be utilized and to establish regulatory and enforcement procedures. In doing this, legal and organizational principles have been applied to the problems of (1) insuring the safety and efficiency of communications;[99] (2) accommodating the different uses of areas that serve as media for communications;[100] (3) protecting the diverse interests affected by use of media for communications;[101] and (4) distributing the costs of using the

98. In any given space that is used for movement of vehicles and transmissions in international communications, the fundamental question is whether control should be exercised by the state that is responsible for the particular vehicle or transmission, or by the state that has particular responsibility over activities in the space.

99. Safety and efficiency are fundamental concerns in many of the international agreements established to govern international communications. *See, e.g.*, International Convention for the Safety of Life at Sea, *infra* note 108; Chicago Convention, *supra* note 17.

100. The ocean is a particularly good example of an area that, while serving as a medium for international communications, also has a number of other uses, such as, production and harvesting of fisheries, source of supply for minerals, medium for cable communications, dumping area for waste, and area for recreation activity. The legal regime that governs the use of ocean areas must reconcile the use of these areas for maritime communications with other sometimes competing uses.

101. The use of media for communications may affect other interests such as

media fairly and reasonably among those states and interests involved.[102]

Underlying the general need for control and regulation of communications is, however, the reality that the authority to control and regulate can become the power to deny all or certain states access to communications. Therefore, in the various approaches to control and regulation of communications, the need to minimize the potential for unilateral or coercive disruption of communications is apparent.

Examination of the diverse legal arrangements that have been devised to govern international communications in various parts of the global environment reveals two general approaches to the allocation of control over the passage of vehicles and transmissions: (1) a *common-use approach,*[103] which permits use of communications media by all states in accordance with general principles of international law and international regulatory agreements; and (2) a *national approach,*[104] that recognizes national sovereignty and control over communications media, but permits other states to use the media for communications in accordance with international law and national regulation. These two approaches do not constitute rigid legal categories, but they do point toward differences in the focus of effective control over communications in particular areas. In regimes classified as common-use, primary control of communications in a given area is vested in the international community with each state responsible for its transmissions or vehicles using the media. In those classified as national, primary

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the national security of adjacent states or the interests of adjacent states in nonpolluted water and air.

102. The use of media for communications inevitably involves certain costs such as the cost of maintaining safety standards or tolerating accidents, and the cost of preventing or tolerating pollution. *See* notes 149-51 *infra.*

103. This is a referential term that is used in this article to refer to the general class of legal regimes governing communications, which place primary control over such communications in the hands of the state that is responsible for the particular vehicles and transmissions in passage through a given space or medium.

104. This is a referential term used in this article to refer to the general class of legal regimes governing communications that place primary control over such communications in the hands of the individual state with authority to govern activities occuring within a particular territorial area.

control over communications lies with the individual state whose territory encompasses the media.

It is difficult to discern any general trend favoring either a common-use or a national approach in the organization of legal regimes to govern communications. Rather, the choice of approach seems basically to reflect the characteristics of particular media and the patterns and intensity of their use. In either case, the allocation of authority to control and to regulate use of communications media has resulted in legal regimes that support and promote international communications.

1. *The Common-Use Approach to Control Over International Communications.*—Outer space and ocean space beyond national jurisdiction are examples of areas where the common-use approach to control over international communications has been applied,[105] and, thus, primary control over the use of communications media is vested in the international community. Communications media in outer space and ocean space beyond national jurisdiction are not subject to permanent claims of national sovereignty[106] and may be used by all states for international communications. In exercising their right to use these common-use areas, states are required to refrain from interfering with the reasonable use of the same areas by other states.[107] Other more specific conditions and regulations

105. The general allocation of authority to control communications through and over the high seas is established by customary international law codified in part in the Convention on the High Seas, *supra* note 31, which explicitly recognizes freedom of navigation and overflight, and freedom to lay cables in high seas areas. The general allocation of authority to control communications in outer space is established by the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *done* Jan. 27, 1967, [1967], 3 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 [hereinafter cited as Outer Space Treaty]. This treaty was preceded by the *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space,* G.A. Res. 1962 (1963).

Alexandrowicz also considers radio space or spectrum space to be a common use area not under national or sovereign control. ALEXANDROWICZ, *supra* note 92, at 27-35. Moreover, Antarctica, though not at this time particularly significant as a communications zone, is also preserved, at least for the present, as a common use area. Antarctic Treaty, Dec. 1, 1959, [1961] 1 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

106. Convention on the High Seas, *supra* note 31, art. 2; Outer Space Treaty, arts. I, II.

107. Convention on the High Seas, *supra* note 31, art. 2; Outer Space Treaty, arts. III, IX.

governing the use of these areas have been established by user states in regulations applicable to their vessels and aircraft or by international agreements and customary international law.[108] Enforcement of these conditions and regulations is, however, in most cases the responsibility of flag or user states.[109] Three factors influence the pattern of control over communications employed in the common-use approach. First, these areas are capable of sustaining a large number of users without substantial conflict. Secondly, the vastness of outer space and the oceans makes the exercise of exclusive national control on an areas basis difficult. Thirdly, these areas are relatively distant from populated land areas of states; consequently the effects of their use for communications are less directly felt by adjacent states. The common-use approach to the allocation of authority to control and regulate communications has provided a reasonably efficient legal framework for use of the high seas and outer space communications media. A vast network of air, sea, and space communications linking different parts of the globe and facilitating trade and relations between nations has developed around the rights of states to use these areas for communications. At the same time, international regulations enforced by flag states

108. *See, e.g.*, Convention on International Liability for Damage Caused by Space Objects, *done* March 29, 1972, [1973] T.I.A.S. No. 7762, and the numerous international agreements relating to maritime safety and pollution control, including the International Convention for the Safety of Life at Sea, *done* June 17, 1960, [1965] 1 U.S.T. 185, T.I.A.S. No. 5780, 536 U.N.T.S. 27; International Convention on Load Lines, April 5, 1966, [1968] 2 U.S.T. 1857, T.I.A.S. No. 6331, 640 U.N.T.S. 133; International Convention for the Prevention of Pollution of the Sea by Oil, with Annexes, *done* May 12, 1954, [1959] 3 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3; International Convention Relating to Intervention on the High Seas in Cases of Oil-Pollution Casualties, *done* Nov. 29, 1969, *reprinted in*, 9 INT'L LEGAL MATERIALS 25 (1970); International Convention on Civil Liability for Oil Pollution Damage, *done* Nov. 29, 1969, *reprinted in*, 9 INT'L LEGAL MATERIALS 45 (1970); International Convention for the Prevention of Pollution from Ships, *done* Nov. 2, 1973, *reprinted in*, 12 INT'L LEGAL MATERIALS 1319 (1973).

