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William T. Burke
University of Washington School of Law

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SUBMERGED PASSAGE THROUGH STRAITS:
INTERPRETATIONS OF THE PROPOSED LAW OF THE SEA TREATY TEXT

William T. Burke*

The Third United Nations Conference on the Law of the Sea (LOS) convened in its fourth and fifth sessions for several months of negotiations in 1976.¹ At the fourth session in New York in the spring the Conference discussed the Informal Single Negotiating Text (Informal Text),² developed at the third session in Geneva in 1975, in sufficient detail to result in issuance of a Revised Single Negotiating Text (Revised Text).³ The fifth session met in New York in August-September, but no revisions in the Revised Text were made⁴ and the question of an ultimate treaty remains open.⁵

* Professor of Law and Marine Studies, University of Washington. The author has served as an expert on the United States delegation to the Law of the Sea Conference. The views expressed herein are personal views only and do not necessarily reflect the position of the United States or any other entity.


³ 5 Third U.N. Conf. 125–201, U.N. Doc. A/CONF.62/WP.8/Rev.1 & A/CONF.62/ WP.9/REV.1 (1976) [hereinafter cited as Revised Text]. The major provisions of the Revised Text concerning transit passage are reproduced in Appendix I, with significant changes in the Informal Text italicized. References herein to specific articles of the Informal and Revised Texts are to Parts II thereof, which have been the responsibility of the Second Committee. Such articles are referred to throughout this piece without specific footnotes.

⁴ The principal products of the fifth session were committee reports issued at the end of the session and a document concerning dispute settlement to be issued later. The report most pertinent to this discussion is Report of Second Committee Chairman on the Fifth Session, U.N. Doc. A/CONF.62/L. 17 (Sept. 16, 1976).

⁵ The next Conference session is scheduled to begin in New York in May 1977,
Among numerous important problems before the Conference, one of the most critical is the right of transit passage through straits, those narrow passageways which would fall within the territorial sea when nations generally agree on a twelve-mile limit. The right of submarines to pass submerged through straits (and of airplanes to overfly) is at the center of the transit passage issue. This is a key issue because the two major naval powers, the United States and the U.S.S.R., insisted early in the Conference's preparatory work on the necessity of an assured right of transit for all vessels and aircraft through and over straits. As negotiations proceeded, it was made plain to all concerned that this question was paramount for these two powers.

and there is a widespread feeling that some partial agreement may emerge from it if a few divisive issues (mainly pertaining to the seabed regime) can be separated from the great majority of issues on which substantial agreement exists. If this separation cannot be made, there is a good chance the Conference will drag on for several years, with state claims and counterclaims framing customary law. At this writing it is not at all clear that the issues can be separated.

6. It no longer seems to be seriously doubted that a 12-mile territorial sea has been established by customary international law, or soon will be unless a trend develops toward even wider limits. The expectation underlying the Conference negotiations has been that the treaty will recognize a 12-mile territorial sea and that there will be further agreement clarifying new law for transit of straits. Despite this expectation, the fact is that most straits of interest already fall within the claimed territorial sea of adjoining states and most states already recognize these claims. The United States still insists that it need not recognize territorial seas wider than three miles.


8. See note 33 and accompanying text infra.
Submerged Passage

It is the purpose of this article to consider provisions in the Revised Text dealing with passage through straits and especially to comment on interpretations thereof which contend that the Revised Text does not secure a right of submerged passage for submarines. Before proceeding to this task, it is useful to provide a brief background of the development of the issue, focusing on the reasons for its emergence.

I. BACKGROUND ON THE RIGHT OF TRANSIT PASSAGE

The failure of the 1958 and 1960 LOS Conferences to agree on the width of the territorial sea left undecided the critical question of the permissible extension of national territory into the ocean. In the absence of an explicit understanding, coastal nations proceeded in the 1950's and 1960's increasingly to claim a territorial sea of twelve miles, with a few nations claiming limits as extensive as 200 miles. A major concern arising from these expanded claims and their proliferation was the growing prospect of general acceptance of this limit as

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9. These two conferences were the first two sponsored by the United Nations on the law of the sea, and they were not wholly unsuccessful, even if the most critical question was left unresolved. Four treaties were produced of which the most relevant for present purposes is the Convention of the Territorial Sea and Contiguous Zone. See 2 United Nations Conference on the Law of the Sea 131-43, U.N. Docs. A/CONF.13/L.52--55 (1958).

Although the 1960 Conference failed by only one vote to adopt a six-mile territorial sea, and could agree on no other limit either, this failure to set an explicit limit cannot be interpreted to mean that states were, or are, free to establish any limit they may choose. The 1958 and 1960 Conferences refused to accept proposals for such discretionary authority and implicitly agreed that the territorial sea could not lawfully exceed 12 miles. See M. McDougal & W. Burke, The Public Order of the Oceans 490-98, 559-61 (1962).

10. The evolution of these claims may be seen in the following table:

<table>
<thead>
<tr>
<th>Territorial Sea Claimed (Naut'l Mi.)</th>
<th>Number of Territorial Sea Claims Over Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year</td>
<td>3</td>
</tr>
<tr>
<td>Before 1930</td>
<td>32</td>
</tr>
<tr>
<td>1930</td>
<td>15</td>
</tr>
<tr>
<td>1958</td>
<td>41</td>
</tr>
<tr>
<td>1960</td>
<td>40</td>
</tr>
<tr>
<td>1973</td>
<td>27</td>
</tr>
<tr>
<td>1974</td>
<td>25</td>
</tr>
</tbody>
</table>

195
customary law, which would include some critical straits within the territorial sea of adjoining states. As a result, passage through these straits would depend on the right of innocent passage under international law rather than upon the right to freedom of navigation which prevails on the high seas.  

Disquiet over this possible change in applicable legal principle arose for three principal reasons, primarily military in character. First, the doctrine of innocent passage established in the 1958 Convention on the Territorial Sea and the Contiguous Zone provides for a wide discretion in the coastal state to determine whether passage is innocent, and this subjectivity in judgment might result in interference with inoffensive passage.  

Second, aircraft do not enjoy the right of innocent passage.  

Third, submarines must travel on the surface in order to exercise the right. While the 1958 Convention provided that the coastal state could not suspend innocent passage through straits, as it could in other parts of the territorial sea, the above aspects of the innocent passage concept made its usefulness questionable in the context of a wider territorial sea, at least in the eyes of the major maritime states, i.e., the United States and the U.S.S.R.  

