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Law of the Sea and the Rights of Passage

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Outline of Presentation

International Law Terminology

Overview of 1982 UNCLOS

High Seas

Territorial Sea

Straits Used for Int'l Navigation

Archipelagic States

Exclusive Economic Zone

Part 1

International Law Terminology

Sovereignty

Sovereignty is the power of a State to exercise the functions of a State within its territory, to the exclusion of any other State

The functions of a State include the establishment of legislative, administrative and judicial institutions for governing the State

States have ***sovereignty*** over their land territory, including their offshore islands.

States also have ***sovereignty*** over a belt of ocean space adjacent to their coast called the Territorial Sea

Jurisdiction

- **Jurisdiction** refers to the power of a State under international law to govern persons and property by its laws, including its criminal laws and regulatory laws
 - **Prescriptive Jurisdiction** refers to the power of a State to prescribe laws to govern persons or activities
 - **Enforcement Jurisdiction** refers to the power of a State to enforce its laws by arresting, prosecuting and imprisoning persons

Treaty Law Terms

Treaty: an international agreement between States in written form that is governed by international law

Date of Adoption: the date on which the text of treaty was adopted by the United Nations or by States attending an international conference; the treaty is then opened for Signature

Signature: If a State signs a treaty, it is not bound by the terms of the treaty, but it must not act contrary to its object and purpose

Ratification: The document whereby a State that has signed a treaty it gives its formal consent to be bound to the treaty

Accession: The document whereby a State which has not signed a treaty gives its consent to be bound