109. Convention on the High Seas, *supra* note 31, arts. 5-11; Outer Space Treaty, arts. VI, VII. There are some exceptions to this general allocation of enforcement authority; for example, regarding piracy, enforcement authority on the high seas is conferred on all states. Convention on the High Seas, art. 13. *See generally* H. MEYERS, THE NATIONALITY OF SHIPS 82-88 (1967); MCDOUGAL & BURKE, *supra* note 6, at 1080-91.

have generally been considered sufficient to provide for the safe and efficient use of these vast areas.[110]

2. *The National Approach to Control of International Communications.*—International communications and movement in most land areas and in the air and ocean immediately adjacent to land areas are governed by legal regimes that embody a national approach to the allocation of authority. Primary control of communications in these areas is vested in the individual states whose territorial boundaries encompass the communications media.[111] The use of the national approach in regulating communications on and immediately adjacent to land areas can be attributed to (1) the relatively less extensive space encompassed by these areas; (2) the intensity of competing uses for these areas; and (3) the military, political, and economic interests of states affected by international communications through these areas.

The national approach to communications facilitates detailed regulation and supervision of communications. Using this approach, governments, balancing the need for communications against other competing uses of the same area, have been able to organize and coordinate use of certain communications media on an area-wide basis. As a result, safe and efficient systems of com-

110. The efficacy of this approach in facilitating pollution control and maritime safety has been increasingly questioned in recent years. The process of developing international standards has been criticized by some states as being too slow and cumbersome to provide the regulation necessary. Reliance on flag state enforcement of international standards has been criticized on the grounds that it does not result in sufficiently rigorous enforcement, particularly in view of the large number of ships flying flags of convenience. In response to these pressures, the Canadian government in 1970 declared an anti-pollution zone extending up to 100 miles off the Canadian coast. Arctic Waters Pollution Prevention Act, 18 & 19 Eliz. 2, c. 47 (Can. 1970), *reprinted in* 9 INT'L LEGAL MATERIALS 543 (1970). For justification of the Canadian action see Gotlieb & Dalfen, *National Jurisdiction and International Responsibility: New Canadian Approaches to International Law,* 67 AM. J. INT'L L. 229, 240-47 (1973). For a critique see Henkin, *Arctic Anti-Pollution: Does Canada Make—or Break—International Law?,* 65 AM. J. INT'L L. 131 (1971).

111. *E.g.*, Chicago Convention, *supra* note 17, art. 1 provides: "The Contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory." Territorial Sea Convention, *supra* note 32, art. 1 provides in part: "The sovereignty of a state extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea."

munications have been established even in relatively compressed and congested land and sea areas.[112] The national approach to control and regulation has been utilized to varying degrees in international legal regimes that have been established to permit states to use communications media within national boundaries of other states. These regimes deal generally with transit and communications; functionally with air, land, river and ocean communications, postal communications, telecommunications; and specifically with the communications problems of landlocked states.[113] In these re-

112. Carefully controlled air traffic in densely populated areas of the United States and Europe provides an excellent example of safe and efficient communications under a national approach.

113. Among the international agreements establishing global or regional legal regimes to govern communication in national areas are the following:

Transit: GATT art. V, *supra* note 95, and the Convention and Statute on Freedom of Transit, *open for signature* April 20, 1921, 7 L.N.T.S. 11 are the primary multilateral treaties dealing with transit. However, day-to-day intercourse between countries is predominantly regulated by bilateral treaties of friendship, navigation, and commerce. *See* Walker, *Modern Treaties of Friendship, Navigation, and Commerce,* 42 MINN. L. REV. 805 (1958).

Air: Air Communications are governed by two major multilateral conventions and by a web of bilateral agreements that have become increasingly standardized. *See* ALEXANDROWICZ, *supra* note 90, at 15-18, 26-27. The two primary multilateral conventions are the Chicago Convention, *supra* note 17, and the International Air Services Transit Agreement, *done* Dec. 7, 1944, [1945] 59 Stat. 1693, E.A.S. No. 487, 84 U.N.T.S. 389.

Rivers: The Convention on the Regime of Navigable Waterways of International Concern, April 20, 1921, 7 L.N.T.S. 35 is the basic multilateral treaty dealing with river communications; however, it has not been widely ratified. A number of international agreements have been concluded to govern navigation on particular rivers such as the Rhine and the Danube. *See* D. O'CONNELL, INTERNATIONAL LAW, 625-39 (1965).

Ports: Internal Waters and the Territorial Sea: Communications in the territorial sea are governed by customary international law and the Territorial Sea Convention, *supra* note 32. Navigation in internal waters and ports is generally regulated by bilateral treaties of friendship, navigation, and commerce. *See* MCDOUGAL & BURKE, *supra* note 6, at 103-13. The Convention and Statute on the International Regime of Maritime Ports, Dec. 9, 1923, 58 L.N.T.S. 285 establishes general rights of transit into ports, but has been ratified by relatively few states.

Postal Communications: A global postal system has been established by international conventions dating from the Bern Convention in 1874. For the constitution of the Universal Postal Union (UPU) see Universal Postal Union: Constitution and Final Protocol, General Regulations and Final Protocol, Convention, Final Protocol and Regulations of Execution, July 10, 1964, [1965] 2 U.S.T. 1292,

gimes primary control of communications continues to rest with the individual state. The regimes are limited in the scope of their application and the kinds of communications they permit.[114]

T.I.A.S. No. 5881 [hereinafter cited as Postal Convention]. An additional protocol to the Constitution was concluded Nov. 14, 1969 (T.I.A.S. No. 7150 (effective 1971)). For a discussion of the operation of the U.P.U. see Menon, *Universal Postal Union,* INT'L CONCILIATION (1965), which also includes at 49 a discussion of regional postal unions.