Data for this chart was derived from Bureau of Intelligence & Research, U.S. Dep't of State, Limits in the Seas No. 36, National Claims to Maritime Jurisdiction (3d rev. ed. 1975). Some states are not reflected in the figures in the chart. The situation with respect to their territorial sea claims is as follows:  

<table>
<thead>
<tr>
<th>State</th>
<th>Claim (naut'l mi.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Republic of Korea</td>
<td>20-200 n.m. territorial sea</td>
</tr>
<tr>
<td>Lebanon</td>
<td>No specific claim</td>
</tr>
<tr>
<td>Maldives</td>
<td>Defined by geographical coordinates; range: 3-55 n.m.</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>No limits specified</td>
</tr>
<tr>
<td>Philippines</td>
<td>Based on archipelagic baselines</td>
</tr>
</tbody>
</table>

11. See sources cited in note 7 supra.
13. Article 14(4) of the 1958 Convention provides as follows: "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." Id. at 133. See McDougal & Burke, supra note 9, at 247-69; Slonim, The Right of Innocent Passage and the 1958 Conference on the Law of the Sea, 5 Col. J. Transnat'l L. 96 (1966).  
15. Article 14(6) of the 1958 Convention provides: "Submarines are required to navigate on the surface and show their flag." 1958 Convention, supra note 12, at 134.  
16. The Soviet position was anomalous because it had long claimed a 12-mile territorial sea and in the first two LOS Conferences in 1958 and 1960 its view was that warships had no right of innocent passage. The change in the Soviet view coincided with its emergence as a major naval power. The turnabout did not go unnoticed and
Submerged Passage

The underlying concern of the two superpowers was that requiring nuclear ballistic-missile submarines to transit straits on the surface would compromise the security of key elements of their strategic deterrent forces. Surface passage might threaten to some degree the ability of such submarines to be undetectable and hence invulnerable to surprise attack. Thus the straits issue is linked by some to vital national security interests. 17

There were understandable reasons for this uneasiness about the developing law of the sea as it might affect straits and navigation. Since the 1958 and 1960 LOS Conferences, a large number of new nations had come into existence. Virtually all of them were developing nations, and it would not be unexpected if their views on coastal authority over straits were unsympathetic to those seriously interested in protecting passage by submarines below the surface. Accordingly, when members of the United Nations began to reconsider the law of the sea, stimulated primarily by prospects for mining deep sea minerals, the United States and the U.S.S.R. took the opportunity to press for an agreement continuing high seas rights of passage through straits. Both nations placed special emphasis on this issue, but even in the preparatory talks sharp differences of view were obvious. 18

At the Caracas session of the Conference in 1974, the conferees were unable to agree on a draft text or other formulation of a single view, but a document was compiled showing the "main trends." 19 The next session of the Conference, in Geneva in the spring of 1975, resulted in the issuance of the Informal Single Negotiating Text (Informal Text) which was supposed to take account of the negotiations but was neither a negotiated document nor intended to bind anyone. 20

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17. Some observers do not believe that an adequate case has been made for this concern or for a new law of the sea treaty containing a special right of transit through straits. See note 80 infra.


20. The Introduction to the Second Committee's part of the Informal Text stated that the Text was to take "account of all formal and informal discussions and proposals" and that "the text would be a basis for negotiation, rather than a negotiated text or accepted compromise, and would not prejudice the position of any delegation." Informal Text, supra note 2, at 153.
Rather, it was intended to be a basis for negotiation. Nonetheless the Chairman of the Second Committee, which dealt with the transit issue, did select among proposals to incorporate specific provisions in the Informal Text, and it is very likely that he sought to include propositions which would find acceptance.

At the next session in New York, in spring 1976, the Informal Text was the main topic for consideration. It is of some importance for the following discussion to take note of the procedure employed during this session in the Second Committee for consideration of the Informal Text. Committee work took place only in informal sessions (fifty-three were held) and followed a specific procedure. In an Introductory Note to the Revised Text the Chairman explained this procedure as follows:

5. The guiding principle in revising the single text was to make such changes as would make the text conform more to the views of delegations, as expressed during discussion in the Committee. In my opinion, very few of the over one thousand amendments proposed during the session would achieve the purpose of making the text a more adequate instrument for the fulfilment of the final objective of the Conference.

6. Early in its work the Committee agreed to follow a “rule of silence,” whereby delegations would refrain from speaking on an article if they were essentially in agreement with the single text. Silence on amendments would be interpreted as lack of support for such amendments. The rule was to be applied flexibly and was not intended to result in any arithmetic calculations or be taken as a form of indicative vote. In my interpretations of the effect of this rule, I took into account the fact that with regard to certain issues, only those delegations most directly involved would normally participate in the discussion. Nevertheless, the rule allowed a general classification of the issues before the Committee.21

The Chairman then noted that in terms of changes in the Revised Text there were three categories of articles. The largest category of articles consisted of those where proposed amendments commanded minimal support, hence these remained unchanged in the Revised Text. Other articles were changed because either there was a “clear trend favouring the inclusion of a particular amendment” or the Chairman “was given a mandate to make a change within agreed

The third category of articles were those most needing negotiation. On some of these the Chairman suggested a compromise or pointed the way toward a solution. In other cases the Chairman refrained from making or suggesting a change, believing modification to a text might be counterproductive.

The great majority of the articles affecting navigation and communication were left unchanged in the Revised Text and, as just noted, this was primarily because there was insufficient support for change. The question of the status of the economic zone is the only instance where an article concerning navigation remained unchanged because of a significant difference of view on the issue involved. The Revised Text is largely the same as the Informal Text on other navigation issues, including the provisions on transit passage, innocent passage, and archipelagic passage. In short, it is fair to say that a large measure of agreement exists on these problems.

The two major purposes of special provisions on transit passage of straits are (1) to secure a right for submarines and aircraft to pass respectively, under and over straits which fall within the territorial sea; and (2) to eliminate the competence of the coastal state to characterize passage as non-innocent and, therefore, subject to exclusion. Since the New York spring session ended in May 1976, some questions have been raised about portions of the Text concerning straits. Doubts have been expressed about whether the right of transit passage includes a right of submerged passage because there is no explicit

22. Id.
23. At the fifth session the straits issue was considered a key question still to be resolved, but it is evident that the differences on the matter are not widespread. The Chairman of the Second Committee observed in his report that the Revised Text is "an acceptable negotiating basis for the great majority of delegations" and that "some States bordering straits said their acceptance of the text was conditional on the incorporation into it of certain changes aimed at achieving a better balance between their interests and the interests of users of the straits." Report of Second Committee Chairman on the Fifth Session at 8, U.N. Doc. A/CONF.62/L.17 (Sept. 16, 1976).
24. A letter to the author from Senator Barry Goldwater, dated July 23, 1976, reads as follows:

As a non-lawyer with Committee responsibilities covering the Law of the Sea negotiations, I am seeking your legal opinion of certain provisions in the "Revised Single Negotiating Text," released on May 6, 1976, at the New York session of the Third United Nations Conference on the Law of the Sea. Specifically, I am interested in knowing whether or not the Text guarantees the United States rights of submerged transit through straits which connect two areas of high seas or economic zone and in which the territorial waters generated by the opposite coastlines of the straits states overlap.

Now, I should mention that members of the official U.S. delegation to the Law of the Sea Conference tell us that the Text does guarantee the United States such
mention of the latter in the Text.\textsuperscript{25} Recent comment also contends that the Revised Text neither establishes a secure right of submerged transit nor insulates transit passage from significant coastal state discretion to qualify passage as “nontransit” and, therefore, subject to exclusion.\textsuperscript{26} The remainder of this article examines these comments, in the context of straits and archipelagoes, and suggests that they have little substance.

