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FREEDOM OF NAVIGATION: THE EMERGING INTERNATIONAL REGIME

Dinah Shelton* and Gary Rose**

INTRODUCTION

The history of the law of the sea has been dominated by a conflict between maritime states seeking unhampered navigation and access to resources and the claims of coastal states seeking exclusive control of adjacent seas.1 At one time almost all of the oceans of the world were claimed by a limited number of states,2 claims eventually overcome by the international community which recognized the benefit of seas freely accessible to all.3 Yet, coastal states have never ceased to assert their rights over waters adjacent to their coasts.4

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1. Even in antiquity, although writers favored the notion that the seas were common to all humanity, states often made extensive claims over adjacent waters. See H. Knight, The Law of the Sea: Cases, Documents and Readings 3-7 (1975) [hereinafter cited as Knight]. See also M. McDougal & W. Burke, The Public Order of the Oceans (1962) [hereinafter cited as McDougal & Burke]; Lapidoth, Freedom of Navigation—Its Legal History and Its Normative Basis, 6 J. Mar. L. & Com. 259 (1974) [hereinafter cited as Lapidoth].

It should be noted that the description of a state as "maritime" or "coastal" is not entirely accurate. Generally, maritime states may be read as referring to developed countries and coastal states may be read as referring to third-world countries. These latter designations were not used because they are not sufficiently descriptive of the competing interests; developed nations are both maritime and coastal (with the exception of Poland) which does not have a substantial coastline and some third-world countries may side with maritime interests as opposed to coastal interests.

2. Following a Papal Bull issued by Pope Alexander VI in 1493, Spain and Portugal purported to divide the major oceans. Spain claimed the Western Atlantic, the Gulf of Mexico and the Pacific Ocean. Portugal asserted ownership of the Eastern Atlantic and the Indian Ocean. In addition, claims were made by the Republic of Venice over the Adriatic Sea; Denmark and Sweden over the Baltic Sea; Norway and Denmark over the North Sea; and Great Britain over parts of the North Atlantic. Lapidoth, supra note 1, at 261-62.

3. The principle of freedom of the high seas was classically defended by Dutch author Grotius in his book Mare Liberum. The Dutch were primarily concerned with Portuguese attempts to prevent Dutch commerce with the East Indies. Grotius based his theory upon the indivisibility of the seas. Because they could not be appropriated by individual nations, they should be considered the common possession of all mankind. H. Grotius, De Juri Bellac Ac Pacis 190-91 (1646 ed. F. Kelsey trans. 1925).

4. One reason for this is to give adequate protection to "the security of the social..."
Through several centuries of claim and counter-claim, international law has seen the balance shift from fulfilling the demands of coastal states on the one hand, to accommodating the navigational interests of maritime states on the other. Recently, enhanced competition for the resources of the sea, coupled with concern over pollution of coastal waters, have produced strong demands by coastal states for a reformulation of the presently accepted rules balancing international and local interests.

The latest attempt of the coastal and maritime states to strike a balance between their competing interests has been undertaken at the Third United Nations Law of the Sea Conference. Negotiations between coastal and maritime states at the Third Law of the Sea Conference have produced the Revised Single Negotiating Text (RSNT), Part II of which contains the basic compromises between the competing interests of maritime and coastal states. This article evaluates Part II of the RSNT, the jurisdictional maritime zones it creates and the rights and duties incident to those zones. It briefly describes the history of the Law of the Sea Conferences and the basic purpose and structure of the RSNT. Then the allocation of rights and duties to coastal and maritime states which Part II of the RSNT makes is examined for its effect on the navigational rights of merchant and naval vessels. The article concludes by suggesting that while Part II of the RSNT may shift the balance in favor of the interests of coastal states and marine resource exploitation, the text contains the basic ingredients necessary to protect navigational freedom, the existence of which will be necessary in the future to foster international trade and, thus, to serve the needs of all people.

processes upon their land masses.” McDougal & Burke, supra note 1, at 2. In addition to military security, coastal interests include restricting the movement of competitive trade, securing a monopoly over offshore seabed and fishing resources, and controlling potential damage to the environment by ship-based pollution.

5. See Lapidoth, supra note 1, at 259.

6. Enhanced competition for the resources of the sea is due primarily to technological developments and exhaustion of living resources.

7. The United States is one of the strongest proponents of unhampered navigation. See, e.g., Report on the Law of the Sea Conference, 122 Cong. Rec. E1,986-87 (daily ed. Apr. 12, 1976), in which free navigation rights is declared to be one of seven primary United States negotiation goals: “The United States and Russia are both desirous of maintaining maximum freedom of the high seas, particularly unimpeded navigation through, over [aircraft] and under [submarines] straits such as Dover, Gibralter and Malacca.”
The History of the Revised Single Negotiating Text

At present, the law of the sea is codified in four international conventions. These treaties, adopted April 29, 1958, were the result of more than ten years preparatory work by the International Law Commission (I.L.C.), followed by negotiations at the First United Nations Conference on the Law of the Sea. In spite of all efforts by the Commission and by the Conference, no agreement could be reached on a number of crucial issues, the most significant being the scope of national jurisdiction. A second Law of the Sea Conference in 1960 "similarly failed to establish outer limits of national jurisdiction, due in part to disagreement between states favoring a traditional three-mile rule and those seeking to extend coastal jurisdic-


10. No agreement was reached as to the breadth of the territorial sea nor as to fishing rights within an exclusive zone. Regarding the former, the I.L.C. in its 1956 Report found no uniform practice among states and no agreement could be reached during the Conference. Territorial sea is defined in the CTS from the perspective of the coastal state as "a belt of sea adjacent to its coast." CTS, supra note 8, art. 1(1). On the rights and duties of states within this zone, see text accompanying note 42 infra and following.

Agreement was reached in article 24 of the CTS, however, that the contiguous zone may not extend beyond 12 miles from the baseline. See notes 17, 34, and text accompanying note 80 infra.


tion for the protection of natural resources.

Since 1960, disputes increasingly have arisen from the failure of the First and Second Law of the Sea Conferences to resolve these jurisdictional questions. In addition, technological developments have dramatically changed ocean use, creating a need for reconsideration of the entire legal order governing the seas. As a result, a Third Law of the Sea Conference was convened in 1973. It was directed by the General Assembly to work for the establishment of an equitable international regime governing the oceans, including the high seas, continental shelf, territorial seas, the contiguous zone, fishing and conservation of the living resources of the high seas (including the preferential rights of coastal states), and the preservation of the marine environment.

The first session of the Third Conference was held in New York beginning in December 1973. The first substantive meetings occurred at the second session held in Caracas in 1974. There, the various proposals submitted from among the 138 delegations were sent to three committees established for the Conference. The committee meetings held at the Caracas

13. Between 1960 and 1972 there was a 25% increase in the number of states claiming a 12 mile territorial zone. Those claiming only 3 miles declined by 18%. More importantly, in the same time period, there was a one-third increase in the number of states claiming jurisdiction over adjacent waters outside 12 miles. III NEW DIRECTIONS IN THE LAW OF THE SEA 161 (R. Churchill, K. Simmonds & J. Welch eds. 1973) [hereinafter cited as NEW DIRECTIONS].


15. High Seas constitute "all parts of the sea that are not included in the territorial sea or in the internal waters of a state." CHS, supra note 8, art. 1.

16. For purposes of these articles, the term 'continental shelf' is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands. CCS, supra note 8, art. 1.

17. Article 24 of the CTS, supra note 8, provides for a zone of coastal state authority up to 12 miles from the coast, known as the contiguous zone.

18. Its purpose was to settle organizational and procedural matters for subsequent Conference sessions. CARACAS DOCUMENTS, supra note 14, at xvi.

19. G.A. Res. 2750(c), 25 U.N. GAOR, Supp. (No. 28), U.N. Doc. A/8028 (1970), gave the United Nations Committee on the Peaceful Uses of the Sea and the Ocean Floor Beyond the Limits of National Jurisdiction authority to prepare for the Third Conference, including, in paragraph 7, the right to establish subsidiary organs. Three main committees were thus established: Committee I, the deep seabed; Committee
session and at the third session, which followed in Geneva, resulted in the elaboration of an informal single negotiating text intended to serve as the basis for further discussions. By May 1976, following the fourth session of the Conference at New York, this document had been renegotiated and reappeared as the Revised Single Negotiating Text. It formed the basis of informal negotiations in the three committees at the recent fifth session of the Conference.