Telecommunications: A global system for telecommunications (including radio and telephone communications) is organized through the International Telecommunications Convention and the International Telecommunications Union (I.T.U.) established by the Convention. The Convention and the Union date back to 1865. The current Convention was signed at Montreux in 1965 ([1967] 1 U.S.T. 575, T.I.A.S. No. 6267 (effective 1967)). For a discussion of the development of the I.T.U. see Glazer, *The Law-Making Treaties of the International Telecommunications Union Through Time and in Space,* 60 MICH. L. REV. 269 (1962). More recently, space communications organized generally under the INTELSAT agreements have become important. *E.g.*, Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System, Aug. 20, 1964, [1964] 2 U.S.T. 1705, T.I.A.S. No. 5646, 514 U.N.T.S. 26, which initially created INTELSAT has now been superseded by the Agreement relating to the International Telecommunications Satellite Organization "Intelsat," *open for signature* Aug. 20, 1971, [1972] 4 U.S.T. 4091, T.I.A.S. No. 7532. For a discussion of INTELSAT and global communications see McWhinney, *The Antimony of Policy and Function in the Institutionalization of International Telecommunications Broadcasting,* 13 VA. J. INT'L L. 3 (1973).

Landlocked Countries: Multilateral treaties include the Convention on the High Seas, *supra* note 95, art. 3; and the Convention on Transit Trade of Landlocked States, *supra* note 95. In addition, there are a number of bilateral treaties governing communications and transit for landlocked states. *See Question of Free Access to the Sea of Landlocked Countries,* I United Nations Conference on the Law of the Sea OFF. REC. 114, *also found in,* U.N. Doc. A/CONF. 13/37 (1958).

For a general survey of contemporary developments in the law governing global communications in these areas see 9 WHITEMAN, *supra* note 8, at 107-308 (Maritime Navigation and Transportation), 309-689 (Aviation), 690-1036 (Telecommunications), 1037-109 (Postal Communications), 1110-31 (Land Transportation), 1132-42 (Water Transportation), 1143-62 (Landlocked Countries).

114. *E.g.*, Convention on the Regime of Navigable Waterways of International Concern, *supra* note 113, art. 5, (authorizing riparian states to reserve cabotage between ports in their own territory for their own flag); Statute on Freedom of Transit, *supra* note 113, art. 5; Convention on Transit Trade of Landlocked States, *supra* note 113, art. 11 (permitting parties to the agreement to prohibit or prevent transit of goods or persons on grounds of public health, security, and protection of intellectual property). In addition, many of the agreements do not apply to military communication and modes of transportation. *See, e.g.*, Chicago

Within their territory, individual states retain significant authority over communications including (1) the right to impose restrictions on communications in cases of war or emergency or in other circumstances when their economic, political, or security interests are threatened;[115] (2) the right to regulate and control communications in their territory so long as their actions are not inconsistent with their international obligations;[116] and (3) in most cases, the right to renounce their participation in the regimes.[117] Despite the control over communications exercised by individual states, legal regimes using the national approach have generally served to facilitate and promote international communications on a reasonable, uniform, and nondiscriminatory basis.[118] The key to the effective-

Convention, *supra* note 17, arts. 3, 51; International Telecommunications Convention, *supra* note 113.

115. *See, e.g.*, Chicago Convention, *supra* note 17, art. 9; International Telecommunications Convention, *supra* note 113, art. 32; Territorial Sea Convention, *supra* note 32, art. 16(3); Universal Postal Convention, *supra* note 113, art. 3; Statute on Maritime Ports, *supra* note 113, art. 16.

116. *See, e.g.*, Convention on Transit Trade of Land-locked States, *supra* note 113, principle V, which provides: "The State of transit, while maintaining full sovereignty over its territory, shall have the right to take all indispensable measures to ensure that the exercise of the right of free and unrestricted transit shall in no way infringe its legitimate interests of any kind." *See also* Territorial Sea Convention, *supra* note 32, art. 17, which provides: "Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation."

117. For example, the Chicago Convention, *supra* note 17, article 1 recognizes that every State has "complete and exclusive sovereignty over the airspace above its territory." In subsequent articles of the Convention, the parties grant to other parties certain rights to use territorial airspace for air communication. However, under article 95 parties may denounce the Convention, and when such denunciation takes effect, the denouncing state possesses complete and exclusive sovereignty, and the remaining parties to the Convention no longer have rights to use the airspace of the denouncing state.

However, when a communications right is recognized as a fundamental limitation on the sovereignty of the state under customary international law, the state cannot abrogate the right merely by denunciation. Thus, the right of innocent passage is a basic limitation of coastal state sovereignty and control in the territorial sea, and mere denunciation of the Territorial Sea Convention will not abrogate that right.

118. For example, the International Civil Aviation Organization has devel-

ness of these arrangements lies in the reciprocal interests of states in the maintenance of reliable international communications. Though individual states possess the power to restrict or deny the use of areas under national control for international communications, they are restrained from exercising this power by their equally strong interest in using areas under the control of other nations for their own communications.[119]

C. *Contrasting Legal Approaches to the Allocation of Authority to Control Communications in Straits*

The common-use approach and the national approach to the allocation of authority to control communications are both reflected in the current proposals for legal regimes to govern straits. The proposals that advocate retention of a high-sea right of navigation and overflight for passage through straits embody a common-use approach to the allocation of effective control over movement

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oped an extensive set of international standards and recommended practices under the Chicago Convention, *supra* note 17, article 37, which insures reasonable uniformity in national regulations governing international air communications. The principle of non-discrimination between users is specifically recognized in many of the applicable international agreements. *See, e.g.*, Universal Postal Convention, *supra* note 113, art. 1(1); International Telecommunications Convention, *supra* note 113, art. 31; Convention on the Transit Trade of Landlocked States, *supra* note 113, art. 2(1).