II. CRITICISMS OF THE REVISED SINGLE NEGOTIATING TEXT

Criticisms that have been made of the Revised Text can be summarized as follows: First, the term “freedom of navigation” in Article 37 does not include a right of submerged transit. Second, even if the negotiators sought to include such a right, it is substantially qualified and hedged by restrictions so that the Text does not clearly and unequivocally “guarantee” a right of submerged transit. Third, the refer-

\footnotesize{\textsuperscript{25}H. Gary Knight, Analysis of the “Revised Single Negotiating Text” and the Question of the Right of Submerged Transit Through International Straits (Aug. 1, 1976) (unpublished memorandum on file with the \textit{Washington Law Review}) [hereinafter cited as Knight]; Statement of W. Michael Reisman (Aug. 5, 1976) (on file with the \textit{Washington Law Review}) [hereinafter cited as Reisman]. The author is grateful to Professors Knight and Reisman for making this material available.}

\footnotesize{\textsuperscript{26}Reisman, \textit{supra} note 25.}
Submerged Passage

ence to "normal modes of transit" in Article 38 is not, for various reasons, an authorization for submerged navigation of a strait. Fourth, the provisions of Article 19 requiring surface transit by submarines in the territorial sea may also be applicable to straits. Each of these criticisms is discussed below.

A. "Freedom of Navigation" Does Not Include a Right of Submerged Transit

There appears to be general agreement that the term "freedom of navigation" in traditional international law refers to vessels on the high seas and authorizes a broad freedom of operation and maneuver, including military activities and practices, as well as freedom to stop or move slowly in a particular area. The concept in its high seas context does not simply connote movement from one place to another but embraces a broad range of practices in use of the ocean floor, water column, and space above. No one seriously doubts that freedom of navigation on the high seas includes the right of submerged passage.

Although the term "freedom of navigation" is used in Article 37 to refer to a right of transit passage in straits embraced by a territorial sea, the argument is made by Professor H. Gary Knight that it is accompanied by so many qualifications and restrictions that, there being no express mention of submerged passage, it was not intended to in-

27. The freedom to navigate and move about the oceans carrying out multiple tasks has been the principal traditional component of freedom of the seas. For centuries freedom of the seas meant freedom of navigation. Insofar as human activity on the high seas requires the use of a mobile platform, the main doctrinal protection is the doctrine of freedom of navigation. See generally 4 Digest of International Law 501–633 (M. Whiteman ed., Dep't of State Pub. No. 7825, 1965); McDougal & Burke, supra note 9, at 751–78.

28. The term "navigation" embraces such activities as surveillance, observation or inspection; military maneuvers and operations involving the use of aircraft, surface vehicles, submarines, and associated structures and installations; testing of equipment and weapons systems; refueling operations; placing and retrieving objects and buoys; and no doubt additional activities. See generally 4 Digest of International Law, supra note 27, at 543–51, 619–28.

29. This point has been challenged only in connection with the prospective establishment of exclusive economic zones in certain offshore areas for the benefit of coastal states. The People's Republic of China proposed in the Sea-Bed Committee that freedom of navigation in such zones be limited to surface craft. Even in this instance it should be noted that the exclusive economic zone is to be a regime separate and apart from that of the high seas. See [1973] 3 Report of Sea-Bed Committee, supra note 1, at 73.
clude submerged passage. The main qualifications mentioned are the phrase "solely for the purpose of continuous and expeditious transit" and the provisions of Articles 38–40 which set forth duties of passing ships and the regulatory competence of the strait state. Because in his view each of these restrictions is inapplicable to high seas "freedom of navigation," the latter term in this context means something so different that it cannot be interpreted to include submerged transit unless it is expressly stated.

One difficulty with this specific contention and with other criticisms of the Revised Text is that they rest almost completely on textual exegesis and manipulation of words without regard for, and with virtually no reference to, the negotiating context. There is a loss of plausibility when the interpreter makes no attempt to take into account the issues being negotiated, their origin, the contrasting views and proposals of the principal participants, contemporary interpretations of these proposals, and the formulation of the outcome in relation to these communications among the parties in the negotiations. These factors assist in determining the perspectives of those concerned. Observers can expect difficulty in identifying the potential commitments embodied in a draft text if observations fail to go below the surface of the terms employed.

In the present instance, ample evidence is available for understanding important features of the negotiating context, including the nature of the issues involved, how and by whom they came to be identified and formulated, what specific proposals were made by various participants for their resolution, and how these proposals were interpreted by negotiators. We do not have and may never have fully

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31. One authoritative work comments on document interpretation as follows: "It is the grossest, least defensible exercise of arbitrary formalism to arrogate to one particular set of signs—the text of a document—the role of serving as the exclusive index of the parties' shared expectations." M. McDougal, H. Lasswell, & J. Miller, The Interpretation of Agreements and World Public Order xvii (1967).
32. The objective of interpreting the Revised Text is to "discover the shared expectations that the parties to the relevant communications succeeded in creating in each other." See id. at xvi. This task of discovery is obviously difficult in a meeting with as many formal participants as the LOS Conference. But numbers are only a superficial component of the situation. Negotiations occur on a number of different levels, the least important of which are the formal meetings. Other relevant meetings include large, informal gatherings, designated negotiating groups, and exclusive but tiny interest groups. For some notion of these complexities in the context of the straits issue, see Miles. An Interpretation of the Geneva Proceedings—Part II, 3 Ocean Dev. & Int'l L.J. 303, 305–8 (1976). A full depiction of negotiations on the straits issue would
Submerged Passage

adequate legislative histories of all of the negotiations since they were largely on an "informal" basis with no summary or other public record of them. There are, however, satisfactory indications of the views of various parties which provide guidance concerning the expectations they sought to project on the specific issue of the submerged transit of submarines.

It has never been any secret that the United States considered it a vital interest to secure a right of passage through straits which would provide for a right of submerged transit resembling that established by freedom of navigation on the high seas. The Soviet Union also left no doubt that it placed a high value on the right of transit passage, including submerged passage. Both communicated very clearly that satisfactory resolution of this issue was the key to a successful outcome for the Conference as a whole. On the other hand the opposing views of straits states and others were made equally plain. Some states opposed any right of passage by warships and specifically rejected the idea that submarines should have a right to pass in the submerged mode.

The issue of a right of transit overshadowed all other matters in the LOS negotiations, beginning at least in 1971 when the Sea-Bed Committee started preparatory work for the Conference. It is common knowledge that it took two years of intensive negotiations to draw up the list of subjects and issues with which the Conference was require information about the separate deliberations of the Evensen group, the Group of 77, the straits state group, the archipelagic group, and about bilateral links among various of these participants. None of these groups met in open session and some meetings were secret. Id. The analysis in this discussion is based solely on published sources.