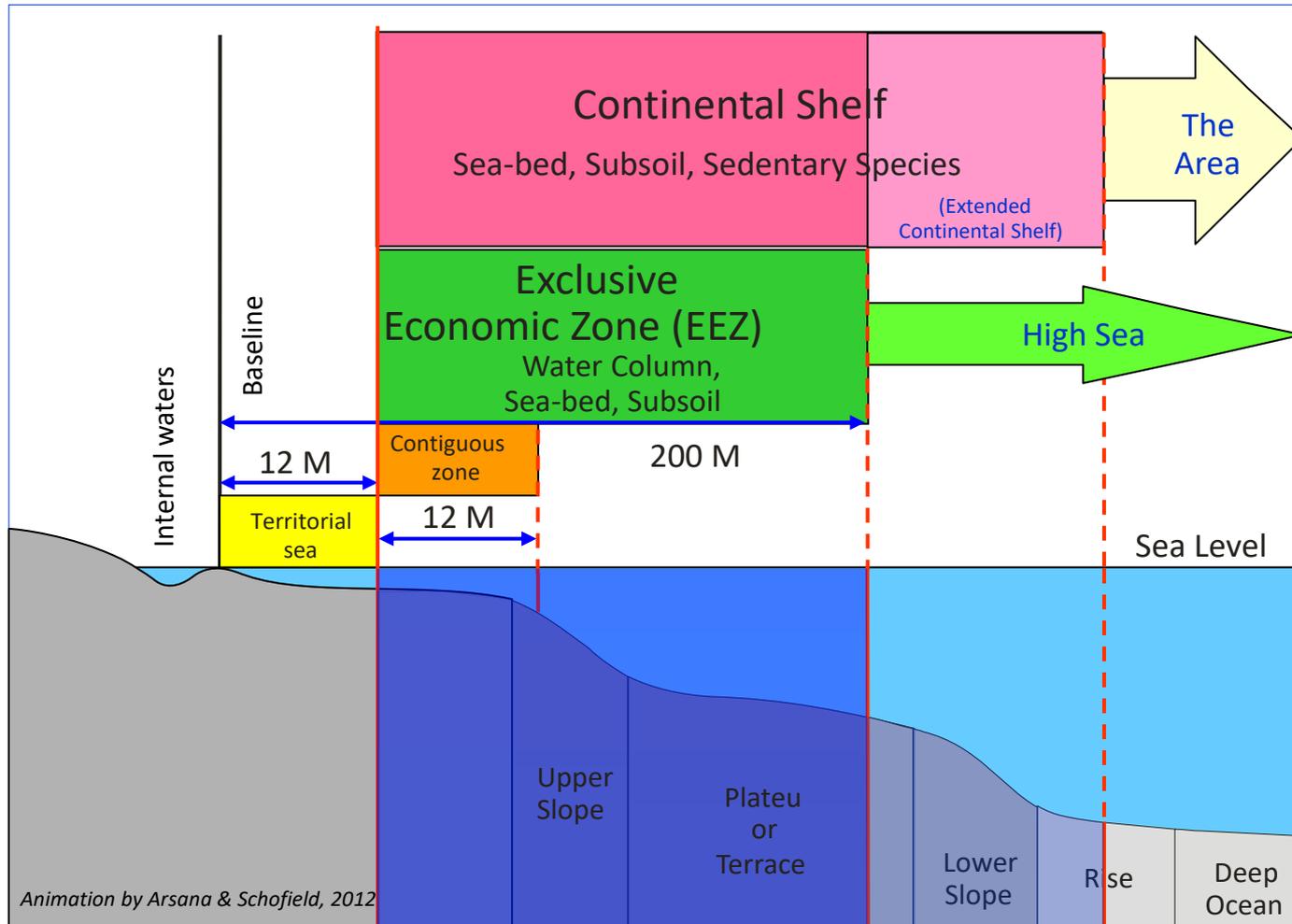
Part 2

Overview of 1982 UNCLOS

History and Current Status

- **Adopted in 1982 after 9 years of negotiations**
- **Entered into force on 16 Nov 1994**
- **Referred to as “1982 UNCLOS” or “1982 LOS Convention”**
- **169 parties, including the EU**
- **All coastal states in Asia are parties except Cambodia & DPRK
Korea**
- **USA is only major state that is not a party, but it has stated that
it accepts and follows the provisions of the Convention**
- **Other important States that are not parties are Iran and Turkey**

Baselines and Maritime Zones



Grand Bargain on Resources

Exclusive Economic Zone – Coastal States have sovereign right to explore and exploit natural resources out to 200 nm

Continental Shelf – Coastal States have right to natural resources of seabed and subsoil in extended continental shelf beyond 200 nm

The Area – Mineral Resources of deep seabed are common “heritage of mankind” governed by International Seabed Authority

Grand Bargain on Sovereignty and Passage Rights



The breadth of territorial sea extended from 3 M to 12 M:

Innocent Passage in Territorial Sea

Transit Passage in Straits used for International Navigation



Recognition of Archipelagic Waters under sovereignty of coastal States

Archipelagic Sea Lanes Passage and innocent passage



High Seas Freedoms outside 12 M territorial sea, subject to rights and jurisdiction of coastal States over natural resources and economic activities in their 200 M EEZ

Maritime Zones under LOSC

Areas under Sovereignty

- Internal Waters
- Territorial Sea
- Archipelagic Waters

Sovereignty

Areas outside of Sovereignty but within national jurisdiction

- Contiguous Zone
- Exclusive Economic Zone
- Continental Shelf

Sovereign Rights & Jurisdiction

Areas Beyond National Jurisdiction

- High Seas
- Deep Seabed (The Area)

Freedom of the Seas

Common Heritage of Mankind

Part 3

High Seas

Freedom of the High Seas

- **General principle** is that ships and aircraft of all States, including warships and warplanes, have freedom to use the high seas, including the freedoms of navigation and overflight
- The **freedom of the high seas** is generally understood to include the freedom to conduct military exercises, including the live firing of weapons
- It is generally agreed that the provision that high seas should be reserved for **peaceful purposes** means that it cannot be used to commit acts of aggression against other States

Freedom of the High Seas

Freedom of the high seas comprises, *inter alia*, . . . :

- (a) freedom of **navigation**;
- (b) freedom of **overflight**;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI (Continental Shelf);
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

Exclusive Jurisdiction of the Flag State



Ships on the high seas are subject to the exclusive jurisdiction of the flag State



The general principle is that navy or coast guard vessels cannot board a foreign ship on the high seas without the express consent of the flag State



The one clear exception is “piracy” – ships of all States

Piracy under LOSC



Piracy provisions in LOSC apply on the high seas and in the EEZ (anywhere outside of the territorial sea)



LOSC provides that all States have duty to cooperate in the repression of piracy



Piracy provisions create an exception to the general principle that ships on high seas cannot be boarded without the consent of flag State



Warships of all States have a right to seize pirate ships and arrest pirates

Legal Definition of Piracy

- Law of the Sea Convention Art. 101 defines piracy as an:
 - Illegal act of violence or depredation
 - Committed for private ends

Legal Definition of Piracy

By the crew or passengers of a private ship or aircraft:

- Against another ship or aircraft
- On the high seas or
- Against a ship, aircraft, persons or property
- Outside the jurisdiction of any State

PIRACY IN INTERNATIONAL LAW: KEY ELEMENTS

Committed for
private ends

Two ship rule?