According to the President of the Conference, the RSNT is to serve the purpose of providing "a basis for continued negotiation without prejudice to the right of any delegation to move any amendments or to introduce any new proposals." The texts are not to be regarded "as committing any delegation or delegations to any of their provisions."

The RSNT is an aggregation of four separate texts, each covering a distinct subject of negotiation. The first three parts of the RSNT were developed independently by three respective committees, while the fourth part was developed by the President of the Conference following a general debate on the item. Part I deals with the exploration and exploitation of the seabed beyond the limits of national jurisdiction. Part II is primarily concerned with dividing the seas into jurisdictional zones and determining the navigational and resource exploitation rights within each zone. Part III is devoted to the protection and preservation of the marine environment, marine scientific research, and the transfer of technology. Part IV deals with the settlement of disputes.

While some important issues still remain outstanding after years of negotiation, Part II of the RSNT has matured to the
point where it now provides a model for the probable navigational regime to be established under any treaty resulting from the Conference. 27 According to the President of the Conference, the texts were presented to the Conference as a procedural device to carry forward the process of negotiation in the expectation and the hope that the future negotiations will help towards the attainment of general agreement in keeping with the letter and the spirit of the "Gentlemen's Agreement" regarding the conclusion of a Treaty or Convention by consensu.28

PART II OF THE REVISED SINGLE NEGOTIATING TEXT: ITS EFFECT ON TRADITIONAL MARITIME ZONES AND NAVIGATIONAL RIGHTS OF MERCHANT VESSELS

The RSNT attempts to resolve the conflicting interests of maritime states and coastal states. The interests which coastal states have sought to further in the RSNT include exploitation and management of resources in the sea and seabed contiguous to their shores, and extension of their territorial sea in order to regulate a greater portion of offshore foreign maritime activity such as naval exercises, surveillance, and the discharge of pollutants from ships. On the other hand, maritime states essentially want to preserve freedom of navigation over as much of the sea as possible.29 Since approximately eighty percent of world trade moves by water,30 it is important that this interest be protected adequately in any regime which extends coastal state jurisdiction farther into the seas for the purpose of exploiting natural resources.

As competition for ocean space and resources intensifies, law must evolve new categories and concepts to effect a finer balancing of competitive interests. With the exception of straits, the balance struck in the RSNT between these interests

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28. RSNT, supra note 21, Note by the President of the Conference, at 2.


30. McDOUGAL & Burke, supra note 1, at 732.
varies with the proximity of the sea to the coastal state. Internal waters mark the high point of coastal state authority, while the high seas zone, farthest from coastal states, represents the greatest freedom for navigational interests.

In Part II of the RSNT\textsuperscript{31} the ocean has been divided into six regions based upon this proximity, with each region establishing a unique balance between the competing interests. Internal waters, basically comprised of waters landward of the baseline (low tide line), are treated as land territory. Territorial waters extend twelve nautical miles from the baseline, and coastal states have the authority, discussed below, to prevent maritime passage that is not innocent. Coastal states also have the authority to prevent infringement of customs, fiscal, immigration or sanitary regulations in the contiguous zone, an area contiguous to the territorial sea and extending not more than twenty-four nautical miles from the baseline. Archipelagic waters are those over which archipelagic states exercise special authority.\textsuperscript{32} The high seas is the area over which all states stand on an equal footing; where freedom of access and use is the governing principle. Finally, the RSNT creates a new regime within the law of the sea—the exclusive economic zone, which extends 200 nautical miles from the baseline of a coastal state. Under this new regime, the coastal state exercises sovereign rights over the resources of the zone while foreign states may pursue navigational and other interests within the zone. Each state must have “due respect” for the other’s activities therein.

Of the regions to be discussed below, the territorial sea straits and the exclusive economic zone are the topics of greatest interest to maritime states. These are the areas over which coastal states have the greatest potential discretion and authority to inhibit foreign navigation. If the sixth session of the Law of the Sea Conference is to be successful, coastal states will have to assuage the fear of maritime states that the RSNT authorizes coastal states to gradually extend their territorial waters to 200 miles.\textsuperscript{33}

\textsuperscript{31} All references to the RSNT will be to Part II unless otherwise noted.

\textsuperscript{32} Because archipelagic waters is an amalgamation of traditional maritime concepts, it will be discussed in this part of the article although it is technically a new zone.

\textsuperscript{33} See McCloskey & Gilman, supra note 29, at E5,754.
Internal Waters

Waters falling landward of the baseline\textsuperscript{34} of the territorial sea are internal.\textsuperscript{35} Nations enjoy basically the same prerogatives over internal waters as they do over their land territory. Both the CTS\textsuperscript{36} and the RSNT\textsuperscript{37} speak of land and internal waters as having equal status. Neither the CTS nor the RSNT impose any duties upon a coastal state regarding these waters, leaving coastal states the power to exercise jurisdiction in accordance with bilateral treaties and customary practices.\textsuperscript{38} The state retains exclusive right to control entry into these waters; foreign vessels, except in distress,\textsuperscript{39} enjoy no right of access and once within internal waters are subject to coastal state jurisdiction. However, where the drawing of straight baselines encloses waters formerly not considered internal waters, the RSNT provides that such waters will be treated as territorial waters allowing ships the right of innocent passage.\textsuperscript{40}

Territorial Waters

Non-strait waters and the right of innocent passage. Under the RSNT, those waters extending seaward twelve nautical miles from the baseline along a state’s coast shall be considered territorial, settling one of the enduring controversies in modern international law.\textsuperscript{41} Within these waters, ships of all foreign states enjoy the right of access for the purposes of navigation.\textsuperscript{42}

\textsuperscript{34} A baseline is the low-water line along a state’s coast, as marked on large-scale charts officially recognized by the coastal state. RSNT, supra note 21, art. 4. Where a state possesses a highly irregular coastline, or a fringe of islands adjacent to the coast, it may draw straight baselines from selected low-water points along the coast or the island. RSNT, supra note 21, art. 6; CTS, supra note 8, art. 4. See also Anglo-Norwegian Fisheries Case, 3 I.C.J. 132 (1951).

Establishing the low-water mark is difficult and largely left to the discretion of the state. However, the low-water line should not, at its lowest, vary appreciably from the median line or the spring (lowest) tides occurring over a given period along the coast. See 1 A. Shalowitz, Shore and Sea Boundaries 29 (1962) [hereinafter cited as Shalowitz].

\textsuperscript{35} RSNT, supra note 21, art. 7.

\textsuperscript{36} CTS, supra note 8, art. 1.

\textsuperscript{37} RSNT, supra note 21, art. 1.

\textsuperscript{38} Wildenhus’ Case, 120 U.S. 1 (1886).

\textsuperscript{39} United States v. Mexico (“Kate A. Hoff Claim”), United States/Mexican Claims Comm’n, April 2, 1929. See also Restatement (Second) of Foreign Relations Law of the United States § 48 (1965); CTS, supra note 8, art. 14.

\textsuperscript{40} RSNT, supra note 21, art. 7. On innocent passage, see text accompanying note 42 infra and following.

\textsuperscript{41} See Shalowitz, supra note 34, at 207, 210-11, 275.

\textsuperscript{42} As with article 14 of the CTS, no distinction is made between naval and
The regime governing the exercise of this right is innocent passage, which has the following characteristics under both existing law and article 16-31 of the RSNT: (1) submarines must transit on the surface and show their flag; (2) most aircraft have no right of innocent passage; (3) the passage must not prejudice the "peace, good order, or security of the coastal state;" (4) when essential to its security, a coastal state may suspend the right to innocent passage in specific areas of its territorial sea without discrimination and after adequate notice; (5) coastal states retain limited jurisdiction over on-ship activity.

Article 24(1) grants the coastal state the authority to take "the necessary steps in its territorial sea to prevent passage that is not innocent." For navigational interests the crucial question is by whom and upon what basis this innocence is determined. The only example of non-innocent activity in the CTS is fishing. Beyond that, it is largely a matter of coastal state discretion to determine the existence of prejudice to the "peace, good order or security of the state." Fearing the arbitrary or capricious use of this discretion, maritime states have secured in the RSNT a more concrete definition of acts deemed non-innocent and, therefore, capable of being regulated or prohibited by coastal states.