34. See note 37 and accompanying text infra.
to deal.\textsuperscript{35} It may not be common knowledge that at the end of these two years the crucial roadblock to final agreement on this list was the difference on the wording to be used in expressing the straits question. The compromise formulation on this issue\textsuperscript{36} was regarded with such gravity by the United States delegation that acceptance of the wording on behalf of the United States was referred back to Washington and personally decided by President Nixon after hearing opposing viewpoints on the matter. This incident reflects the very high importance of the straits issue to the United States. No delegation in the Conference is unaware of this attitude.

The contrasting positions are fully revealed in the key proposals by the straits states and Fiji, on the one hand, and the United Kingdom and the U.S.S.R. on the other.\textsuperscript{37} Neither of the former proposals offers assurance of a right of submerged passage. The straits states proposal provides exactly the opposite, requiring authorization for passage of warships and, in addition, specifying that submarines must travel on the surface. The Fiji proposal is less restrictive because it recognizes innocent passage for warships and would allow submerged passage if the coastal state has been given prior notification of passage and the submarine uses designated sealanes where required by the coastal state.\textsuperscript{38} Neither proposal mentions freedom of navigation in straits.

The proposals of the United Kingdom and the U.S.S.R. both expressly provide for the freedom of navigation and overflight through straits. The summary record of the discussion at the time these and other straits proposals were introduced fully establishes that "the freedom of navigation and overflight" in straits was intended to incorporate some high seas rights in a new straits regime called the right of

\textsuperscript{35} See [1972] Report of Sea-Bed Committee, supra note 1, at 5-8. One reason it took two years to negotiate the list was the insistence by many participants that the formulation of an item prejudge the resolution of an issue. Many states, for example, opposed inclusion of an item on "free transit" or "right of transit."

\textsuperscript{36} Item 4 of the list reads as follows:

4. Straits used for international navigation
4.1. Innocent passage
4.2 Other related matters including the question of the right of transit

\textit{Id.} at 5. The compromise item is 4.2. This formulation was strongly opposed by Defense Department representatives within the United States delegation.


Submerged Passage

transit passage. The United Kingdom delegate introduced its proposal by noting that the acceptance of a twelve-mile territorial sea resulted in eliminating a strip of high seas in straits and created a need "to ensure that unrestricted navigation through those vital links in the world network of communications should remain available for use by the international community." This explanation quite clearly links the former legal position in straits, i.e., high seas and freedom of navigation, with a new regime that would "ensure . . . unrestricted navigation." The term "freedom of navigation" was used to describe the right of transit passage. It strikes one as an eminently reasonable interpretation, in view of this explanation, to construe the term "freedom of navigation" as embracing submerged passage, especially in light of the fact that mention of this freedom is unaccompanied by any restrictions which would suggest that only surface transit was intended. This interpretation seems amply confirmed by the contemporary observations of other delegations, particularly including those opposed to the concept of transit passage.

Statements by Sri Lanka, Egypt, Peru, and Spain, in commenting both on the United Kingdom proposal and on a United States intervention on the subject, are especially revealing of the contemporary understanding of freedom of navigation in this context. Each of these delegations questioned the need for, and desirability of, submerged passage for submarines. The comments, questions, and proposals advanced by these delegations are virtually impossible to explain unless they understood that submerged passage was intended to be included in the concept of "freedom of navigation" in straits. In obvious assumption that submerged passage was included in transit passage, Egypt and Peru posed extremely pointed questions on the submarine issue, while Sri Lanka in identifying specific safeguards for coastal security in connection with passage by warships conspicuously omitted any mention of requiring surface transit by submarines.

40. Id. at 125.
41. Id.
42. Id. at 126 (Sri Lanka), 131 (Egypt), 131–32 (Peru), and 136–37 (Spain).
43. Egypt asked "how the coastal State could verify whether a submarine refrained from testing weapons of any kind during its passage through straits if it remained submerged." Id. at 131. Peru asserted that concealment of submarines "could only be for far from innocent reasons" and hoped that "further explanations would be forthcoming on the subject of submarines." Id. at 132.
44. Id. at 126. This statement could also be consistent with a view that submerged
The response by the United States to the various questions raised by other delegations is most enlightening. In specific answer to the question about submarines by Egypt, Ambassador Stevenson addressed the issue of coastal security interests and submerged passage and stated unequivocally that the United States was seeking a right of submerged transit. In context it is amply clear that the United States believed that freedom of navigation in the United Kingdom proposal included the right of submerged transit. The detailed United States rejoinder to the statements by Egypt and others simply loses its meaning unless there was a general perception that the United States proposal would include a right of submerged transit. The tenor as well as specific segments of this debate at Caracas leaves little doubt that the participants shared a common view that free transit meant inter alia submerged transit.

This impression becomes virtually a certainty when one examines the Spanish statement on July 23, 1974. The Spanish delegate noted:

The drafts in documents A/CONF.62/C.2/L.3 [United Kingdom proposal], 11 [East European and U.S.S.R. proposal], and 15 [Denmark and Finland proposal], like the draft submitted by the United States in 1971 and the one submitted by Italy in 1973, made no distinction between merchant ships and warships, and there was one very significant element in all those texts: the provision that submarines should navigate on the surface and show their flag had been dropped. It would seem then that the aim was to allow submarines to pass through the ocean space under the sovereignty of another State without that State's knowledge.

If one compares the above proposals it will be seen that not one makes any explicit reference to submerged passage as part of transit passage, yet the Spanish representative had no difficulty in perceiving that they would drop the requirement of surface transit. All of the

passage was not considered part of the proposed free navigation in straits. Nevertheless, the detailed character of the statement, its reference to "current realities," and its occurrence in the midst of a discussion replete with references to submerged passage combine to indicate strongly that the compromise being proposed was intended to permit submerged passage subject only to a notification requirement sufficiently flexible to allow passage at essentially unidentified times.

45. *Id.* at 135.
46. *Id.* at 136–37.
47. *Id.* at 137.
Submerged Passage

proposals, however, refer to the right of freedom of navigation in straits. It is unmistakable that this concept was understood to include the right to pass submerged.

After this pointed debate and further informal negotiations, it must be seen as significant that both the Informal and the Revised Texts make provision for freedom of transit in straits in terms which are identical to those of the United Kingdom proposal. Under the rule of silence employed by the Second Committee at the fourth session, the majority of delegations indicated "essential agreement" with the Informal Text provisions on this issue and these are retained unchanged in the Revised Text. Even more significantly, the Chairman of the Second Committee stated in his report on the fifth session that the straits provisions, still in the form identical to the United Kingdom proposal, appear "to provide an acceptable negotiating basis for the great majority of delegations." In view of this record there seems to be little room for question that the term "freedom of navigation" in the Revised Text includes submerged passage.

Professor Knight also appears to argue that submerged passage is excluded because the phrase "solely for the purpose of continuous and expeditious transit" qualifies the exercise of "freedom of navigation" under Article 37 of the Revised Text. His view is that "freedom of navigation" cannot be given its traditional meaning when bound by such a limitation. He concludes that the drafters "must have [had] something else in mind when they use[d] the term 'freedom of navigation.'"