Committed on the
**high seas or outside
the jurisdiction of
any State**

Seizure of a Pirate Ship



On the high seas [or EEZ], every State may seize a pirate ship, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board



The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken regarding the ships or property

Problems with piracy provisions



Piracy rules do not apply to attacks on ships in ports, in the territorial sea or in archipelagic waters

Laws of the coastal State apply in areas under its sovereignty, and it has exclusive power to enforce its laws in these areas

Attacks in areas under sovereignty are classified as “armed robbery at sea”, not piracy

Immunity of Warships on the High Seas

- **Article 95 Immunity of Warships on the High Seas**
 - Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.
- **Article 96 Immunity of Ships Used only on Government Non-Commercial Service**
 - Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.

Part 4

Territorial Sea

Breadth of the Territorial Sea

- **Every State has the right to claim a Territorial Sea out to a maximum distance of 12 nautical miles (Art. 3 LOSC)**
- **The 12 nautical mile limit is firmly established in international law**
- **Measured from Territorial Sea baselines**
- **Generated by land**

Legal Regime

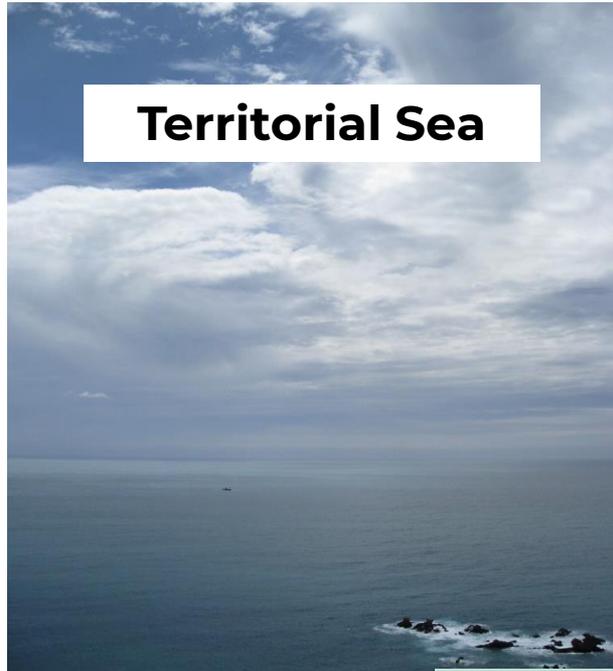
The coastal State has **sovereignty** over the:

**Airspace above the
Territorial Sea**



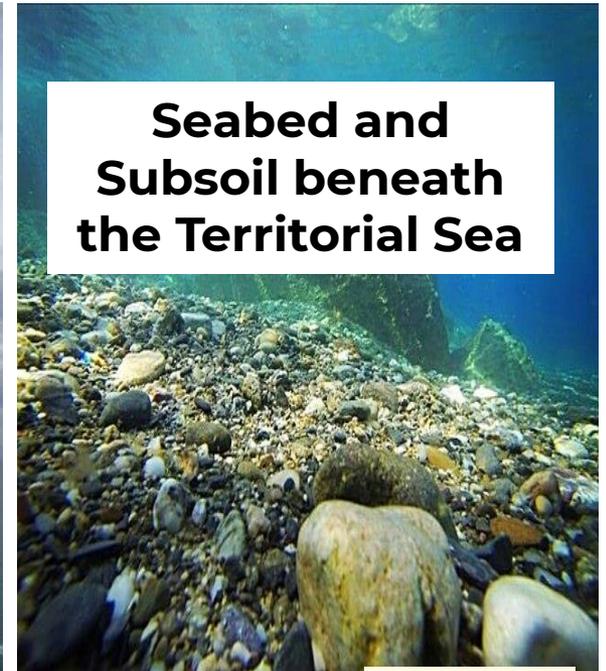
Credit: Sean MacEntee

Territorial Sea



Credit: Soupstance

**Seabed and
Subsoil beneath
the Territorial Sea**



Credit: Sabrina
Cacciolo

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Sovereignty

- **A State has unchallengeable power over its territory and the persons within that territory**
- **This power may be subject to limitations**
- **In the Territorial Sea, the sovereignty of the coastal State is subject to the right of innocent passage of foreign-flagged vessels (Part II, Section 3 LOSC)**