Under the RSNT, non-innocent activities include: any
threat or use of force against the coastal state; weapons practice; espionage; any acts of propaganda aimed at affecting the defense or security of the coastal state; the launching or landing of any aircraft or military device; embarking or disembarking any commodity, currency, or person contrary to the customs, fiscal, immigration or sanitary regulations of the coastal state; willful and serious pollution contrary to the proposed treaty; scientific and survey activities; and "any other activity not having a direct bearing on passage." 52

The last clause gives the coastal state a degree of discretion to interfere with navigation. Nevertheless, the emphasis in the RSNT that certain activities undertaken during transit constitute non-innocent passage, provides a substantial improvement over the ambiguity of the CTS. The latter could be interpreted as allowing states to assert that entry into territorial waters—that is, passage itself—would be prejudicial to the peace, good order or security of the state. Some coastal states have interpreted the language of the 1958 CTS as permitting them to selectively control passage on the basis of flag or destination or the character of the ship or cargo. 53 Controlling passage based on these criteria would be contrary to the intent of the RSNT because, in addition to the focus on ship activity during transit, discussed above, the text expressly denies the coastal state any right to "discriminate in form or in fact against the ships of any state or against ships carrying cargoes to, from or on behalf of any state." 54 Furthermore, article 20(2) prevents coastal state regulation of "design, construction, manning or equipment of foreign ships or matters regulated by generally accepted international rules . . . ." 55

The present text reflects the competing interests being pressed during the negotiations. Coastal interests are expressly protected, while the essential right of access receives a two-fold reassurance. By stressing that activity during transit is the issue rather than access, and that discrimination against flag,

52. RSNT, supra note 21, art. 18(2).
53. Stevenson & Oxman, supra note 43, at 43. While this allegation is very often made, the authors could find no concrete examples of actual coastal state abuse of discretion. The fear is largely prospective. Under the CTS, coastal states could abuse shipping. See A. Hollick & R. Osgood, New Era of Ocean Politics 103 (1974) [hereinafter cited as Hollick & Osgood].
54. RSNT, supra note 21, arts. 23(1), (2).
55. In light of recent accidents involving oil tankers, more attention may be given to this provision at the sixth session.
cargoes, or design cannot be exercised, the RSNT reduces the opportunity for politically motivated interference. Hence, the protection of passage that is innocent is generally greater for all nations under the RSNT than under the CTS.56

Straits and the right of transit passage. With the traditional three-mile wide territorial sea, most important straits contain a corridor of high seas waters where all nations can exercise the usual high seas rights of surface transit, overflight and submerged passage.57 The RSNT, however, extends coastal state territorial jurisdiction to twelve miles, bringing over one hundred straits, many of crucial importance, under the regime of territorial seas and, therefore, innocent passage. In the view of many maritime states, although innocent passage would be acceptable for territorial sea passage in general, its restrictions and its grant of discretion to coastal states to declare certain passage non-innocent would not provide an adequate guarantee of free movement through these crucial straits.58

56. Although the vague reference to passage which “prejudices the peace, good order or security” in article 18(1) from the CTS, a tribunal should interpret this in light of the activity-oriented example of article 18 (2), see text accompanying note 52 supra, and the prohibition on discrimination in article 23.

57. Straits have been variously defined as: “an area of the sea, a narrow sea channel which separates two adjacent land masses or connects two different water bodies,” Hodgson & McIntyre, Maritime Commerce in Selected Areas of High Concentration, in HAZARDS OF MARITIME TRANSIT 9 (T. Clingon & L. Alexander eds. 1973) [hereinafter cited as Hodgson & McIntyre]; “a narrow passage of water joining two larger bodies of water,” KNIGHT, supra note 1, at 347; “a connection of the sea between two territories, being of a certain limited width and connecting two seas otherwise separated . . . .” Hodgson & McIntyre, supra at 9. Although it is clear that there are limitations on the width of areas which will be considered straits, no precise standard has been established. The range of recognized international straits currently varies from less than one nautical mile to 105 miles. See KNIGHT, supra note 1, Annex I at I-1.

58. Most important straits are wider than six miles. See KNIGHT, supra note 1, Annex I.

59. CHS, supra note 8, art. 2.

60. See Hodgson & McIntyre, supra note 57, at 10-17; KNIGHT, supra note 1, Annex I.

61. These include restrictions on overflight and submerged passage. See text accompanying note 41 supra and following.

62. The grant of discretion to coastal states is especially broad under article 16(4) of the CTS, which states that innocent passage in straits shall not be suspended. This clearly implies that non-innocent passage can be suspended, thereby incorporating into straits passage the full measure of discretion which coastal states exercise over passage through their territorial sea.

63. The United States originally supported protection of high seas navigational rights in straits in exchange for recognition of a twelve mile territorial zone. New Directions, supra note 13, at 162-63. A Soviet proposal would have added: “No State
In an attempt to meet the need for transit through straits free of the restrictions of innocent passage, the RSNT creates a new type of passage applicable only to these straits, called transit passage.\textsuperscript{44} Transit passage is:

the exercise in accordance with this Chapter of the freedom of navigation and overflight \textit{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.\textsuperscript{46}

As discussed below, the RSNT accords the right of transit passage to ships which navigate these straits for the purpose of transit so long as the on-ship activity incidental to passage is consistent with the purpose of transit. In return for the right of transit passage, maritime states are subject to the good faith of coastal states who are granted the discretion to determine the character of on-ship activity incident to passage, as well as the power to regulate passage undertaken for purposes other than transit. Also, coastal states are granted rights to establish new sea lanes through the straits, so long as they are consistent with international norms, as well as the right to enact laws proscribing specific types of conduct, provided they also are consistent with international norms.

While the basic aspects of transit passage are clear, it appears that serious interpretive problems will arise from the textual lacunae and linguistic vagueness used to achieve a balance between the interests of coastal states in preserving the integrity of their territorial waters and the interests of maritime states in unrestricted navigation. The boundaries of acceptable behavior during passage are not clearly defined, nor is the scope of enforcement authority for violations of international norms.

Maritime passage, for purposes other than continuous and expeditious transit is clearly not protected under this section.\textsuperscript{64}
Thus, marine research, mineral exploration and resource exploitation in international straits are not protected by transit passage. Since most important straits will lose a high seas corridor under the RSNT, transit passage represents those few aspects of the high seas regime which maritime states sought to maintain such as submerged transit, overflight, and unrestricted access. To lose the right of transit passage is to lose the guarantee of uninterrupted passage. The rights conferred upon the international community to navigate international straits thus apply for the sole purpose of "continuous and expeditious transit."

The boundaries of acceptable behavior during passage, at first reading appear to favor navigational freedom, guaranteeing the rights of submerged transit, overflight and access. But a closer analysis reveals that coastal states retain a large measure of discretion to determine whether activity is "incident to" passage, and, therefore, within the protection guaranteed to those engaged in "transit passage."

Therefore, characterization by coastal states of incidental on-ship activity during passage is another problem which may cause the loss of transit passage. Even during otherwise permissible continuous and expeditious transit, a vessel could conceivably discharge waste, undertake research, or launch military aircraft. The question is whether these incidental activities violate the right of transit passage. Article 38(1)(c) addresses this question: "Ships and aircraft . . . shall: 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." It is unclear

67. Article 37(1) guarantees to "all ships" the right of transit passage without restriction as to the mode of transit.
68. RSNT, supra note 21, art. 37(1).
69. Article 42 prohibits coastal states from suspending the right of transit passage through straits used for international navigation. While article 14 of the CTS prevents the suspension of innocent passage through straits used for international navigation, this implies that non-innocent passage can be suspended. As the concept of innocent passage is, in the opinion of maritime powers, too vague, coastal state discretion to harass traffic in straits exists as a constant possibility. See Nolta, Passage through Straits: Free or Innocent? The Interests at Stake, 11 S.D.L. Rev. 815 (1974).
70. See, e.g., note 71 infra.
71. "In the South Pacific and the Caribbean, the use of helicopters during the transit of certain straits by deep-draft vessels is useful for such navigational purposes as screening for opposed exits from the strait." Hollick & Osgood, supra note 53, at 105. Indonesia has complained of the use of such aircraft in local straits.
72. Emphasis added. Note the similarity of this to the prohibition on activity
whether the characterization of activities as incident to navigation is within coastal state discretion, but if so, the right of transit passage is tenuous indeed. The right is subject to loss if passage is not continuous and expeditious or if any on-ship activity is not incident to otherwise acceptable passage.