One may agree that the framers of Article 37(2) did not mean to carry over and to protect the whole panorama of operational practices protected by freedom of navigation in its traditional usage. But to acknowledge this simply poses the more precise question: what components of the old concept are now protected in straits and what are not. The negotiating history briefly summarized above strongly suggests that submerged passage is one such aspect of transit passage. Certainly the restriction in the phrase "continuous and expeditious passage" does not by its terms exclude submerged passage. Passage in

48. See note 21 and accompanying text supra.
50. Knight, supra note 25, at 3.
51. See notes 31-43 and accompanying text supra.
the submerged mode can be as "continuous and expeditious" as surface movement. Nothing in the negotiations even remotely suggests that this qualification was thought to modify the mode of making transit other than by excluding inconsistent operations.

The other set of qualifications allegedly relevant to a conclusion that freedom of navigation in Article 37(2) does not include submerged passage is found in the apparently innocuous requirement that transit passage be exercised "in accordance with this Chapter." This is said to include Articles 38–40 which, it is asserted, provide for duties inconsistent with freedom of navigation. Professor Reisman also appears to urge that Article 38 and other requirements of transit passage totally exclude submerged passage or, at least, constitute significant qualifications on the latter right. For him they impose such significant qualifications that it is "not a necessary interpretation or even most reasonable of constructions" to conclude that freedom of navigation is understood to include freedom of submerged transit. Presumably the most reasonable interpretation is to be preferred, and apparently in that case Article 38 would exclude a right of submerged transit.

Although the various duties mentioned in Articles 38 and 39 may be inconsistent with traditional freedom of navigation, this does not necessarily lead to the conclusion that submerged passage is excluded from the right of transit passage. For example, a submerged submarine would have no unique difficulty in proceeding "without delay" through a strait as required by Article 38(1)(a). Similarly such a submarine can as easily as any vessel refrain from activities extraneous to the normal mode of continuous and expeditious transit in accordance with Article 38(1)(c). A submarine can also comply with specified sealanes and traffic separation schemes and would be expected to do so by Article 39. Finally, a submarine can comply with the coastal state's permissible laws and regulations as specified in Article 40 because such regulations are compatible with submerged passage. Indeed Article 40(2) seeks to insure that compatibility by specifying that coastal laws and regulations shall not have the "practical effect of denying, hampering, or impairing the right of transit passage as defined in this section."

52. Knight, supra note 25, at 3–4.
53. Reisman, supra note 25, at 3.
B. The Right of Submerged Transit Is Overly Qualified

In his overall assessment of the Revised Text on submerged passage, Professor Reisman states that it is "not outlandish or preposterous" to interpret "transit passage" as including a right of submerged passage. But he says that Article 37(2) is not a "clear and unequivocal statement for a number of reasons," and that the right of transit passage is "laden with significant qualifications unknown to the 'freedom of navigation.'" The reasons he advances are, in fact, the qualifications which are assertedly either incompatible with or unknown to freedom of navigation, including the word "solely" in Article 37(2), Article 38(1)(b) and (d), and Article 40(1).

Perhaps the most significant alleged qualification mentioned is Article 38(1)(b) which states that vehicles in transit passage shall "refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering straits, or in any other manner in violation of [sic] the principles of international law embodied in the Charter of the United Nations." One difficulty with the contention that this article may restrict the right to submerged transit is the apparent assumption that vessels engaged in freedom of navigation on the high seas (assuming a strait were part of the high seas) are somehow exempted from the same obligation. It is reasonably clear that the law concerning impermissible coercion, as defined in the United Nations Charter from which this language of Article 38 is derived, is not displaced by or subservient to the principle of freedom of navigation. Hence explicit recognition that "transit

54. Id.
55. Id.
56. Id. Professor Reisman attaches unexplained significance to the use of the term "solely" in Article 37(2) to qualify the "purpose of continuous and expeditious transit." In citing this provision (and Article 38) he makes the immaterial point that this qualifies the high seas concept of freedom of navigation. Such a limitation, however, is not inconsistent with a right of submerged passage. As noted above, such passage is not inconsistent with continuous and expeditious movement.

Article 38(1)(d) has also been identified as a significant qualification on the right of submerged transit. Reisman, supra note 25, at 3: Apparently the concern over this article, which says that ships in transit passage shall comply with other relevant provisions of the chapter, is that it might be taken to refer to Article 43 (providing for innocent passage in those straits to which transit passage is inapplicable). But it is frivolous to suggest that among the "relevant provisions" of the straits chapter, with which vessels in transit must comply, is a provision that is expressly applicable only to straits to which transit passage is not applicable.

57. Where coercion reaches a high level of intensity, such as may justify a responding use of coercion in self-defense, the relevant prescriptions and policies are those
passage" must conform to the U.N. Charter is hardly a significant qualification unknown to freedom of navigation on the high seas. If a strait state were confronted with an impermissible use of force justifying measures of self-defense, the responsible vessel could not be shielded from such use of force by the principle of freedom of navigation or of transit passage.

It seems clear from the Revised Text that the activities of submerged transit or overflight in and of themselves do not necessarily constitute an impermissible use or threat of force or coercion. Such a conclusion would require examination of a wider context than merely these activities alone. Thus, while a vessel or aircraft in transit might use impermissible coercion, the mere fact of passage alone cannot establish that fact. A strait state could not, consistently with the Text, simply declare without regard to context that all submerged passage or overflight of a strait would be considered incompatible with the U.N. Charter so as to make the right of transit inapplicable. If it were otherwise, strait states could by simple unilateral assertion divest the Revised Text of significant meaning. Nothing in the record suggests this is a plausible interpretation. The significance of Article 38(1)(b) as a restriction on submerged transit and overflight may perhaps best be seen when it is understood that its deletion from the Text would not materially change the legal obligations of vessels exercising the right of transit passage.

Article 42 of the Text provides that "[t]here shall be no suspension of transit passage" by strait states. This is the counterpart to Article 43(2) which prohibits suspension of innocent passage in straits. The latter is identical to Article 16(4) of the 1958 Convention on the Territorial Sea and Contiguous Zone. Elsewhere in the territorial sea the coastal state can suspend the right of innocent passage. This means that a particular vessel which otherwise qualifies for the right

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58. Article 42 reads: "States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which it has knowledge. There shall be no suspension of transit passage." Revised Text, supra note 3, at 160.

59. Article 43 comprises Section 3 of the straits chapter and provides for innocent passage in certain straits to which transit passage is inapplicable. Id.

60. 1958 Convention, supra note 12, at 134.
may not be able to use it because its availability has been suspended. When suspension is prohibited, the coastal (strait) state can only exclude passage for cause, i.e., that a particular instance of passage is not innocent or does not meet the conditions of transit passage. The significance of this is that straits cannot be completely closed to passage by any and all vessels. The strait state can deal with passage only on a piecemeal basis rather than wholesale.