The primary exception to the general effectiveness of these regimes is in the area of rights of landlocked states to communication across neighboring states. Although there are numerous international agreements dealing with the question (*see* note 113 *supra*), their effectiveness is open to doubt. *See* M. GLASSNER, ACCESS TO THE SEA FOR DEVELOPING LAND-LOCKED STATES, 214-18 (1970); Franck, Baradei, & Aron, *The New Poor: Landlocked, Shelf-Locked and Other Geographically Disadvantages States*, 7 INT'L L. & POL. 33, 54-56 (1974).

119. Significantly, the international community has been less successful in organizing effective legal regimes to govern the rights of landlocked states to transit neighboring states. The difficulty evidently stems from the lack of reciprocal interests between landlocked states and the neighboring states in which transit rights are sought. Commenting on the general failure of coastal states with landlocked neighbors to ratify the Convention on Transit Trade of Landlocked States, Frank, Baradei, and Aron (*supra* note 118, at 56) make the following point: "This [the failure of coastal states to ratify the Convention] is not altogether surprising, since the Convention, while providing *safeguards* for coastal states, does not provide them with any new benefits in return for their agreeing

through straits.[120] This approach places primary control over air and sea communications through straits in the hands of the international community as a whole with each user state responsible for the conduct of its vessels and aircraft.[121] In contrast, the proposals that treat straits overlapped by the territorial sea as merely a part of that sea embody a national approach to the allocation of control over communication,[122] and confer on coastal states broad power to regulate and control air and sea movement in nearby straits.[123] Neither approach, however, adequately resolves the problems encountered in attempting to create an international legal regime to govern straits encompassed by the territorial sea extension.

1. *Retention of High Seas Rights—The Common-Use Approach to Control of Straits.*—For many years straits wider than six miles were broad enough to accommodate the passing air and sea traffic on a high seas, common-use basis. However, changes in air and marine technology, and growth in world trade and global interdependence have led to the intensification of communications through straits. Because of the changes in the nature of shipping and the increased density of traffic,[124] many important straits now have characteristics that significantly differentiate them from other common-use areas. Safe and efficient use of these straits and the protection of coastal state interests require that air and sea movement be subject to more detailed control and supervision than is required in larger high seas areas.[125]

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to better defined and protected transit rights for the landlocked. This again emphasizes the importance of negotiating in the context of trade-offs."

120. *See* note 103 *supra.*

121. *See* notes 51, 59, 62 *supra.* The draft articles on straits proposed by the United Kingdom deviate to some extent from the high seas approach by conferring on coastal states limited rights of enforcement and subject to international approval, regulation. *See* notes 60, 62 *supra.*

122. *See* note 104 *supra.*

123. *See* note 54 *supra.* Note that there is considerable variation in these claims, with the proposal of Fiji being less restrictive than the draft articles of Cyprus, Greece, Indonesia, *et. al.*

124. *See* notes 41, 76-77, 86-87 *supra* and accompanying text.

125. The increased density of traffic and a high collision rate led to the establishment of traffic separation schemes for the Straits of Dover, and later for straits such as Gibraltar, Hormuz, Malacca, and Singapore. These voluntary schemes set up specific lanes for traffic moving in a particular direction through a strait. *See* Oudet, *The Ordering of Seaborne Traffic,* 22 J. INST. NAVIGATION 59 (1969).

The common-use approach to the allocation of control, relying as it does on international prescription and user state enforcement of regulations, is not well-suited for the task of regulating communications through congested straits. The process of international prescription is cumbersome and is not responsive to the requirements of particular straits. Flag state supervision and enforcement in straits located in faraway parts of the world is often not rigorous, and the difficulties of enforcement are compounded by the large number of ships that fly flags of convenience.[126] Furthermore, the common-use approach leaves coastal states adjacent to straits largely powerless to prescribe and enforce regulations designed to prevent catastrophic accidents and pollution, although these states frequently bear the burden of damage resulting from those incidents. In summary, while a common-use approach to allocat-

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The peculiar maneuvering characteristics of supertankers operating in relatively shallow water in straits have stimulated interest in greater regulation because of the hazardous nature of petroleum and liquified natural gas cargoes. *See* Winstanley, *Navigation of Deep Draught Vessels in the Southern North Sea,* 22 J. INST. NAVIGATION 426 (1969); Van Hoff, *The Air Analogy at Sea,* 24 J. INST. NAVIGATION 341 (1971).

126. Ships that fly flags of convenience are foreign-owned vessels registered in a particular state such as Liberia for economic reasons. The 1972 OECD Study on Maritime Transport estimated that in 1972 fleets operated under flags of convenience amounted to 56.1 million gross registered tons or 21.2 per cent of the world fleet. *See* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, MARITIME TRANSPORT 1972, 18 (1973). Flags of convenience have been criticized on the grounds that the state of registration lacks any real ability to enforce national or international safety or environmental regulation. For example, one author commenting on the disastrous wreck of the *Torrey Canyon* writes:

> It is possible that under the Liberian flag ships may be built under adequate . . . supervision. It is also possible that the Liberian government may demand adequate standards of education, training and certification, and even manning scales. But at the time of the *Torrey Canyon* accident the, in my opinion even more necessary, enforcement organization was completely lacking; it is like having a code of laws but not police to enforce it. Only recently, under heavy pressure of public opinion, has some sort of ship inspection organization been established on behalf of the Liberian government but again with headquarters in New York. So, with all the Liberian paper requirements existing at the time [of the *Torrey Canyon* incident], vessel operation by the owners was uncontrolled and standards of operation were open to any deficiency in the name of operating economy. Wepster, *A Black Mark,* 26 J. INST. NAVIGATION 132, 133 (1973).

ing control of communications in straits safeguards the rights of all states to pass by air and sea through straits, it does not provide the effective regulation and supervision needed to insure safety and efficiency in the use of straits for communications.

2. *Straits as Part of the Territorial Sea—The National Approach to Control.*—Legal regimes that embody a national approach confer primary authority to control communications on the state whose territory encompasses the media. In contrast to the common-use approach, the national approach is useful for governing communications in relatively congested areas where considerable regulation and supervision are required. Since the use of the national approach gives individual states the power to restrict or disrupt communications arbitrarily, it is essential that these controlling states share with user states reciprocal interests in the maintenance of communications.[127] These reciprocal interests stimulate the development of legal regimes that encourage nations to share the communications media under their control and promote the adoption of uniform practices and standards in regulating communications.