Sovereignty

The coastal State has the power to prescribe, apply and enforce its laws in the Territorial Sea and has full ownership over the resources in this maritime zone, including marine living resources (e.g. fish) and the non-living resources (e.g. oil, gas), as well as seabed minerals on and in the seabed.



Credit: Mike Johnston



Credit: Sumit Awinash



Credit: PhilWeb

Right of Innocent Passage

- All foreign vessels, including warships, have the right of **unimpeded passage** in the Territorial Sea, provided their passage is innocent
- There is no right of innocent passage for aircraft flying over the Territorial Sea
- Military aircraft must obtain diplomatic clearance to enter a coastal States' territorial airspace and commercial aircraft must be covered by a Bilateral Air Service Agreement

Elements of Innocent Passage

- Passage can be to internal waters or not, and may involve stopping at a port or not (**Art. 18 LOSC**)
- Passage must be continuous and expeditious (**Art. 18 LOSC**)
- Stopping or anchoring are possible where:
 - Incidental to ordinary navigation
 - Rendered necessary by *force majeure* or distress
 - Rendering assistance to persons, ships or aircraft in danger or distress

Activities that render passage non-innocent

- Innocent passage is not prejudicial to the peace, good order or security of the coastal State (**Art. 19 LOSC**)
- **Art. 19 LOSC** provides a non-exhaustive list of 12 activities that would render passage non-innocent

Examples include:

- Threat or use of force
- Weapons exercises



Credit: Yam914

Activities that render passage non-innocent

More examples:

- Acts prejudicial to defence or security of the coastal State
- Propaganda affecting State security
- Launching or landing aircraft or any military device
- Breaking FISC regulations
- Willful pollution
- Fishing
- Research Activity
- Communication interference
- Any other activity **not** having a direct bearing on passage



Credit: Kritzolina

Non-Innocent Passage

- **Art. 25 LOSC** permits a coastal State to take ‘necessary steps’ in its Territorial Sea to prevent passage that is not innocent
- Commonly used methods to halt non-innocent passage include:
 - Verbal warnings
 - Firing of warning shots
 - Positioning vessels to block the offending vessel
 - Boarding the offending vessel
- Vessels that engage in non-innocent passage are subject to the full jurisdiction of the coastal State

Temporary Suspension

- The coastal State may temporarily suspend innocent passage, for essential security purposes, but not discriminate.
- Must be duly published, giving its timing and location.



Credit: Pixabay

Submarines and underwater vehicles

- Submerged submarines are always not-innocent
- Submarines must navigate on the surface and show their flag
(Art. 20 LOSC)



Warships

- Warships enjoy the right of innocent passage
- Warships and non-commercial government vessels are sovereign immune (Art. 29 LOSC)
- Non-compliance:
 - Leave immediately
 - Flag State liable for damages

Nuclear-powered ships and ships carrying dangerous cargoes

Nuclear vessels (cargo and/or propulsion) or vessels carrying dangerous or noxious substances have the right of innocent passage, but must comply with relevant international conventions

(Art. 23 LOSC)



Criminal Jurisdiction of the Coastal State

Criminal jurisdiction over vessels exercising a right of innocent passage is limited to:

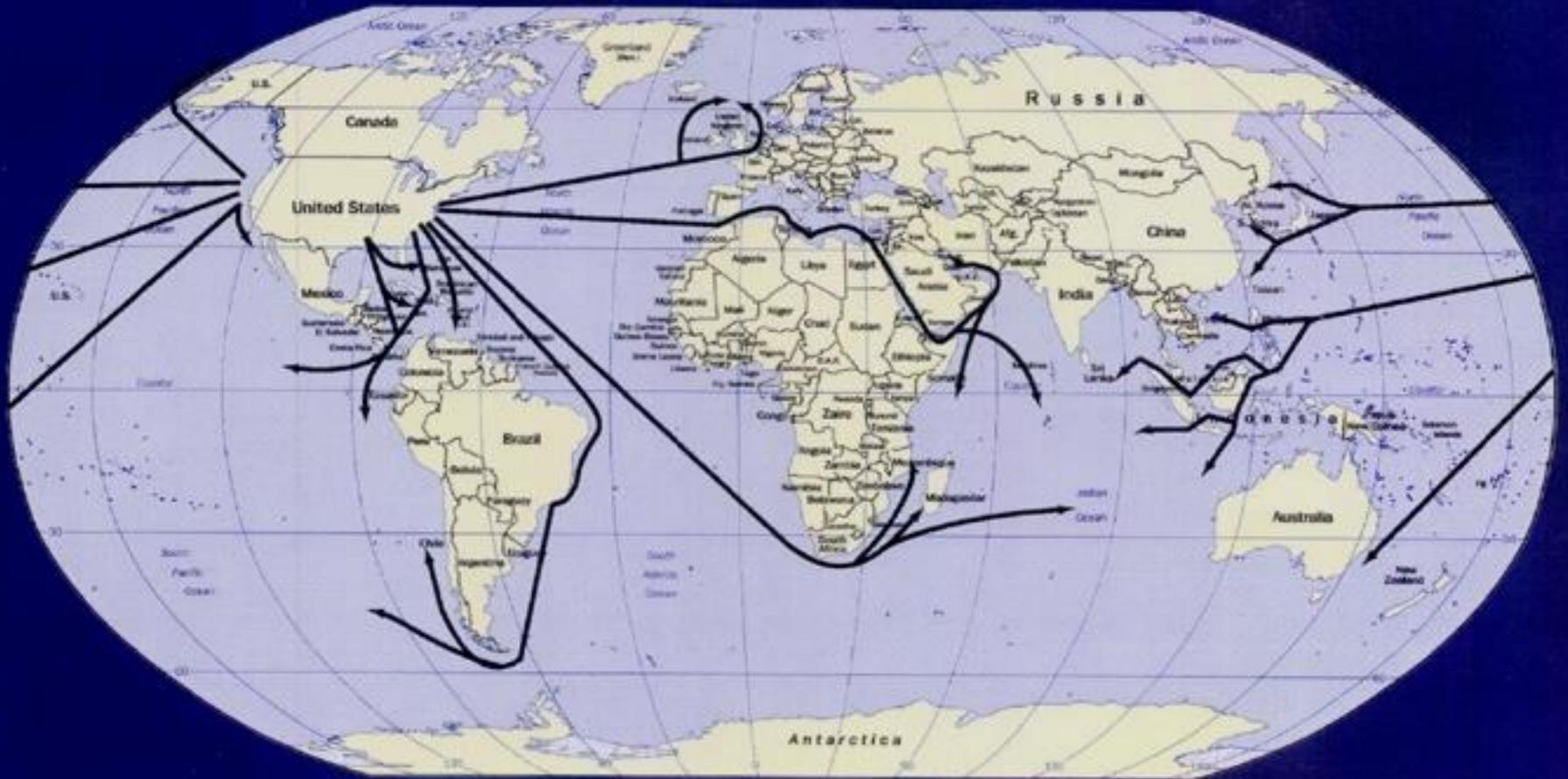
- Where master calls for assistance
- Consequences of crime extend to the Territorial Sea or the coastal State
- Measures to curb the drug trade
- Diplomatic request



Part 5

Straits Used for International Navigation

STRATEGIC STRAITS





As a matter of customary law, warships had a right of innocent passage through international straits which could not be suspended by the coastal State

UNCLOS III – Preparatory Meetings

- Two interest groups: Strait States & Maritime Powers.
- 1958 territorial sea convention, it merely says, “There shall be innocent passage through territorial sea...”
- 3 M territorial sea there was no problem.
- But when you extended it to 12 M?

UNCLOS III – Private Straits Group

- Clarified the do's and don'ts in innocent passage.
- Need to provide more 'freedoms' for submarines and warships passing through straits.
- Worked out the compromise on Straits, based on the term "transit passage".
- There has to be unimpeded right of passage through straits, but at the same time, you ensure that the passing vessels have certain duties too.