In light of this background it is simply irrelevant to observe, as has Professor Reisman, that the Text provision prohibiting suspension of transit passage "is not the same as saying 'There shall be no suspension of passage.'" He adds: "In other words, a state bordering a strait might unilaterally determine that a particular transit, in given circumstances, violates . . . Article 38(1)(b), hence, is not a 'transit passage' in the meaning of the Convention and may either be prohibited entirely or permitted only upon surfacing." Of course a vessel which engages in an activity that is not an exercise of transit passage can be excluded from passage and the Text provides for this possibility in Article 37(3). But this coastal competence is limited to specific transits because the coastal state cannot suspend transit passage. The singular purpose of this anti-suspension provision in Article 42 is to confine coastal state competence to assessments of individual instances of passage.

In asserting that transit passage has qualifications which are "incompatible with the high seas' notion of freedom of navigation," it has also been suggested by Professor Reisman that one might consider the relevance of Article 40(1) "as a possible authorization to the strait state to insist on surface transit of submarines through busy straits as a safety regulation." To evaluate this contention it is necessary to con-

61. Reisman, supra note 25, at 3.
62. Id. (original emphasis). Of course a nation might unilaterally make any conceivable claim, but other nations are not bound to accept. In the Corfu Channel Case, the International Court of Justice rejected the Albanian attempt to impose its unilateral view that British warships threatening force in the Corfu Channel within the Albanian territorial sea were not in innocent passage. The Court found that the warships had a right of innocent passage and were properly exercising it. Corfu Channel Case, [1949] I.C.J. 4, 30-32. A vessel exercising the right of transit passage certainly could reject and resist a forceful, unilateral attempt to deny transit passage contrary to an LOS Conference treaty.
63. Article 37(3) reads: "Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of the present Convention." Revised Text, supra note 3, at 159.
64. Reisman, supra note 25, at 3.
sider Article 40 in its entirety. First, paragraph 1 confers prescriptive competence on the strait state "subject to the provisions of this section," which is the section establishing and defining the right of transit passage. This makes it difficult, at the least, to argue that the strait state can use its regulatory authority to qualify a right granted in another provision of the same section. Second, if this is not already clear, paragraph 3 adds that the application of coastal laws shall not "have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section." Requiring surface transit simply destroys the right of transit passage for submarines and would appear to be wholly inconsistent with paragraph 3. The conclusion is that Article 40(1) is not a significant qualification upon the right of submerged transit established by Article 37.

C. "Normal Modes of Transit" Does Not Authorize Submerged Navigation of a Strait

Among other critical commentary upon the Revised Text, Professor Knight contends that "normal modes of transit" as employed in Article 38(1)(c) does not refer to submerged transit, is not an authorization therefor, and ought to be understood as meaning surface transit. Professor Reisman thinks the term "normal" might or might not mean submerged transit, because the signification of "normal" depends upon a great many variables in a given instance.

As Professor Knight observes, Article 38 is not intended by itself to establish a right of submerged passage but rather to provide for the duties of vessels in transit. Although it is therefore correct to conclude that Article 38 is not itself an authorization for submerged passage, the Article does anticipate the exercise of the right of transit passage in the submerged mode. Because Article 38 uses the term "normal modes of . . . transit" it seems clear that the right of transit passage contemplates vehicles which differ in their method of movement insofar as they operate in their "normal mode." The requirement of normality defines the obligations of a vehicle, in terms of its permissible activities during passage, according to its chosen mode of transit, i.e., whether it travels under, on, or over the water. It is rather difficult

Submerged Passage

to perceive what other references normality might have when employed in an article dealing with vehicles having such different operating characteristics as aircraft, submarines, and surface vessels.

The critical comments of Professors Knight and Reisman appear to be mostly hypothetical excursions into possible references of the term "normal mode of transit," undertaken largely without reference to the negotiations and the purposes sought. Their commentaries pose the question involved quite differently. Professor Knight inquires into the "legal content" of the phrase and examines prior agreements to determine if there is an agreed meaning for it. He concludes that if there is any uniformity in prior usage it is that surface transit is required for submarines in the territorial sea. For Professor Reisman, in contrast, the question of "normal mode" is a factual one to be answered for every single incident of passage by taking into account the type of vessel and numerous other, highly variable factors.

The more important issue raised about Article 38(1)(c) is whether the right to travel submerged depends upon factors varying with every separate instance of passage. Assuming that Article 37 establishes a right of submerged passage as a general principle, does Article 38 make the availability of that right contingent upon the coastal state's interpretation of what is "normal" in any particular situation? It seems highly unlikely that proponents of the phrase "normal modes of... transit," who favored the right of submerged transit, sought to provide a right whose availability was so variable that it might change not only day by day but also hour by hour. It virtually boggles the mind to conceive that negotiators contending over a highly critical, sensitive, and even dangerous issue would seriously consider a provision that could lead to recurrent disputes over what was "normal" in an ever-changing context.

A far more reasonable interpretation is consistent with a variable concept of the term "normal." It may be acknowledged that a submarine might occasionally travel on the surface in a strait rather than

67. Knight, supra note 25, at 5–6. The relevance of prior usage is not self-evident in interpreting draft treaty provisions resulting from, and identical to, proposals made for the very purpose of replacing prior law on the matter. Under prior law submarines were required to pass on the surface in order to exercise the right of innocent passage and in compliance therewith submarines might normally travel on the surface. The idea of proposing "freedom of navigation" in straits was to change this expectation and permit other behavior.

68. Reisman, supra note 25, at 4.
submerged because it is safer to do so or offers prospect for more expeditious passage. The choice of the mode of travel, however, would remain that of the flag state and not that of the coastal state. In this interpretation, Article 38 recognizes that a vehicle may be engaged in either surface, submerged, or air transit and it enjoins a vehicle in whatever mode from engaging in any activities not incident to that mode. Article 38 does not command one mode or another in any particular circumstance but does prohibit such activities as are not incident to whatever mode is employed by the vehicle.

In this view a submarine is in a normal mode of passage when it operates submerged and its obligations or duties are measured in that light. On the other hand the submarine might pass on the surface and its obligations would then take that mode into account. The important point is that Article 38 does not authorize the coastal state to determine what is a "normal" mode of transit each time a vehicle approaches a strait. It does specify that a vessel in transit passage, in whatever mode it determines to use in light of its operating characteristics and other relevant features of the context, shall only engage in conduct which is an incident of such mode of passage.