A national approach to communications, which would result from applying the regime of the territorial sea to straits overlapped by a twelve-mile limit, would not, however, require this vital element of reciprocity. Coastal states do not usually share a reciprocal interest with user states in keeping straits open for communications. For many coastal states the use of straits beyond their immediate control is of only secondary importance.[128] Hence, such states are in a position to restrict or deny passage through straits with little fear that reciprocal closure by other states will damage their interests. Lacking the sanction of retaliation inherent in balanced reciprocity, a national approach to the control of straits carries with it a clear potential for unilateral disruption of international communications. Under a national regime this potential may be realized in one of two ways. First, coastal states that consider only the potential dangers—to their environment, use of natural resources, and security—imposed on them by air and sea traffic in

127. *See* notes 118, 119 *supra.*

128. This is generally true for Iran, Oman, the Philippines, Indonesia, Malaysia, Morocco, and Spain. It is, of course, not true for Japan and the United Kingdom. *See* note 59 *supra.*

nearby straits may impose regulations that do not mesh with internationally accepted standards. Moreover, very stringent regulations that restrict straits traffic may result in costs in terms of interrupted communications that far outweigh the dangers the regulations allegedly prevent.[129] Secondly, coastal states that recognize the strength of their position and their insulation from reciprocal sanctions may be tempted (or forced by other states) to use their power to control air and sea communications through straits as a source of wealth or as a strategy of national policy to coerce user states into making economic or political concessions in other areas.[130] A national regime permitting coastal states to prescribe and enforce regulations governing straits communication would offer those states many and varied means to restrict use of straits in an arbitrary or discriminatory fashion; and, these means could be subtly applied in a manner making outright condemnation difficult.[131]

Regardless of how they are applied, measures leading to denial or unreasonable restriction of air and sea communications through straits may have highly coercive effects on user states.[132] Indeed,

129. Because certain coastal states are likely to be more sensitive to dangers to their immediate interests posed by sea and air movement through adjacent straits than to the need to maintain reliable ocean communications, their view of rational regulation may tend to be biased toward the protection of coastal state interests. Because of this natural bias, there is a danger that even highly objective coastal state regulation of straits transit will impose greater costs on seaborne transportation than is justified by the nature of the risks that the state is seeking to avoid.

130. *See* notes 90, 91 *supra*. The discretion to close straits might become a prerogative coastal states would find unpalatable. Baxter points out that though there have been cases in which the closure of an international waterway might be lawfully used as a sanction against an outlaw state (such as closure of the Suez Canal to Italy after the invasion of Ethiopia as a sanction under article 16 of the Covenant of the League of Nations), this has not been done. Baxter attributes this to the burden that would be placed on the littoral state in such a case. BAXTER, *supra* note 15, at 236-37.

131. A national regime would confer authority on coastal states to prescribe and enforce regulations governing air and sea communications through adjacent straits. These states could use this authority as a means to impose restrictions on air and sea movement under the guise of regulations for safety, pollution prevention, security, or other purposes.

132. The sensitive nature of communications has already been described. *See* notes 70, 94 *supra*. For a discussion of the importance of communications through straits see notes 76-83 *supra* and accompanying text.

such actions are likely to create an unstable situation inviting counteraction since few states in an interdependent world can afford to have their vital communications subject to the arbitrary control of others.[133] Thus, besides the potential for interruption of international communications through straits, a national regime for straits would carry with it the direct potential for major disruption of international peace and security.

V. Toward a Legal Regime for Straits Communications

Viewing the current straits controversy in terms of international communications demonstrates the deficiencies of the current law of the sea proposals for straits. Neither the common-use approach of a high seas regime nor the national approach of a territorial seas regime adequately protects the interests of the littoral states or the states relying on straits for communications. These two approaches, however, do provide a useful base of reference in the search for an equitable and judicious solution to the problem. By drawing upon the strengths of both the common-use and national approaches to communications, a legal regime for straits can be designed that would protect the functional requirements for maintaining communications through straits while preserving conditions conducive to efficiency and safety and the furtherance of international peace and security. Viewed in this light, the preceding analysis suggests that a new regime for straits should combine the protection of the right to communicate through straits found in the high seas regime with the stronger, decentralized, regulatory and enforcement authority found in the territorial seas regime.

A merger of high sea and territorial sea rights in a new regime to cover straits overlapped by a twelve-mile territorial sea would preserve the traditional law associated with use of the oceans and charge those using the straits with responsibilities similar to those undertaken by states in the United Nations Charter—to encourage friendly relations and economic cooperation among nations. The

133. For example, in 1941 the Soviet Union informed Japan that "attempts to hinder the realization of normal trade relations between the Soviet Union and the United States of America through the Far Eastern Soviet ports could not be viewed by the Soviet Government otherwise than as an act unfriendly to the U.S.S.R." 4 Whiteman 403-04. (Note that access to Vladivostok required passage through straits then controlled by Japan.)

merger of these rights is suggested historically by recognition of the legal status of territorial straits as separate and diverse from territorial seas.[134] The special legal regime established to govern particular straits and the concept of innocent passage as it appears in the *Corfu Channel Case* follow this pattern.[135] Taken together these precedents, which were specifically designed to govern straits, reveal a trend to insulate communications through straits from unilateral disruption by preserving, in areas otherwise under territorial control, a freedom of passage akin to that established on the high seas.

A. *A Mixed Regime to Govern Communications Through Straits*

To preserve global communications in the oceans, a new straits regime must guarantee to all nations use of and access to the communications media in straits overlapped by the proposed extension of territorial seas to twelve miles. Control over the use of communications media in straits must rest firmly in international hands. Moreover, the right of overflight and navigation in straits should be connected with the more fundamental right of all nations to communicate with each other.[136]

Recognition of the right of states to maintain air and sea communications through straits will place the effective control of pas-

134. The notion of contiguous zones has also been employed to effect a merger of high sea and territorial sea rights. According to McDougal & Burke: "The historic function of the contiguous zone concept has thus been that of authorizing coastal states unilaterally to secure a reasonable protection of their limited exclusive interests, without permitting the more drastic expansion of their continuing, comprehensive competence associated with internal waters and the territorial sea." MCDOUGAL & BURKE *supra* note 6, at 578.