Defined as:

- Straits used for international navigation between one part of the high seas or exclusive economic zone and another part of the high seas or exclusive economic zone (Article 37).
- No list of such straits
- Source of significant debate at UNCLOS III because extension of territorial sea from 3M to 12M meant many key straits wholly within coastal states territorial sea claims for first time

Straits used for Int'l Navigation

- Definition (37) [HS-EEZ] or [EEZ-EEZ]
- Examples?

Gibraltar	Turkish Straits	Magellan
Torres	English Channel	Bass
Hormuz	Korean Straits	Cook
Corfu Channel	Lombok	Nth East Passage
Messina	Aqaba	Sunda
Malacca	Nth West Passage	Singapore



Views of the Earth, Copyright © 2006 by Christoph Hormann <http://earth.imagico.de/>

“Transit passage means...the **freedom of navigation and overflight** solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an EEZ and another part of the high seas or an EEZ.”

Transit Passage

- Passage must be: (Art.38)
 - continuous and expeditious
 - visits to ports along the strait are possible
- Ships must: (Art.39)
 - proceed without delay
 - refrain from threat or use of force
 - use normal mode unless rendered necessary by distress or *force majeure*

Transit Passage

- Ships must transit safely - including *International Regulations for Prevention of Collisions at Sea* and other international regulations (Art.39)
- Aircraft must transit safely: (Art.39)
 - ICAO for civilian aircraft
 - safe navigation for State aircraft
 - monitor radio frequencies

BALANCING OF INTERESTS IN INTERNATIONAL STRAITS: FOREIGN STATE DUTIES

Additional rules applicable to Ships (Article 39(2)) - Ships must transit safely :

- Must comply with generally accepted international regulations, procedures and practices for safety at seas, including the *International Regulations for Preventing Collisions at Sea*
- Must comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships (IMO Rules- MARPOL)

TRANSIT PASSAGE

Coastal State laws: (Article 42)

- safety of navigation
- pollution
- fishing, including the stowage of gear
- fiscal, immigration, customs and sanitation
- Sovereign immunity only gives rise to damages

TRANSIT PASSAGE

- Non-suspendable (Art. 44)
- Cannot be hampered (Art. 44)
- Can be subject to navigational restrictions
 - IMO referral (e.g. traffic separation schemes) (Art. 41)
- Available to aircraft

Strait to a Dead-End

- Where the international strait leads to a port of a third State, transit passage does not apply
- However, innocent passage in such circumstances is not suspendible (Art.45)



Transit Passage

Applies to international straits **except**:

- High seas or EEZ route exists through the strait used for int'l navigation (Art.36)
- Straits with long-standing agreements (Baltic/Danish Straits, Strait of Magellan, Montreux Agreement) (Art.35(c))



Transit Passage

Applies to international straits **except**:

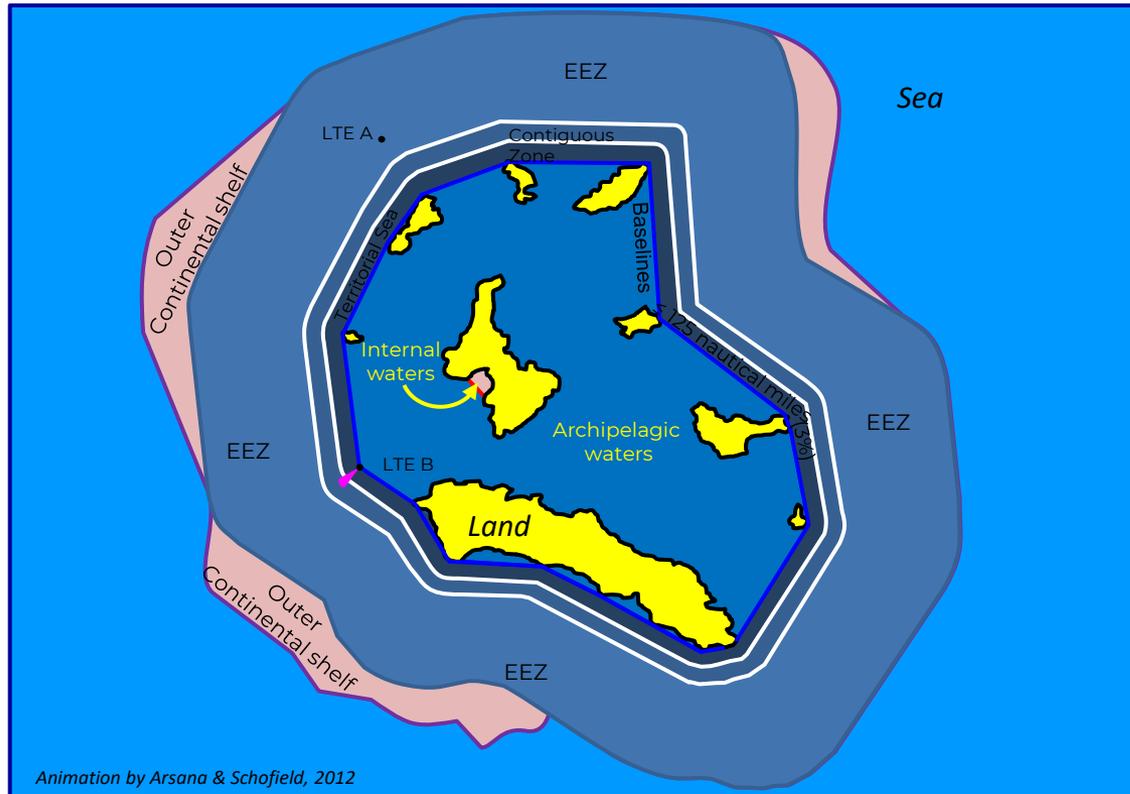
- Messina exception: where a route of similar convenience exists elsewhere (Art.38(1))
- Not used for international navigation (NW Passage; NE Passage)