D. Article 19 May Require Surface Transit in Straits

A final critique of the Revised Text is that it is not clear (or not self-evident) that Article 19,69 requiring surface transit by submarines in the territorial sea, is inapplicable to the territorial sea in straits. The arguments again vary. Professor Knight derives his view that this is an arguable point from consideration of Article 33 which provides that the regime of transit passage in certain straits "shall not in other respects affect the status of the waters forming such straits."70 To this he adds the proposition that submerged passage is not expressly permitted through straits and concludes that Article 33 means that these straits remain as territorial sea to which Article 19 is applicable. He nevertheless considers that this matter is arguable in light of Article 43 which provides only for innocent passage in straits to which transit passage is inapplicable.71

69. Article 19, entitled "Submarines and other underwater vehicles," provides: "In the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag." Revised Text, supra note 3, at 156.
70. Id. at 158.
71. Knight, supra note 25, at 7–9.
Apart from the clear provision of Article 43, the main weakness of this argument is the notion that submerged passage is not made a part of transit passage by the Text. Article 33 loses considerable point if transit passage is not substantially different from innocent passage in the territorial sea. Virtually the only important differences between innocent and transit passage are the rights of submerged passage and overflight; if these rights are not appurtenant to transit passage, Article 33 approaches meaninglessness. The regime of transit passage would then have hardly any characteristics differentiating the waters in straits from the territorial sea. On the other hand, acknowledgement of these rights stresses the importance of preservation in Article 33 of the remaining coastal state authority over internal waters and territorial sea in straits. There would be no need to preserve coastal state authority over territorial sea or internal waters if transit passage is by definition compatible with such authority.

Professor Reisman reaches the view that this matter is not unequivocal by incorporating Article 19 into the definition of innocent passage in Article 43, which he argues might be a relevant provision applicable under Article 38(1)(d) to all transit passage.\(^{72}\) This reasoning is extremely fragile in light of the fact that Article 43 is expressly applicable only in straits to which transit passage is inapplicable. Professor Reisman does not press this point very vigorously. He phrases his line of argument in a highly qualified fashion and seems especially reluctant to assert that Article 43 is a relevant provision for ships in transit passage.

III. SUBMERGED PASSAGE IN ARCHIPELAGIC WATERS

Some of the critical comment on the transit passage question may also be relevant to archipelagic passage which is dealt with by a separate section of the Text.\(^{73}\) The specific issue is again whether the right of archipelagic sea lanes passage provided in the archipelagic chapter includes submerged passage where the relevant provisions do not spe-
cifically mention such passage. As with straits, the criticisms do not have merit as applied to archipelagic sea lanes passage, for much the same reasons.

The definition of the right of archipelagic sea lanes passage in Article 125 closely resembles but is not identical to the corresponding definition of transit passage in Article 37. There are three major differences between the two: (1) Article 37 refers to "freedom" and Article 125 to "rights" of navigation and overflight; (2) Article 125 refers to navigation and overflight "in the normal mode" and Article 37 does not; and (3) Article 37 uses the modifying term "solely" before "for the purpose of continuous and expeditious transit," but this term does not appear in Article 125. Reasonably interpreted, these appear to be textual differences without substantive importance other than possibly mediating differences in negotiating positions.

The distinction between "freedom" and "right" in this context seems insignificant as the two terms are simply different formulations of the same concept. The freedoms of navigation and overflight on the high seas are often, indeed very commonly, referred to as rights of navigation and overflight; apart from the Revised Text there are no comparable rights of navigation and overflight in another part of the ocean. In both straits and archipelagic waters, the objective of the Revised Text is to preserve high seas rights, or freedoms, except as they are explicitly modified by the new arrangement. This is especially significant for archipelagic waters because their recognition is a new development in international law and embraces very large areas formerly part of the high seas.

Despite the virtual identity of the terms "rights" and "freedoms," the addition of the phrase "in the normal mode" in Article 125 provides added assurance that submerged passage is part of the right of archipelagic sea lanes passage. In contrast to the straits provisions, the phrase is used here as part of the description of the basic right. When so used, the term "rights of navigation and overflight in the normal mode" refers to the right to operate vessels and aircraft as they are

74. Article 125(3) provides:
Archipelagic sea lanes passage is the exercise in accordance with the present Convention of the rights of navigation and overflight in the normal mode for the purpose of continuous and expeditious transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.
Revised Text, supra note 3, at 172.

216
Submerged Passage
designed to be operated and as responsible flag state officials may decide to use them. The term thus appears to have the same meaning as it does in Article 38(1)(c), except that here it is part of the description of the right rather than an auxiliary term which helps clarify the scope of a right elsewhere created.

Professor Reisman's suggestion in the straits context is that the term "normal" is "quite variable" and that such "mode of transit" for submarines might differ "according to such factors as type of channel, density of traffic, safety factors, nature of mission, rules of the road and so on." If this interpretation were applied to Article 125 to suggest that the right of submerged archipelagic passage depends on what is normal in a specific context, the "right" thereby established would be extremely indefinite and its existence would be so contingent on time and particular circumstances that for practical purposes it would be unavailable.

It seems extremely unlikely that the shared expectations of those who negotiated Article 125 were that the right of submerged archipelagic passage would turn on density of traffic or the state of weather or stage of tide as impinging on safety, or on the differing conformations of land and water found in numerous archipelagoes around the globe. Nothing in the record of the negotiations supports such an interpretation. Such factors are entirely too ephemeral to be bases for an important legal right.

There is evidence within the Revised Text itself that these factors are irrelevant to the right of submerged archipelagic passage. Coastal state competence to deal with traffic density, safety of navigation, and rules of the road, is spelled out in Article 40 which is applicable mutatis mutandis to archipelagic sea lanes passage. Article 40(2) as incorporated by Article 126 provides that laws and regulations concerning these matters shall not "have the practical effect of denying, hampering, or impairing" the right of archipelagic sea lanes passage. Coastal regulations requiring, due to the factors noted above, surface transit by submarines would appear totally inconsistent with the right

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75. Reisman, supra note 25, at 4; see note 68 and accompanying text supra.
76. In Article 125 the term "normal mode" is a part of the definition of the right of archipelagic passage while in Article 38 it is part of a provision concerning the duties of ships and aircraft during passage. It is accordingly a more critical question of interpretation in connection with archipelagic passage. Professor Reisman's comments are confined to the meaning of the phrase in Article 38. The extrapolation to Article 125 is mine for the purpose of this discussion.
77. Article 126 provides as follows: "Articles 38, 40 and 42 apply mutatis mutandis to archipelagic sea lanes passage." Revised Text, supra note 3, at 172.
of archipelagic sea lanes passage and hence tantamount to a denial or at least a substantial impairment of that right.

The omission of the word "solely" before "continuous and expeditious transit" in the archipelagic articles also seems unimportant in terms of the right of submerged archipelagic passage. It perhaps relates to the more likely possibility (than in straits) that vessels in transit would be calling at ports within the archipelago or in neighboring states. Indeed the Revised Text on straits contains a new provision to assure that the right of transit there established includes entry for visiting at ports within straits. The absence of a similar amendment in the archipelagic articles suggests that those articles contemplate such transit visits, which might be barred if "solely" had been included. The significance of the term "continuous and expeditious transit" is that vehicles are not to sojourn in waters outside ports nor to engage in maneuvers and operations other than simple movement through the area. Hence this term signifies that archipelagic passage does not authorize the same operations as does the right of freedom of navigation on the high seas.