The vagueness of the transit passage provisions causes a further problem regarding the enforcement of international norms. Some internationalization of straits has occurred in the RSNT. Coastal states are allowed to establish sea lanes to promote the safe passage of ships only with the approval of an international authority.\(^73\) Laws regarding discharge of oil, oily wastes, and other noxious substances in the straits may be enacted only in conformity with "applicable international standards."\(^74\) Beyond these, the coastal state may enact laws only regarding prevention of fishing, and violation of customs, fiscal, immigration or sanitary regulations.\(^75\) While strait states presumably have the power to enforce the latter class of laws so long as violations occur within their jurisdictions,\(^76\) the text is silent as to who has the authority to enforce the former class of laws regarding the discharge of oil, oily wastes, and other noxious substances into the straits. If authority is not implicit in the RSNT, strait states may have to look to other treaties for authority to enforce international norms.

While the scope of state authority to enforce international norms is unclear, it is clear that strait states have the authority to enforce violations of transit passage. As provided in article 37(3), "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." Since every activity not incident to transit would necessarily not be an exercise of the right of transit passage, every such activity falls during innocent passage in article 18(2)(1) where "[a]ny . . . activity not having a direct bearing on passage" is considered non-innocent. "Direct bearing" does appear to be a higher standard.

\(^73\) RSNT, supra note 21, arts. 39(4), 39(5). Article 39 is currently under attack by strait states.

\(^74\) Id. art. 40(6).

\(^75\) Id. art. 40. In this regard, article 40(2) limits coastal state jurisdiction further by providing that "[s]uch 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."

\(^76\) Article 41 can be interpreted as authorizing coastal state enforcement: "[F]oreign ships exercising the right of transit shall comply with such laws and regulations of the coastal state." See W. Burke, Contemporary Law of the Sea: Transportation, Communication and Flight 27 (1975) [hereinafter cited as Burke].
under other relevant provisions of the Convention. By this means, activities outside the scope of transit passage such as marine research, mineral exploration and resource exploitation, would either be governed by provisions of the territorial sea and innocent passage or by those governing the exclusive economic zone, depending upon the width of the strait.\(^7\) Thus, the protection afforded by transit passage applies only insofar as the transiting vessel strictly adheres to the standards of the text respecting activities incident to continuous and expeditious navigation. Nearly every violation of the right of transit passage would also constitute a violation of the provisions on innocent passage.\(^7\)

Article 24(1), taken with article 37(3), appears to grant to strait states precisely the same enforcement powers they enjoy in the territorial sea. However, there remain some differences between the regime of straits and that of the territorial sea. As noted above, overflight and submerged passage cannot be prohibited by strait states, nor can those states enact laws which would impair transit or impose regulations stricter than international standards regarding pollution control, vessel design, or sea lanes. States do have these powers over their territorial sea.

In sum, transit passage through straits, as conceived in the RSNT, grants the rights of both submerged passage and overflight, so important to major naval powers. However, the protection of transit passage is afforded vessels only for acts incident to passage. A coastal state perceiving on-ship activity not, in its opinion, incident to transit, is accorded the full powers available to it under the regime of innocent passage. From the perspective of merchant vessels, then, this new regime is little more than a mildly relaxed innocent passage regime.\(^7\)

\(^7\) Although the right of transit passage was primarily drafted because of maritime states' fears over extension of the territorial sea regime to 12 miles, the provisions regarding transit passage are not limited to straits of less than 24 miles breadth. Article 36 states that the sections apply "to straits which are used for international navigation between one area of the high seas or an exclusive economic zone and another area of high seas or an exclusive economic zone." Thus, it seems that states whose economic zones fall partly within international straits must exercise their rights in the straits subject to this chapter. This is further supported by article 48(7) which clearly recognizes the primacy of essential sea lanes over the erection of artificial structures.

\(^7\) Compare the provisions of article 18 regarding the meaning of innocent passage with articles 38-41 dealing with: the duties of ships and aircraft during passage; sea lanes; regulations by strait states; and navigation and safety aids.

\(^7\) Compare the "incident to" provision of transit passage with the "direct bear-
passage is certainly not a high seas regime, nor has coastal state discretion been greatly reduced. As long, however, as transiting vessels strictly observe the prohibition on undertaking "any activity not incident to passage" and coastal states act in good faith, the regime should adequately protect the interests of both coastal and navigation states.

**Contiguous Zone**

The RSNT maintains a zone established by the First Law of the Sea Conference in 1958, the contiguous zone. The RSNT, however, doubles the breadth of this zone. Article 32 provides that the contiguous zone is contiguous to the territorial sea and may extend no more than twenty-four nautical miles from the baseline used to establish the breadth of the territorial sea. A coastal state has the authority to control activities in this zone to prevent the infringement of its customs, fiscal, immigration, or sanitary regulations in its territorial sea. Since maritime states have lived with the concept for almost twenty years, the contiguous zone was not a highly controversial topic at the Third Law of the Sea Conference.

**Archipelagic Waters**

Prior to the RSNT no special rules pertaining to the coastal jurisdiction of archipelagic states achieved general recognition. At both the 1958 and 1960 Law of the Sea Conferences, mid-ocean archipelagic states such as Indonesia and the Philippines proposed special regimes governing waters within lines drawn around archipelagoes, although in both cases the Conferences failed to enact those proposals. Since the Second Conference, some archipelagic states have made unilateral pro-

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80. See note 17 supra.
81. The geographical definition of an archipelago is "a formation of two or more islands (islets or rocks) which geographically may be considered as a whole." Amerasinghe, *The Problem of Archipelagoes in the International Law of the Sea*, 23 INT'L & Comp. L.Q. 539 (1974) [hereinafter cited as Amerasinghe]. Article 118(a) of the RSNT vaguely defines an archipelagic state as one "constituted wholly by one or more archipelagoes [which] may include other islands." Article 118(b) defines an archipelago as "a group of islands, including parts of islands, inter-connecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."
82. See *Burke*, supra note 76, at 5-8.
clamations enclosing the waters within archipelagoes, but these claims have been resisted by maritime states.

In 1973, Fiji, Mauritius, Indonesia and the Philippines authored declarations of principles governing archipelagic states which evolved into a single set of proposed articles concerning the respective rights of archipelagic states and maritime countries. This proposal and one drafted by the United Kingdom were considered at the Caracas session of the Third Conference.

Based on the two proposals, negotiations at the Conference produced general agreement that there should be special provisions governing archipelagic states and that these new rules should protect existing navigational interests. The RSNT balances both sets of interests in the creation of a new region: archipelagic waters. Within this region ships enjoy the right of innocent passage through enclosed archipelagic waters which are not designated or traditional sea lanes, and the right of "archipelagic sea lanes passage" (virtually identical to transit passage) through designated and traditional sea lanes.

83. Ecuador has treated the Galapagos as a unit, with the longest baseline between the islands being 147 miles. Both Indonesia and the Philippines make similar claims. Amerasinghe, supra note 81, at 544. See U.N. Doc. A/CONF. 19/5/Add. 1 (1960) and [1956] Y.B. INT’L COMM’N 69. In regard to Indonesia, the original government claim, made in December, 1957, provided that “all waters surrounding, between and linking the islands belonging to the State of Indonesia ... constitute natural parts of island or national waters under the absolute jurisdiction of the State of Indonesia.” 8 EMBASSY OF INDONESIA, REPORT ON INDONESIA (Nov. 1957-Jan. 1958).


87. These special provisions should protect existing navigational interests in, for example, the traditional lanes through Indonesia and the Philippines.

88. These are waters within baselines drawn, according to article 119, from “the outermost points of the outermost islands and drying reefs of the archipelago,” with some limitations on the ratio of water enclosed to the land masses. Article 122 permits the archipelagic state to draw closing lines within the archipelagic waters for purposes of delimiting its internal waters, making clear that archipelagic waters are a different regime. Nor are such waters to be considered territorial sea, as this is distinguished from archipelagic waters in article 120.

89. RSNT, supra note 21, art. 124(1). While warships are included, aircraft are not.

90. Id. art. 124. But see id. arts. 125(1), 125(9).

91. Id. arts. 124, 125. A similar right pertains in the regime of the territorial sea. See text accompanying note 57 supra.