Part 6

Archipelagic States

Archipelagic Baselines and Maritime Zones



Source: TALOS Manual (5th edition, 2014)

Passage of Ships and Aircraft through Archipelagic States



Ships of all States have the right of **innocent passage** through Archipelagic Waters



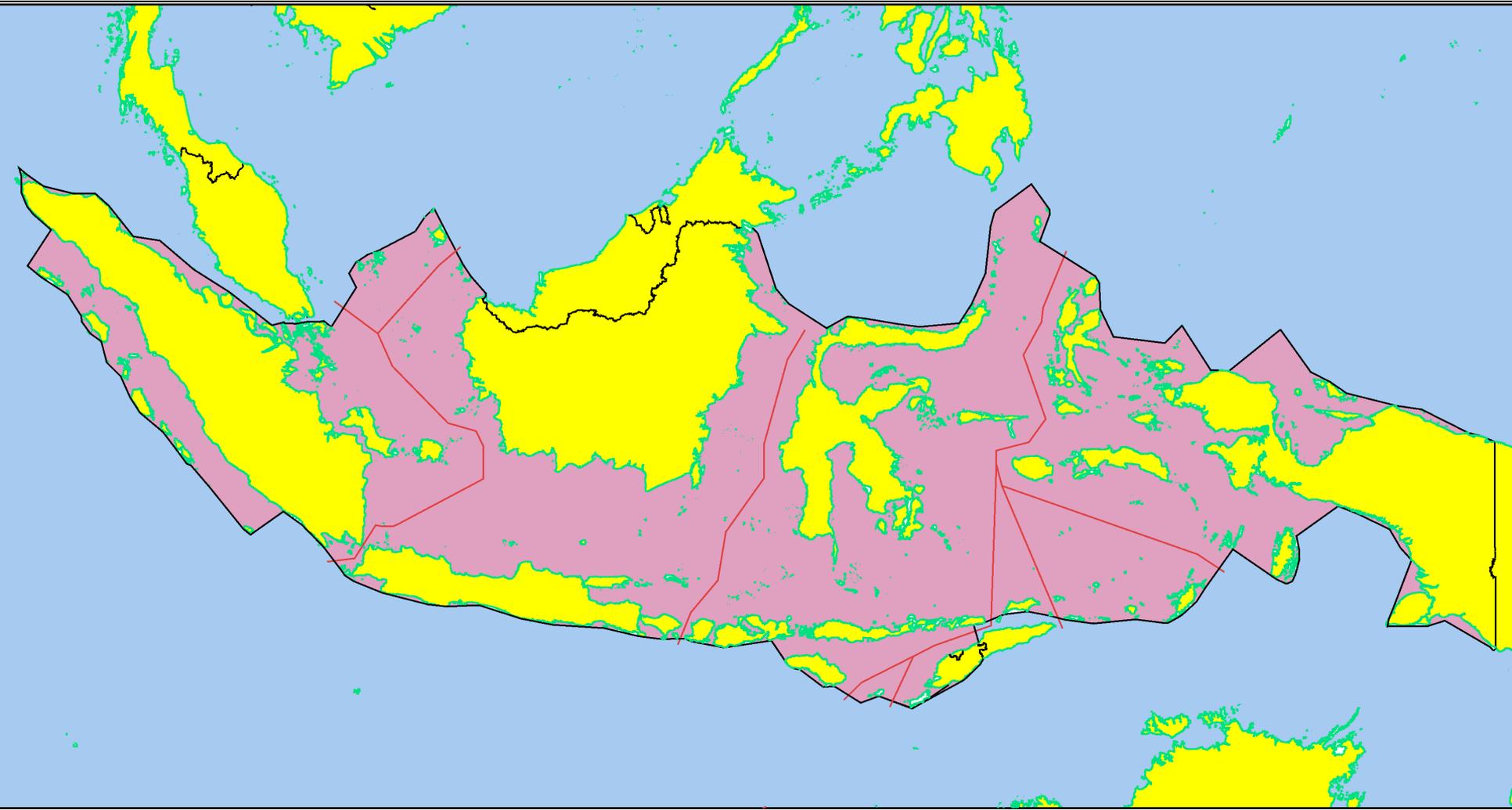
Rules on Innocent Passage to their rights of passage through the territorial sea