135. *See* notes 8-26 *supra* and accompanying text. The international law governing interoceanic canals also follows this pattern. The three major interoceanic canals—the Suez Canal, the Panama Canal, and the Kiel Canal—have in various international instruments been declared open to the vessels of all states not at war with the state administering the canal. The Permanent Court of International Justice, in *Case of the S.S. Wimbledon* [1923] P.C.I.J., ser. A., No. 1, at 28, referred to these three canals as "permanently dedicated to the use of the whole world." For an extensive discussion of the law governing interoceanic canals see BAXTER, *supra* note 15, at 341. "[T]here is ample room for the view that interoceanic canals are already governed by a common body of law, which is the product of state practice, of treaties, and of adjudication."

136. *See* notes 93-96 *supra* and accompanying text.

sage beyond the national policy whims of particular coastal states. This communications right by itself, however, will not insure that the use of straits for communications is safe and efficient. Because of the technical difficulties in instituting adequate navigation systems and the even more difficult problem of policing the area to apprehend violators of safety regulations, the coastal states have the crucial role of spurring adequate international attention to maritime and air safety and of providing regulatory and enforcement authority to maintain a reliable system of ocean communications.[137] Regulations appropriate for all straits and for the peculiar physical conditions of particular straits should be developed in a negotiating forum that includes representatives of littoral states and of states depending on the direct or indirect use of straits. The assistance of experts who know the details of appropriate navigation systems, of ship and aircraft design, and of pollution control would be required in the negotiating process.[138] In devising these regulations it is essential that the international community formulate standards that will protect coastal states from the hazards of catastrophic accidents and pollution. Failure to deal adequately with the concerns of coastal states would prejudice the right of all nations to communicate through straits.[139]

137. It has become clear that rules and regulations are needed to ensure safe, efficient, and reliable movement in straits. The complexity involved in setting up, maintaining, and enforcing a navigation system is not, however, well known. For example, in some heavily congested areas, it may be necessary to institute a system of radar and radio control similar to that used for aircraft approaching airports. Yet the mere problem of language differences poses difficult problems for the establishment of such systems. Moreover, the establishment of any navigational system requires careful study and a great deal of technical expertise. Lacking these vital ingredients, a navigational system may create more serious problems than it solves.

138. This would include the authorities of national agencies dealing with this matter as well as experts from applicable international agencies, most notably the Inter-Governmental Maritime Consultative Organization.

139. For example, Canada's creation of an extensive pollution zone, note 110 *supra*, was defended by the Canadians on the grounds that because of the lack of effective international action to safeguard the arctic environment, Canada had no choice but to take unilateral action. In the absence of effective regulation of air and sea communications through straits to ensure safety and efficiency, similar unilateral measures by coastal states are foreseeable.

B. *Straits and Communications: The Necessary Contours of a Legal Regime for Straits*

Analysis of the straits controversy as a communications problem suggests an approach for resolving the fundamental question of who should have authority to control communications in straits. The implications of this approach can be seen more readily by examining some of the specific issues in the straits controversy.

1. *Applicable Straits.*—There has been considerable controversy and debate concerning which straits should be included in a legal regime designed to govern air and sea communications.[140] Although the importance of particular straits for international communications varies considerably, it is difficult to reach agreement on criteria for determining those straits in which communication should receive special legal protection.[141] At a minimum, the legal regime for straits should recognize a right to pass by air and sea through those straits linking areas of the high seas[142] (including the waters of coastal resource zones beyond the territorial sea) that are overlapped by the extension of the territorial sea from three to twelve miles. This approach would leave those straits less than six miles wide and those straits linking high seas with territorial seas to be governed by special international agreements, (*e.g.*, the Turkish Straits) or by the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. From a communications perspective, it would be desirable to broaden the straits regime to include straits in these latter categories; however, this solution might unduly complicate the negotiating process and, thus, prevent agreement on a regime for the broader and more important straits. The problem presented by the archipelagic claims of island nations undoubtedly will need special consideration, but every effort should be made to insure that states have the right to use straits in archipelagoes for air and sea communications.

2. *Applicable Types of Air and Sea Passage.*—Another major element of the straits controversy centers on the task of defining

140. *See* note 51 *supra*.

141. *See* note 75 *supra* and accompanying text.

142. This is an allusion to the probability that any comprehensive law of the sea treaty concluded will establish an economic zone for coastal states extending out to 200 miles and thus encompassing ocean areas that are now considered high seas.

the kinds of air and sea movement that should be protected by a straits regime. There have been a number of approaches to this problem, including efforts to define passage in terms of acceptable or prohibited activities,[143] as well as efforts to specify the types of aircraft and ships entitled to enjoy a right of passage.[144]

Because of the importance of communications to nations, all types of vessels and aircraft should be entitled to use straits for international communications. From a communications perspective, it would not be desirable to distinguish between air and sea communications or between civil and military communications in establishing a right of straits passage. These forms of communications are regarded by states as vital to their ability to interact with the rest of the world, and failure to protect them would invite conflict and confrontation between coastal states and user states. Since the right of air and sea passage through straits is based on the need to maintain international communications, ships and aircraft exercising the right should be required to move expeditiously through the straits area and to engage only in activities that are reasonably necessary for safe passage.[145]

143. For example, the Soviet draft articles on straits specifically prohibit warships transiting straits from engaging in any exercises or gunfire, using weapons, launching aircraft, or undertaking hydrographical work. U.S.S.R.: Draft Articles, *supra* note 51. *See also* Cyprus, Greece, Indonesia, *et. al.*: Draft Articles, *supra* note 54, art. 7 (prohibiting the following activities: espionage; interference with communications; embarking or disembarking of troops, crew members, or frogmen without coastal state authorization; illicit trade; destruction or damage of submarine cables, pipelines, or other installations; and marine exploration by any ships transiting the straits); U.K.: Draft Articles, *supra* note 62, art. 2 (requiring that ships and aircraft in transit through straits proceed without delay and without engaging in any activities other than those incident to their normal modes of transit and prohibiting any threat or use of force in violation of the Charter of the United Nations).