92. See text accompanying note 57 supra for a discussion of transit passage. See
The regime of archipelagic sea lanes passage applies to navigation through areas designated by archipelagic states as sea lanes or through the routes normally used for international navigation should the archipelagic state choose not to create special lanes. Articles 124 and 125 make it clear that in these areas the general rule of innocent passage is not applicable, and that the right to use traditional lanes is not contingent upon the permission of archipelagic states in the event of non-designation. Hence, the international community, in exchange for recognition of archipelagic waters, has received the right of international passage through the enclosed waters, not contingent upon an archipelagic state's permission.

Most of the provisions regarding archipelagic sea lanes passage are identical to those governing transit passage through straits. In both cases the states' proposals for the establishment of new sea lanes must be submitted to "the competent international organisation" for adoption. The organization may prescribe only lanes agreed upon by the states. An additional provision, crucial from the perspective of international navigation, defines the rights and duties of archipelagic and maritime states in sea lanes passage by incorporating articles 38, 40 and 41, dealing with the rights and duties of transit passage. The result is that the relations of coastal state and transiting ships in archipelagic sea lanes are the same as in international straits.

High Seas

Rules governing navigation on the high seas have traditionally included exclusive flag state jurisdiction over vessel

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Burke, supra note 76, at 5.
93. Designated lanes must include traditional sea lanes used for international navigation. RSNT, supra note 21, art. 125(4).
94. Article 124 provides that the right of innocent passage is "subject to" article 125 which deals with the right of archipelagic sea lanes passage.
95. "If an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation." RSNT, supra note 21, art. 125(12).
96. Compare id. art. 39(1) with id. art. 125(6). Compare also id. art. 39(6) with id. art. 125(10).
97. Compare id. art. 39(4) with id. art. 125(9).
98. Id. art. 126.
99. Article 75 defines "high seas" as all the parts of the sea that are not included in an exclusive economic zone, discussed infra at text accompanying note 108 and following, or internal, territorial, or archipelagic waters.
conduct, as well as a right of unrestricted access and use, including navigation and fishing, for all nations. Article 80 maintains the tradition of flag state jurisdiction; "Ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties or in the present convention, shall be subject to its exclusive jurisdiction on the high seas." Article 76 continues the basic right of unrestricted access.

The high seas is the area which affords the greatest freedom to maritime states. However, the RSNT substantially reduces the amount of ocean surface which presently has the status of high seas. As mentioned above, over one hundred straits which contain a high seas corridor under a three mile territorial sea regime will be subject to the provisions of territorial waters and transit passage under the RSNT. While the loss of high seas status for strategic straits is important, the high seas zone will lose a much greater ocean surface area to the exclusive economic zone. Under the RSNT, the exclusive economic zone contains approximately thirty-six percent of the ocean's surface.

A NEW MARITIME ORDER—THE EXCLUSIVE ECONOMIC ZONE

Disagreement over the breadth of territorial seas has increased since World War II in part due to a perception by the developing coastal states that their land resources are exhaustible, their populations are expanding, and high seas freedom of fishing provides no protection from over-exploitation by the

100. McDougal & Burke, supra note 1, at 798. See also RSNT, supra note 21, art. 76.
101. CHS, supra note 8, art. 2.
103. These "cases" are relatively limited: for example, suppression of piracy (art. 93); suppression of unauthorized broadcasting (art. 97); and prohibition of slave trade (art. 87).
104. This is verbatim from the CHS, supra note 8.
105. See text accompanying note 60 supra.
106. RSNT, supra note 21, arts. 46, 75.
108. McNees, Freedom of Transit Through International Straits, 6 J. MAR. L. & COM. 175, 181 (1975): "At the beginning of the 20th century, twenty of twenty-one states which claimed or acknowledged a territorial sea at that time had adopted the three-mile limit or acknowledged it as being the law." See also note 3 supra.
fleets of developed nations. To protect their interests, coastal state jurisdiction has been unilaterally extended, initially by Latin American states, to areas traditionally considered high seas. The label given by each country to these extended zones has varied from "Patrimonial Sea" to "Exclusive Economic Zone." To accommodate these interests, the RSNT creates the exclusive economic zone which extends 200 miles from the baseline of a coastal state. However one labels them, the extension of coastal state jurisdiction over new zones adjacent to their coasts marks "an irreversible trend towards a new legal order for the oceans."

Definition and Development

An economic zone is an area adjacent to the territorial sea where a state exercises jurisdiction over resource exploitation. Difficulties arise in drafting a formula that both fairly and adequately establishes coastal state jurisdiction over resources while protecting other international uses of the zone. Despite intense debate and negotiations at the fifth session of the Conference, the question of the juridical status of the zone and the rights enjoyed by all states within it were not solved and remain among the most difficult questions facing the Conference.


112. Under RSNT, article 45, this is an area not to "extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."

113. These international uses are primarily navigation, communications, traditional fishing rights, and, to a lesser extent, national defense.

114. "Unfortunately, I cannot say that the meetings of that group [dealing with
The impasse at the Conference results from two different concepts as to the status of the zone. Maritime states argue that the zone should retain its traditional high seas status, subject to coastal state jurisdiction over economic resources. As such, all other uses would belong to the international community as of right. An analogy to property law suggests that maritime states wish to see "title" to the zone remain with the international community, subject to easements for the benefit of coastal states. Regarding unallocated or unforeseen uses of the zone, the international community would enjoy a prima facie right superior to coastal claims of jurisdiction, as traditionally every nation had a right to engage in whatever activities the high seas might allow. The result of such a regime would be that any coastal state claim to exclusive jurisdiction would be an exception to the prevailing regime and the state seeking such jurisdiction would bear the burden of proving the validity of its claim.

In contrast to this proposal, coastal states adopt two positions. More extremist delegations claim that the economic zone should be included within the territorial sea, that is, title to the zone should reside in coastal states subject to easements which they might grant to maritime states. The more moderate majority argue for treating the zone as sui generis: that is, a new regime within the legal order of the oceans. Under this formulation, the zone is neither territorial because of the unreasonable restrictions that that status would place upon navigation, nor is it high seas since the absolute freedoms characteristic of that regime are incompatible with the restrictions necessarily imposed to manage resource exploitation. A zone sui generis represents a compromise between the advocates of high seas

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115. CHS, supra note 8, art. 2.
116. Despite strenuous efforts by maritime states, this regime was not adopted at the conference. The United States is especially unhappy over this failure. "The U.S. made clear that the provisions of the RSNT on this subject are unacceptable as written and that we cannot agree to any text which makes it clear that the zone is not high seas. On the contrary, the text must somehow explicitly accord high seas status to the zone." U.S. Delegation Report, supra note 27, at 10.
117. Chairman Aguilar seems to hold this majority view. RSNT, supra note 21, Committee II Chairman's Note, at 4.
status and those proposing an extended territorial sea.

The RSNT reflects the compromise position: it creates a zone which allocates the rights and duties of coastal states, the rights and duties of the international community, and defines the zone for purposes of settling disputes over unallocated or unforeseen uses. An analogy to property law suggests that uses of the zone are allocated between the maritime and coastal states in the same way that land may be divided into surface uses such as agriculture, sub-surface uses such as mining, and above-surface uses such as aircraft flight lanes.

Residual Rights

It is in the RSNT treatment of unallocated rights and unforeseen uses that the equitable balance achieved in the text can best be demonstrated. Residual rights involves the competence of states to undertake activities not dealt with explicitly by the treaty. As noted above, in the high seas the international community is granted the right to enjoy all uses the sea might provide, whether foreseen or unforeseen. No state may claim an exclusive right therein. In contrast, the principle of the territorial sea involves granting sovereignty to the coastal state over all foreseen and unforeseen uses within the zone. In the exclusive economic zone, however, a balance is struck between coastal state sovereignty and the international community’s right of use.