IV. CONCLUSION

The major reason for considering the allegations that the Revised Text does not secure United States interests in submerged passage of straits is that the pertinent Revised Text provisions may very well be adopted without substantial change, if a treaty is concluded in the reasonably near future. Most observers believe this will be the case because there appears to be general agreement already on these points. The only parties considerably dissatisfied are straits states, which suggests that they believe the Text does not serve their interests. The major maritime states appear to be content, especially the United States. A recent letter from the representative of the United States Secretary of Defense on LOS Conference matters expresses the American view as follows:

Throughout these protracted negotiations, the United States has let it be known that we could not become a party to a treaty that did not accommodate our national security interests in submerged transit and overflight of straits connecting high seas to high seas. Essentially, what

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78. Article 37(2), Revised Text, supra note 3, at 159.
we seek is freedom of navigation (i.e., submerged transit) and over-flight for the purpose of transit in straits connecting high seas to high seas. We oppose the restrictions of innocent passage in such straits. . . .

The chapter on straits in Part Two of the Revised Single Negotiating Text, which we have every reason to believe will be incorporated into any treaty upon which the Law of the Sea Conference might agree, provides in Article 37 for the right of "transit passage" in straits connecting high seas to high seas. Transit passage is defined as the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait. The United States and other maritime powers insisted on the use of the words "freedom of navigation and overflight" precisely because of their use in the High Seas Convention. Thus, submerged transit and overflight, under a new designation of "transit passage," is assured in straits connecting high seas to high seas. Indeed, no doubt has been expressed in the Law of the Sea Conference that this is the result. In fact, States opposed to submerged transit specifically proposed amendments requiring submarines to surface which we, of course, rejected as did the Conference itself.79

Once the LOS agreement is adopted by the Conference, it will be subject to ratification. In the United States, the Constitution requires that the President secure the advice and consent of the Senate before the treaty may be ratified. When this question comes to the Senate, it is possible that among other objections to acceptance it will be urged that the treaty does not secure the United States' interest in submerged passage. If the eventual treaty embodies the provisions of the Revised Text this view should be rejected. If the United States Senate refuses consent to ratification, it ought to be based on much more substantial grounds than the objections discussed herein concerning the availability of submerged passage.

If the LOS Conference fails to produce an agreed treaty text, a contingency that now seems likely due to continuing differences over the seabed regime, the Revised Text may become important because it is widely considered to reflect the law on important issues. If so, the conclusion reached here is that in certain straits submarines would have a right to pass submerged. Unless the Text is modified to provide

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for notice and authorization of intended passage, it is also the view of this writer that such a right does not accord with desirable community policy. 80

80. Even at this late date no showing has been made that the maritime powers require a right of submerged passage to protect their submarine deterrent forces. On the other hand, coastal nations have an understandable concern about the possible unannounced use of national territory by such foreign military craft. An appropriate balance of these interests suggests that submerged passage of nuclear submarines through straits should require notification and authorization. See Burke, supra note 7, at 212–14 (author's views). For other appraisals, see Knauss, The Military Role in the Ocean and Its Relation to the Law of the Sea, in The Law of the Sea: A New Geneva Conference 77–86 (L. Alexander ed. 1972); Osgood, supra note 7, at 11–24.
APPENDIX I

Revised Single Negotiating Text\textsuperscript{81}
Chapter II: Straits used for international navigation

SECTION 2. TRANSIT PASSAGE

\textit{Article 36}
\textit{Scope of this section}

\textit{This section applies} to straits which are used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone.

\textit{Article 37}
\textit{Right of transit passage}

1. In straits referred to in article 36, all ships and aircraft enjoy the right of transit passage, which shall not be impeded, except that if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if a high seas route or a route in an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists seaward of the island.

2. Transit passage is the exercise in accordance with this Chapter of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone. \textit{However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.}

3. Any activity which is not an exercise of the right of transit pas-

\textsuperscript{81} Revised Text, supra note 3, at 159–60. Significant changes from the Informal Text are indicated in italics. See Informal Text, supra note 2, at 158–59.
Article 38
Duties of ships and aircraft during their passage

1. Ships and aircraft, while exercising the right of transit passage, shall:
   (a) Proceed without delay through or over the strait;
   (b) Refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering straits, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
   (c) Refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress; [italics in original]
   (d) Comply with other relevant provisions of this Chapter.

2. Ships in transit shall:
   (a) Comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;
   (b) Comply with generally accepted international regulations, procedures and practices for the prevention and control of pollution from ships.

3. Aircraft in transit shall:
   (a) Observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; State aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation;
   (b) At all times monitor the radio frequency assigned by the appropriate internationally designated air traffic control authority or the appropriate international distress radio frequency.

sage through a strait remains subject to the other applicable provisions of the present Convention.
Article 39
Sea lanes and traffic separation schemes in straits used for international navigation

1. In conformity with this Chapter, States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships.
2. Such States may, when circumstances require, and after giving due publicity thereto, substitute other sea lanes or traffic separation schemes for any sea lanes or traffic separation schemes previously designated or prescribed by them.
3. Such sea lanes and traffic separation schemes shall conform to generally accepted international regulations.
4. Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits, after which the States may designate, prescribe or substitute them.
5. In respect of a strait where sea lanes or traffic separation schemes are proposed through the waters of two or more States bordering the strait, the States concerned shall co-operate in formulating proposals in consultation with the organization.
6. States bordering straits shall clearly indicate all sea lanes and traffic separation schemes designated or prescribed by them on charts to which due publicity shall be given.
7. Ships in transit shall respect applicable sea lanes and traffic separation schemes established in accordance with this article.

Article 40
Laws and regulations of States bordering straits relating to transit passage

1. Subject to the provisions of this section, States bordering straits may make laws and regulations relating to transit passage through straits, in respect of all or any of the following:
(a) The safety of navigation and the regulation of marine traffic, as provided in article 39;
(b) The prevention of pollution by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;
(c) With respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;
(d) The taking on board or putting overboard of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary regulations of States bordering straits.

2. Such laws and regulations shall not discriminate in form or fact amongst foreign ships, nor in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section.

3. States bordering straits shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of transit passage shall comply with such laws and regulations.

5. The flag State of a ship or aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Chapter shall bear international responsibility for any loss or damage which results to States bordering straits.

**Article 41**

*Navigation and safety aids and other improvements and the prevention and control of pollution*

User States and States bordering a strait should by agreement cooperate:

(a) In the establishment and maintenance in a strait of necessary navigation and safety aids or other improvements in aid of international navigation; and

(b) For the prevention and control of pollution from ships.
Submerged Passage

Article 42
Duties of States bordering straits

States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which it has knowledge. There shall be no suspension of transit passage.

SECTION 3. INNOCENT PASSAGE

Article 43
Innocent Passage

1. The régime of innocent passage, in accordance with section 3 of Chapter I, shall apply in straits used for international navigation:
   (a) Excluded under paragraph 1 of article 37, from the application of the régime of transit passage; or
   (b) Between one area of the high seas or an exclusive economic zone and the territorial sea of a foreign State.

2. There shall be no suspension of innocent passage through such straits.