144. For example, under the provisions of the draft articles proposed by Cyprus, Greece, Indonesia, *et. al.*, warships, nuclear-powered ships, and ships carrying nuclear weapons would not enjoy automatic rights to transit straits. Rather, their passage could at the discretion of the coastal state be subject to a requirement for prior authorization. Cyprus, Greece, Indonesia, *et. al.*,: Draft Articles, *supra* note 54, arts. 15, 21.

145. Articles approximating this requirement have been proposed. *E.g.*, Cyprus, Greece, Indonesia *et. al.*: Draft Articles *supra* note 54, art. 3, para. 2, provides in part: "2. Passage shall be continuous and expeditious. Passing ships shall refrain from maneuvering unnecessarily, hovering, or engaging in any activ-

3. *Prescription and Enforcement of Regulations Governing Air and Sea Passage Through Straits.*—Engineering a safe and efficient navigation system for any congested maritime or air zone is difficult because a multiplicity of factors must be considered and because sudden changes in weather may jeopardize standard procedures. These problems are magnified when there is division of national authority to prescribe and enforce regulations. In the absence of strong, central, international regulatory authority,[146] the tasks of dividing responsibilities, providing enforcement, and assigning liabilities become complex.

In light of the potential impact of regulations governing straits passage, the international community must retain the final authority to prescribe such regulations. The process of prescription should, however, include negotiations among flag or user states, coastal states, states depending on trade that passes through straits, and technical experts from appropriate international, nationals, and private agencies. Since coastal states have strong and legitimate concerns about the danger of pollution and accidents in straits, these states should have the authority to draft proposals for safety and pollution regulations in straits and submit these proposals to an appropriate international body for approval.[147] Whatever

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ity other than mere passage." This article is, however, too restrictive in that it would permit only activities constituting "mere passage" rather than activities reasonably necessary for safe passage.

U.K.: Draft Articles, *supra* note 62, art. 2, para. 1(a) provides in part: "1. Ships and aircraft, while exercising the right of transit passage shall: (a) proceed without delay through the strait and shall not engage in any activities other than those incident to their normal modes of transit." This provision is considerably broader but may be defective in that it employs a standard based on "normal modes of transit" rather than on activities reasonably necessary for safe passage.

146. Baxter discusses the various operating and supervising agencies that have been used to govern international waterways. BAXTER, *supra* note 15, at 50-148. He notes that with the exception of the Convention Relating to the Regime of the Straits (July 24, 1923, 28 L.N.T.S. 115, (Lausanne Convention), arts. 10, 12, 14), which established an international "Straits Commission" to supervise the application of the treaty to the passage of military ships and aircraft through the Turkish Straits, straits have not been placed under the supervision of international bodies. *Id.* at 50, 141-43.

147. The British articles would establish such a procedure for the limited purposes of designation of sealanes and traffic separation. U.K.: Draft Articles, *supra* note 62, art. 3.

regulations are devised must, however, be balanced with the right of nations to communicate by air and sea in straits. Moreover, regulations should in general apply uniformly to all straits included within the legal regime, except where peculiar geographic circumstances necessitate a specific set of rules.[148]

The allocation of authority to enforce regulations governing air and sea passage in straits is one of the most difficult issues in the current straits controversy. Coastal states have contended that flag state enforcement is inadequate to prevent violations of international regulations. User states, however, fear that conferring enforcement powers on coastal states could lead to arbitrary disruption of straits communications.

From a communications perspective, what is needed is an approach to enforcement that protects international communications while providing adequate control over straits traffic to insure safe and efficient passage. Viewed from this perspective, it would be reasonable to confer on coastal states certain limited and well-defined enforcement authority, particularly with respect to regulations governing pollution discharge and traffic separation. Coastal states should also have enforcement authority when it can be shown that flag states are not enforcing applicable international standards. This approach could only be acceptable, however, if accompanied by the establishment of an effective and impartial process for dispute settlement that: (1) provides for expeditious handling of disputes; (2) incorporates a procedure for the posting of reasonable bonds to secure quick release of any ship apprehended; and (3) confers on users a right of action for damages caused by arbitrary enforcement action on the part of coastal states. In addition, the right of coastal states to apprehend vessels in passage should in most cases be limited to situations in which there is reasonable evidence of a violation and when apprehension

148. The importance of uniform regulation of straits should not be underestimated. Even relatively insignificant inconsistencies could lead to substantially higher transportation costs for international trade. For an analogous case involving conflicting state standards for mudguards on trucks engaged in interstate commerce see *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). In that case the Court held an Illinois statute requiring the use of particular mudguards invalid in its application to interstate carriers on the grounds that such a requirement would subject interstate carriers to delay and inconvenience by requiring them to adjust their equipment on entrance into and departure from Illinois.

of the vessel does not endanger life or property. Because of the sensitive nature of military shipping and aircraft and the danger of confrontation, the enforcement of regulations governing straits passage with respect to these vessels and aircraft may require somewhat different treatment.

4. *The Distribution of the Costs of Maintaining International Air and Sea Communications in Straits.*—The costs of maintaining international communications in straits arise from three sources: (1) the expense of providing necessary aids for safe navigation through and over straits; (2) the cost of devising and enforcing effective regulations to control and facilitate straits transit; and (3) the costs resulting from damage caused by pollution and accidents, which are to some extent an inevitable result of using straits for international air and sea communications. A new straits regime must acknowledge that coastal states cannot be expected to subsidize use of straits by the international community.[149]

To provide for safe navigation through straits under conditions of congested traffic, a variety of navigational aids and services may be required including the marking and dredging of channels, the maintenance of navigational aids such as lights, foghorns, radar systems, radio contacts and beacons, and the provision of services such as pilots, charts, and notices to mariners.[150] Since these aids and services benefit primarily those states that use straits as channels for international air and sea communications, it would seem appropriate to establish a system of cost-sharing under which states using straits for navigation or overflight would each bear a portion of the cost of maintaining these services.[151]

149. This approach is paralleled in other communications regimes. For example, the Chicago Convention, art. 15, permits airport charges to be levied on aircraft of other states using airports provided the charges for foreign aircraft are the same as those for national aircraft. Similarly, the Postal Convention, art. 47, permits charges to be levied for the cost of handling mail in transit through a state to some other destination. However, both conventions prohibit charges or tolls paid solely for the right of entry, exit, or transit across the territory of a contracting state.