The underlying principle guiding the allocation of residual or unforeseen uses within the economic zone is neither high seas freedom nor territorial sea sovereignty, but that of equity. Under the regime of the economic zone there is no presumptive vesting of residual rights to either the coastal state or the international community. Rather, allocations of rights and jurisdiction within the zone, where not explicitly dealt with under the treaty, are to be made on a case by case basis. In recognition that the zone is to be shared and extensively used by sovereign states, the treaty permits each to use the zone to the fullest extent, while requiring that account be taken

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118. Article 44 defines coastal rights, article 46 defines other states’ rights, and article 47 defines the zone for purposes of settling disputes over unallocated and unforeseen uses.
119. CHS, supra note 8, art. 2.
120. CTS, supra note 8, art. 1.
121. RSNT, supra note 21, art. 47.
of the competing interests of other users. This is the "co-
operative zonal regime" sought by delegates uncomfortable
with the traditional lack of legal order on the high seas.\textsuperscript{122}

While the RSNT speaks in terms of "sovereign rights and
jurisdiction"\textsuperscript{123} the sovereignty is in no sense unlimited com-
tence or plenary jurisdiction. States are required by the text to
exercise their rights in conformity with the regime of the eco-
nomic zone and that regime is explicitly one of "due respect"\textsuperscript{124}
for the interests of all user states. Thus, "in the economic zone,
the coastal state would exercise sovereign rights over its re-
sources but not over the zone itself, and must take into consid-
eration the rights of other States . . . ."\textsuperscript{125}

In principle, then, equity rules the exclusive economic
zone. It should be noted that article 47 applies to "cases where
the present convention does not attribute rights or jurisdic-
tion." The delegates, however, have undertaken to attribute
many rights and duties within the zone, presumably in con-
formity with the principles expressed in article 47: "in the light
of all relevant circumstances, taking into account the respec-
tive importance of the interest involved to the parties as well
as the international community as a whole." A reading of the
rights and duties allocated within the treaty may indicate a
less than perfect adherence to this principle, but certainly in
the case of any dispute arising over competing uses, the consid-
erations articulated in article 47 would provide the basis for
settlement by a tribunal.

\textit{Allocated Rights: Navigation and Coastal Authority over
Resources}

Certain rights and duties have been allocated in the exclu-
sive economic zone regarding the navigational rights of mari-
time states and the coastal states' sovereign rights of resource
exploitation and management (including pollution control). It

\textsuperscript{122} See, e.g., Statement of M. Templeton (N.Z.), \textit{OFFICIAL
RECORDS}, supra note 111, at 170.
\textsuperscript{123} RSNT, supra note 21, art. 44.
\textsuperscript{124} Article 47 provides guidance as to the mutual duty of "due respect" imposed
on all states. See text following note 144 infra.

The concept of "due respect" can be analogized to the concept of nuisance in
property law. Essentially, due respect requires coastal states to exercise their rights in
a manner which will not unreasonably interfere with the use and enjoyment of the
legitimate interests of other user states.

\textsuperscript{125} Mr. Castaneda (Mexico), \textit{OFFICIAL RECORDS}, supra note 111, at 173.
is important to assess whether the balance achieved by the Conference has subordinated navigational freedoms to the sovereign rights of coastal states. It must be noted at the outset that article 76 of the RSNT which defines traditional high seas freedom such as fishing and access to minerals, does not apply to the economic zone\textsuperscript{126} because article 75 excludes the economic zone from the areas in which the high seas regime applies. Other articles concerning various rights and duties in the high seas, including exclusive flag state jurisdiction, are incorporated into the zone only, "insofar as they are not incompatible with this Chapter."\textsuperscript{127} Thus, the economic zone, while clearly not high seas, incorporates some high seas attributes to the extent that they do not alter the concept of the economic zone. However, to insure coastal state rights to develop resources and protect the marine environment, the high seas right of all nations to exploit the area no longer exists. Exclusive flag state jurisdiction may suffer some corresponding restriction.

\textsuperscript{126} RSNT, \textit{supra} note 21, art. 76 (freedom of the high seas):

1. The high seas are open to all States, whether coastal or landlocked. Accordingly, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by the present Convention and by other rules of international law. It comprises, \textit{inter alia}, both for coastal and landlocked States:

(a) Freedom of navigation;
(b) Freedom of overflight;
(c) Freedom to lay submarine cables and pipelines, subject to Chapter IV [regarding the continental shelf];
(d) Freedom to construct artificial islands and other installations permitted under international law, subject to Chapter IV;
(e) Freedom of fishing, subject to the conditions laid down in section 2 [regarding management and conservation of the living resources of the high seas];
(f) Freedom of scientific research, subject to Chapters IV and ... [marine scientific research].

2. These freedoms shall be exercised by all States, with due consideration for the interests of other States in their exercise of the freedom of the high seas, and also with due consideration for the rights under the present Convention with respect to activities in the International Area.

\textsuperscript{127} RSNT, \textit{supra} note 21, art. 46(2). The flag state of a vessel thus retains exclusive jurisdiction over it under article 80 to the extent that it is not incompatible with the provisions governing the economic zone. Note the provisions of the Vienna Treaty on Treaties: "When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." Vienna Convention on the Law of Treaties, art. 30(2), \textit{done} May 23, 1969, \textit{U.N. Doc. A/CONF. 39/27, reprinted in T. Elias, The Modern Law of Treaties} 225 (1974).
Navigation. Freedom of navigation and communication are made "subject to the relevant provisions of the present Convention" under article 46:

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy subject to the relevant provisions of the present Convention, the freedoms of navigation and overflight and of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to navigation and communication.

2. Articles 77 to 103 [regarding the high seas] and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Chapter.

3. In exercising their rights and performing their duties under the present Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coast State and shall comply with the laws and regulations enacted by the coastal State in conformity with this Chapter and other rules of international law.

The degree of interference resulting from this provision will depend upon the quantity and quality of the provisions that these freedoms are "subject to." Unreasonably broad grants of coastal state jurisdiction could reduce navigational freedom to nonexistence.

A consideration of the origin of the "subject to" article is useful to determine the potential for interference resulting from this clause. Conference Committee II, responsible for developing Part II of the RSNT, turned down a proposal making coastal exploitation "subject to" a high seas zone, as well as a "sui generis" draft which placed the burden of proof upon the coastal state for justifying an interference with navigation. Conversely, a proposed article making navigation "subject to the exercise by the coastal State of its rights within the area" was not incorporated either. The provision finally


negotiated makes navigation subject to the convention rather than to coastal rights. The difference is that it tempers the tradition of high seas freedom not with unlimited coastal state expansion of rights, but with the balance set out in the RSNT. Navigation is exercised subject to all the articles in the RSNT, and, significantly, no express declaration that navigation is "subject to" the coastal right to exploit and conserve the zone exists in the text. Rather, the text imposes a duty upon both parties to exercise "due regard" for the rights of other states. Coastal state rights are tempered by the requirement of due regard and the "sui generis" regime of the zone, as are the rights of navigation and communication.

While the choice of language creating the right of navigation is a source of concern, particularly the "subject to" clause in 46(1), the provisions to which it is subject are, on the whole, balanced and consistent with the necessity for mutual consideration in a geographical zone where simultaneous activities are often undertaken by different sovereign entities. Clearly, some formula must be adopted that imposes a duty to compromise on the part of these sovereign entities. A high seas regime would perhaps strengthen freedom of navigation, but a duty to defer to certain coastal activities would remain essential. As it is now, no provisions exist in the text clearly subjecting one interest to another.

The parameters of sovereign rights. While the economic zone provisions require coastal states to give due regard to the navigational rights of maritime states, the RSNT grants "sovereign rights" to coastal states over resources within the zone which were traditionally available to all nations. The grant of sovereign rights does not affect the status of non-living resources on the surface or sub-surface of the continental shelf nor of living sedentary resources attached to it, since these have been governed by coastal states under earlier treaties. Beyond this, the RSNT represents an expression of present coastal state claims to resource jurisdiction well beyond the

131. RSNT, supra note 21, arts. 44(2), 46(3).
133. CHS, supra note 8, art. 2.
The only expansion of prevailing practice is drafted into provisions making research and "any economic activity" subject to coastal jurisdiction. The major impact of the treaty, then, may well be in bringing consistency and predictability to an area of conflicting state practice.

From the grant of sovereign rights to coastal states it can be predicted that state laws will result governing such subjects as the preservation and protection of fisheries, erection of artificial structures, and pollution from ships. However, coastal state duties and limitations upon these rights can be implied from the language of the text in several areas, and is a necessary implication if navigation is to be protected. For example, the existence of a contiguous zone under article 32 implies limited authority within the economic zone. Original proposals for the economic zone did not include provisions for a contiguous zone and many delegations at Caracas expressed the view that the existence of the exclusive economic zone would render it unnecessary. Yet certain delegations expressed the view that the enforcement of immigration, customs, fiscal and sanitary regulations were attributes of territorial sovereignty, not the right of economic exploitation and therefore incompatible with the concept of an economic zone. Further, it was argued that a coastal state could seriously interfere with navigation under the pretext of regulating its contiguous zone.

The result of these debates was a preservation of the contiguous zone in the RSNT, clearly indicating a limitation on coastal state prescriptive authority within the exclusive economic zone.

Consistent with the limitations implied from the existence of a contiguous zone, it is clear that coastal states do not enjoy territorial sovereignty within the economic zone. The sovereign rights granted in the RSNT are topical, not territorial, with the result that permissible coastal state activities are limited by the nature of the topic. Therefore, the coastal state cannot

135. See note 112 supra.
136. See text accompanying note 80 supra.
139. See Statement of Mr. Caflisch (Switzerland), id. at 180.
140. See Statement of Mr. Serra (Portugal), id. at 172, and Statement of Mr. Sapozhnikov (Ukrainian Soviet Socialist Republic), id. at 201.
141. RSNT, supra note 21, art. 32.
unreasonably alter the pattern of uses by other states within the zone, for it has no plenary jurisdiction. The RSNT grants the coastal state a right of exclusive use, not the right of a territorial sovereign to determine entry and uses by other states.

Even exclusive uses granted by the RSNT are subject to restrictions. For example, article 48 grants coastal states exclusive rights and jurisdiction over artificial islands and structures relating to, or interfering with, economic exploitation. But this jurisdiction is subject to restrictions: due notice must be given of construction of such installations; adequate warning devices must be installed; abandoned structures must be entirely removed; the coastal state may, where necessary, establish safety zones around such structures; but neither the zones nor the structures themselves may be established where "interference may be caused to the use of recognized sea lanes essential to international navigation." A broader limitation on coastal state discretion is found in article 46(3) which provides that states "shall comply with laws and regulations enacted by the coastal state in conformity with this chapter and other rules of international law." The converse of article 46(3) is that user states need not comply with coastal state laws and regulations not enacted in conformity with relevant rules of international law and the chapter defining the rights and duties within the zone. It appears that conformity or inconsistency with the chapter is to be found in the terms of article 47, regarding residual rights discussed above.

The demand of article 47, that conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone be resolved on the basis of equity, is made more explicit in article 44 which requires that a coastal state have "due respect" for the rights and duties of other states in the zone. While read alone this may be a vague standard, the duty of compliance is contingent upon laws enacted in conformity with the chapter, not merely with article 44. The content of "due regard," then, is to be found within the chapter defining the economic zone as a whole, and particularly by the juridical status of the zone derived principally from article 47.

142. This would appear to leave open the possibility that submarine tracking devices and other military hardware could be implanted on the seabed without coastal permission provided they in no way interfered with economic exploitation.
143. RSNT, supra note 21, art. 48(7).
144. See text accompanying note 123 and following supra.
Managing the living resources of the exclusive economic zone. The RSNT has not only granted coastal states the sovereign right to exploit the resources of the exclusive economic zone, it has also granted them the sovereign right to enforce laws passed to protect those resources. Although subject to the "due regard" limitation, the RSNT grants the broadest enforcement authority to coastal states for the purpose of managing fishing.\textsuperscript{145} The text provides:

The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations enacted by it in conformity with the present Convention.\textsuperscript{146}

It is important to note that this provision refers to sovereign rights; that is, those provided only in article 44(1)(a), and then only in regard to the living resources subject to sovereign rights. Thus, the right to board and inspect vessels is not extended to violations of laws made pursuant to authority over non-living resources, research, and artificial structures. Hence, the scope of this authority is relatively limited. Furthermore, these extreme measures are limited to those cases "as may be necessary" to insure compliance with properly enacted laws.

The article is perhaps overbroad in that it does not limit boarding and arrest to fishing vessels. An additional inadequacy exists in that no duty is established to publicize the regulations for which boarding is the penalty. A more balanced article would subject merchant vessels to the extreme penalty of boarding and arrest only where the measures which they violate pose a serious threat to living resources, and would require publicity for all regulations.

Protecting the marine environment of the exclusive economic zone. Navigation can prosper on a sterile sea as well as one teeming with life. Thus, navigational and environmental interests are not necessarily coextensive—indeed they may often conflict. Almost any regulation for the protection of the

\textsuperscript{145} This grant is accompanied by the duty to optimize the fishing catch. Where the coastal state cannot harvest the entire catch, it must allow other nations, under terms agreed to by the parties, to harvest the balance. See RSNT, \textit{supra} note 21, arts. 51, 61.

\textsuperscript{146} \textit{Id.} art. 61(1).
environment will involve some inconvenience and expense for navigation. Thus, it is in the interest of maritime and developing countries to oppose any coastal state regulations that might inhibit or raise the cost of establishing merchant fleets.\textsuperscript{147}

The right enjoyed by coastal states to protect the marine environment within the economic zone clearly includes the authority to promulgate regulations to prevent vessel-source pollution, although flag states have pre-emptive rights and duties to enforce pollution regulations against their own ships.\textsuperscript{148}

These measures could have a serious impact upon shipping if they include regulation of vessel construction. In response to this, the text provides that coastal state standards for vessel-source pollution in the exclusive economic zone may not exceed international standards and the arrest of a vessel violating those standards is possible only in exceptional circumstances.

The scope of coastal authority to regulate vessel-source pollution through prescribing standards for vessel construction and the discharge of pollutants is one of the most difficult problems addressed by the Conference. The approach most favorable to the coastal states would permit pollution control through national legislation in any area in which the coastal state has an alleged interest.\textsuperscript{149} Proposals more favorable to navigational interests provide that coastal state authority is limited to legislative measures which are in conformity with international standards.\textsuperscript{150} The RSNT adopts a position between these two proposals.\textsuperscript{151}

It is universally accepted that only international rules and those standards enacted by the flag state apply to ships on the high seas; a provision to this effect is included in the RSNT.\textsuperscript{152} Within the exclusive economic zone, while no general agreement can be said to exist, RSNT article 21(4), Part III, limits

\begin{footnotesize}
\begin{enumerate}
\item[147.] See Summary of Committee III Negotiations (Aug. 11, 1976) [on file at SANTA CLARA L. REV.].
\item[148.] RSNT, supra note 21, Part III, art. 27. Flag states may also enforce stricter standards against their own vessels than required by international law. See id. Part III, art. 21(2).
\item[150.] Proposed Amendment by the Federal Republic of Germany, Summary of Committee III Negotiations (Aug. 23, 1976) [on file at SANTA CLARA L. REV.].
\item[151.] It should be noted that the RSNT also contains provisions dealing with ocean dumping, land-based pollution, and pollution from seabed activities, as well as provisions concerning vessel-source pollution. See, e.g., RSNT, supra note 21, art. 4(3).
\item[152.] Id. Part II, art. 80. See also id. Part III, arts. 21, 26(1).
\end{enumerate}
\end{footnotesize}
coastal states to enacting legislation which conforms to international standards regarding vessel-source pollution. The text clearly implies that no more stringent rules can be imposed. Coastal state discretion in this area has been further weakened by a proposal, which may be included during the next session of the Conference, that these standards be "generally recognized."^{153}

Authority to enforce these regulations is somewhat broader than the authority to promulgate them. Article 30(4), Part III, governing the economic zone, provides that when a vessel has violated applicable international pollution standards, the coastal state may request specific information regarding port of registry, last and next port of call, and other relevant information needed to establish a violation. If the case involves a "substantial discharge and significant pollution," under article 30(5), Part III, and the vessel has refused to give information, or the information given is patently false, the coastal state may undertake a physical inspection of the vessel to establish the facts of the case. The article does not provide for arrest, but where a vessel commits a "flagrant or gross" violation of applicable international pollution standards in the exclusive economic zone which leads to "major damage or threat of major damage," the coastal state may take action in accordance with national law, which presumably includes arrest.^{154}

In contrast, coastal states have greater authority to regulate pollution of their territorial waters. This is consistent with the general RSNT scheme which varies the degree of coastal state control with the distance from the coast and the severity of the violations. Within the territorial sea, article 21(3), Part III, provides that coastal states may establish national laws and regulations regarding vessel-source pollution.^{155} The coastal state group^{156} argued that this article grants a coastal state the unqualified authority to set domestic rules and standards in its territorial sea. The maritime states, however, refer to article 20(2), Part II, which prescribes coastal states from regulating "the design, construction, manning and equipment

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153. See note 150 supra.
154. RSNT, supra note 21, Part III, art. 30(6).
155. Id. Part III, art. 21(3).
of foreign ships," and argue that this should take precedence over article 21(3), Part III. The debate on this inconsistency revealed fairly strong support for the primacy of article 20(2), Part II, but the conflict was such that a compromise version may appear authorizing the coastal state to regulate ship design, construction, manning and equipment.\footnote{157}

Enforcement powers are also greater within the territorial sea. Article 30(2), Part III, provides that where clear grounds exist for believing a ship has violated applicable national or international rules, the coastal state may take steps to inspect the vessel, and where justified by the evidence, arrest the vessel according to local law.