150. Distributing the costs of a navigational system for straits is a difficult problem because the states that must pay may not be those directly benefiting from the system. France delayed establishment of the system of lights for the Straits of Dover for just such a reason. *See* Oudet, *Authority at Sea,* 22 J. INST. NAVIGATION 235 (1969).

151. Cost sharing is already a recognized means of support for international

Additionally, the costs of regulation and enforcement may be substantial.[152] The drafting of effective regulations may require considerable time and expertise while enforcement may require the formation of a special corps of personnel to engage in continuous monitoring of traffic. It seems appropriate that user states and coastal states share enforcement costs.[153] Funds accumulated from payment of fines after arrest and conviction of violators of international standards could also be applied the payment of enforcement costs. The distribution of costs resulting from accidents and pollution is determined through liability rules and insurance schemes. Coastal states should not be required to bear the burden of these costs when they are involved merely by accident of geography.[154]

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communications. Charges are regularly imposed on the users of national airports and marine port facilities to defray the cost of maintaining and operating such facilities. In addition, a number of services and facilities serving international air and sea communications are jointly financed under the terms of specific international agreements, including the North Atlantic Ice Patrol, air navigation services in Iceland, Greenland, and the Faroe Islands, and lights to aid navigation in the Red Sea. *See* Agreement Regarding Financial Support of Ice Patrol, *open for signature* 1969, T.I.A.S. No. 3597, 256 U.N.T.S. 171; Agreement on the Joint Financing of Certain Air Navigation Services in Iceland, Sept. 25, 1956, [1968] 9 U.S.T. 711, T.I.A.S. No. 4048, 334 U.N.T.S. 13; Agreement on the Joint Financing of Certain Air Navigation Services in Greenland and the Faroe Islands, Sept. 25, 1956 [1958] 9 U.S.T. 795, T.I.A.S. No. 4049, 334 U.N.T.S. 89; International Agreement Regarding the Maintenance of Certain Lights on the Red Sea, *done* Feb. 20, 1962, [1966] 17 U.S.T. 2145, T.I.A.S. No. 6150, 597 U.N.T.S. 159. *See also* Montreux Convention, *supra* note 10, art. 2, annex I (permitting Turkey to collect certain charges from passing vessels for services rendered).

152. For example, reasonable regulation may require intensive study of the physical characteristics of a strait and of the nature, intensity, and direction of air and sea traffic moving through the area. Enforcement may require the maintenance of a permanent corps of trained personnel along with supporting equipment. These tasks may be particularly difficult for developing countries, which may lack financial resources and the technical and administrative expertise required.

153. Article 2 of the Montreux Convention (*supra* note 10) permits Turkey to collect charges from passing vessels for services rendered. Among the services for which charges may be levied is the maintenance of control stations for the enforcement of sanitary standards.

154. Where, however, coastal states undertake to provide navigational and other services and are appropriately compensated for their costs, they should be liable for accidents resulting from negligent maintenance and operation of such services.

Accordingly, liability provisions and insurance requirements should be drafted to place these costs primarily on users who are generally in the best position to avoid pollution damage and accidents[155] and who are the primary beneficiaries of air and sea transit through straits. The establishment of international levels of minimum insurance coverage is one approach to spreading the cost of communications that should be considered.[156]

C. *A Look to the Future*

The controversy over straits illustrates the essential connection between the law of the sea and the law of global communications. As the straits issue demonstrates, one of the primary tasks now facing the international community in the law of the sea negotiations is the establishment of a viable jurisdictional basis for the protection and maintenance of global air and marine communications. The conflict over straits is only a precursor of the communications problems to come, as new uses of the sea arise and as coastal states extend their control into broad ocean areas.[157] By

155. This is to some extent an over-simplification. For example, there may be situations in which the coastal state will be best able to avoid certain kinds of accidents by establishing appropriate navigational aids. Moreover, in many situations straits users may not be responsive to accident costs because they may be able to pass on insurance costs to consumers. Nevertheless, it seems likely that those using straits will often be in the best position to avoid accidents. For a rigorous analysis of the problems faced in minimizing the losses resulting from accidents see G. CALABRESI, THE COSTS OF ACCIDENTS (1970), chapter 7, *"Which Activities Cause Which Accident Costs; The General Deterrence Approach."*

156. *See generally*, Healy, *An Economic Analysis of Marine Risk Allocation, Economic Impact of New Regulations and the Extension of Coastal State Jurisdiction,* in HAZARDS OF MARITIME TRANSIT 77 (T. Clingan, Jr., ed. 1973); Handley, *The Role of the Marine Insurance Industry in the Emerging Regime of the Oceans,* in LAW OF THE SEA: THE EMERGING REGIME OF THE OCEANS 285 (J. Gamble, Jr., & G. Pontecorvo, eds. 1973). Both authors stress the limitations of insurance, pointing out that certain types of mandatory programs involve substantial administrative costs and draw on a relatively finite capital base. They note that insurance is only one approach to deterring losses and spreading costs and that other means of preventing accidents, such as improvement of personnel training, traffic handling, and navigational assistance should also be fully exploited.

157. Fishing, commercial and military navigation, petroleum and other mineral recovery operations, superports, offshore nuclear power facilities, and other

carefully examining the straits issue, the future problems for communications foreshadowed by these evolving changes in the law of the sea can be anticipated, and the need for international law to support the systems of global communications that have become vital stabilizing elements in our interdependent world can be emphasized.

activities will in the future all take place in ocean economic zones adjacent to coastal states. The congestion in these areas may ultimately lead to problems analogous to those now encountered in heavily traveled straits. The Gulf of Mexico already represents a case in point and the congestion in that area will increase in the future. *See, e.g.*, Legg, *supra* note 86. Congestion in the Gulf of Mexico can be expected to continue to increase as the use of that area for navigation, fishing, and resource extraction intensifies. At the same time, it can readily be predicted that other important bodies of water, such as the North Sea, the Persian Gulf, the South China Sea, and the waters of the Indonesian archipelago will be used for an increasing number and variety of activities.