\textit{Conclusion}

In light of the above, it is clear that, at least for navigational purposes, the RSNT has created no territorial sea in the exclusive economic zone. Although the navigation rights of maritime states are subject to the provisions of the RSNT, they are not specifically subject to the control of coastal states; each state must have due regard for the rights of others. The RSNT seems to have reached a balance that should protect the legitimate interests of states in both navigation and resource exploitation. The provisions insure that no unreasonable interference with navigation should occur in the future.

\textbf{Navigational Rights of Warships}

A matter of fundamental concern to any sea power is the ability to dispatch its naval forces to whatever part of the globe its national interest dictates.\footnote{158} Yet this concern may conflict with the interests of coastal states in exercising sovereignty over adjacent waters, or interfere with the navigational interests of other states. Naval mobility is thus a crucial and controversial issue in current law of the sea negotiations.

As with navigational rights in general, freedom for warships\footnote{159} traditionally varies according to the ocean regime in-
volved. In the high seas, complete freedom of navigation applies to warships as well as merchant vessels and the former enjoy immunity in all regimes from the jurisdiction of any state other than the flag state. Navigational freedom includes the right of maritime countries to conduct naval exercises on the high seas free from unreasonable interference. What constitutes unreasonable interference would be difficult to elaborate in any text, and the RSNT makes no attempt to clarify the term.

Within territorial waters not used for international navigation, publicists, conventions, and international practice are not in accord over the right of warships to innocent passage. Unlike the situation in international straits, there is no overriding need for transit between seas justifying a sacrifice of coastal state security interests. Unlike merchant vessels, warships are specialized for the use of force and are often deployed for the purpose of achieving coercive effects. Coastal states thus may perceive a genuine need for protecting themselves against such possibilities.

Prior to 1949, authors tended toward the view that warships had no right of innocent passage. The International Law Commission, in preparation for the 1958 Law of the Sea Conference, recommended a provision requiring prior authorization for warships to pass through the territorial sea. This recommendation was not adopted, although some states reserved such a power when ratifying the CTS.

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a ship belonging to the [naval] forces of a State [and] bearing the external marks distinguishing [warships] of its nationality, under the command of an officer duly commissioned by the [government] . . . and whose name appears in the . . . [Navy] [L]ist . . . , and manned by a crew [who are] under regular [naval] discipline.

160. See RSNT, supra note 21, art. 76; CHS, supra note 8, art. 2.
161. RSNT, supra note 21, art. 83; CHS, supra note 8, art. 8(1).
163. See RSNT, supra note 21, art. 76(2). For the text of this article, see note 126 supra. The CHS contains a similar provision requiring "reasonable regard" for the interests of other states. CHS, supra note 8, art. 2.
165. See text accompanying note 57 supra.
166. See Burke, supra note 76, at 10.
167. Id. at 9, n.66.
168. Id.
169. The Soviet Union, Romania, Ukranian Soviet Socialist Republic, Czecho-
In addition to prior authorization, the questions of submerged passage for submarines\textsuperscript{170} and the right of coastal state jurisdiction over warships for violations of innocent passage were negotiated in 1958. The resulting compromise in the CTS requires surface transit of submarines\textsuperscript{171} and limits the authority of coastal states over naval vessels to insisting that "the warship leave the territorial sea."\textsuperscript{172}

The RSNT, like the CTS, extends the right of innocent passage to all vessels in the territorial sea.\textsuperscript{173} And, as it reduces the discretionary aspect of the earlier concepts of innocent passage, it strengthens the right for warships as well as all others. A vocal group of states still opposes this concept, however, and the issue will be raised in further sessions of the conference, although no major changes in the text are expected.\textsuperscript{174}

In regard to international straits, the right of passage for warships has been recognized at least since the 1949 Corfu Channel Case.\textsuperscript{175} In its decision, the International Court of Justice held:

It is, in the opinion of the Court, generally recognized that 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 previous authorization of a coastal state, provided that the passage is innocent. Unless otherwise prescribed in an international Convention, there is no right for a coastal state to prohibit such passage through straits in time of peace.\textsuperscript{176}

The CTS provision on passage through straits is based upon the Corfu Channel Case\textsuperscript{177} and the interpretation of this

\textsuperscript{170} slovakia, colombia, and byelorussian soviet socialist republic all reserved the right to establish procedures for prior authorization for warships passing through territorial waters. declaration and reservations to the convention, u.n. doc. st/leg/3 rev. 1 (1962), reprinted in mcDoulal & Burke, supra note 1, at 1180-84.
\textsuperscript{171} from the perspective of the united states, the unannounced underwater passage of nuclear-powered submarines carrying nuclear missiles is an important strategic weapon. see Hollick & Osgood, supra note 53, at 78.
\textsuperscript{172} CTS, supra note 8, art. 14(6).
\textsuperscript{173} Id. art. 23.
\textsuperscript{174} see RSNT, supra note 21, arts. 28-31. Article 19 preserves the rule regarding surface transit of submarines and article 29 the enforcement power. A new provision, article 30, subjects the flag state to liability for damage caused by warships resulting from non-compliance with regulations or laws.
\textsuperscript{175} See Burke, supra note 76, at 15.
\textsuperscript{177} id. at 28.
\textsuperscript{178} see mcDoulal & Burke, supra note 1, at 208-12.
provision by some maritime states has relied upon the language above; thus, they have resisted any efforts on the part of strait states to require prior authorization for surface transit. However, neither the court, nor the CTS contains any discussion of the right of submerged passage through international straits, and this has been a major focus of negotiations at the Third Conference.

As presently drafted, the RSNT provides for the right of submerged passage through straits by guaranteeing freedom of navigation, without qualification to "all ships and aircraft." Thus, the rights of warships in international straits are as fully protected as those of merchant ships, and in general the RSNT does not make material distinctions between the two types of vessels in any of the regimes under consideration.

CONCLUSION

The premise underlying this analysis has been that navigation should remain as unobstructed as possible. Coastal state exploitation of resources is vital to many developed and developing countries, and navigational interests may suffer inconvenience as a result of this activity. However, all nations have an equal interest in expeditious and inexpensive transit.

Because the participants in the Law of the Sea Conference fully expect to conclude with a treaty or convention, future problems arising over navigational activity will be resolved on the basis of the balance struck in the RSNT, which is, regarding navigational issues, virtually complete. Even in the absence of a treaty, the years of expertise and negotiation that have produced the text mark it as the definitive statement on many areas of current maritime law. Transit passage in straits, innocent passage in the territorial sea, and sea lanes passage through archipelagic waters collectively provide adequate protection for navigational freedom. Under these provisions, warships and ships engaged in commerce should be free from unreasonable interference by coastal states.

Assessing the impact of the exclusive economic zone is more difficult due to the novelty of its principles. For a number

178. See, e.g., the statement of Mr. Stevenson (United States) at the Caracas session of the Conference. OFFICIAL RECORDS, supra note 111, at 135.
179. See BURKE, supra note 76, at 22-23.
180. RSNT, supra note 21, art. 37(1).
181. Id., Note by the President of the Conference, at 2.
of reasons, including the protection of navigation, a coastal state should be under a clear and unambiguous duty of non-discrimination in its treatment of vessels within the zone. Currently it is not. However, references to coastal state “peace, good order, and security” which could justify interference are absent. So too are references regarding customs and immigration regulations. Essential sea lanes are preserved, and pollution regulations are moderate. Aside from an overly strong article on the enforcement of fishery regulations, it appears that the sovereign right of resource exploitation is properly balanced by the principle of “due regard” within a “co-operative zonal regime,” and, thus, the economic zone can equitably secure the needs of all states.

If the needs of all people are to be adequately served, a treaty must be concluded that will carry a great variety of interests into an increasingly crowded future. It appears that the navigational principles embodied in Part II of the RSNT will be sufficient, if adopted, to accomplish this purpose.