Ships and aircraft also have the right of **archipelagic sea lanes passage** through and over the archipelagic waters and the adjacent territorial sea



Rules on archipelagic sea lanes passage the same as rules on transit passage through straits used for international navigation



Transit Passage & ASLP vs Innocent Passage

Apply to aircraft as well as ships (Arts 38 & 53)

Submarines can transit in their “normal mode” (Arts 39(1)(c) and 53(3) rather than surface & fly flag

Can never be suspended (Arts 44 and 54)

Power of coastal States to pass laws and regulations on pollution is limited to giving effect to in applicable international regulations (MARPOL 73/78)

Power of coastal States to pass laws and regulations on safety of navigation is limited to proposing sea lanes and traffic separation schemes for adoption by the IMO

Duties when exercising Transit Passage & ASLP



Must proceed without delay



Must refrain from threat or use of force



Passage solely for purpose of continuous and expeditious transit



Shall refrain from any activities other than those incident to their normal modes of continuous and expeditious transit



Must comply with generally accepted international regulations, procedures and practices for safety at sea and ship-source pollution



Cannot engage in research or survey activities

ART 39(2) DUTIES OF SHIPS EXERCISING TRANSIT PASSAGE AND ASLP

Obligation of ships exercising transit passage to comply with IMO Conventions applies :

whether or not the flag State is party to UNCLOS

whether or not the littoral States have ratified the conventions or adopted laws and regulations

The obligation to ensure that ships comply with IMO conventions under Article 39 rests with flag States, not the littoral States

Littoral States have obligation under Art 44 not to hamper transit passage

Archipelagic Sea Lanes Passage

- Must be undertaken on a lane
- Designated lanes (and traffic separation schemes) must be approved by IMO
 - Indonesia
- In the absence of a designated lane, use routes used for normal navigation
 - Importance of logging transits through archipelagoes

Enforcement Powers of littoral States



Article 44 provides that shall not hamper transit passage



Article 38(3) provides that any activity which is not an exercise of the right of transit passage remains subject to the other applicable provisions of UNCLOS



For normal safety violations during passage the States Bordering the Strait can only report the violation to the Flag State

Part 7

Exclusive Economic Zone

Exclusive Economic Zone

- The EEZ is a zone under **sovereign rights**, where the coastal State has the rights to explore and exploit the natural resources of the zone.
- Natural resources include fish as well as non-living resources such as oil, gas and minerals.
- EEZ is referred to as a *sui generis regime* or a zone 'unique in its characteristics.'

Article 56 of LOSC

A Coastal State's **sovereign rights** are governed by **Article 56(1)(a)** of LOSC:

1. In the exclusive economic zone, the coastal State has:
 - (a) ***sovereign rights*** for the purpose of ***exploring and exploiting, conserving and managing the natural resources***, whether ***living or non-living***, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to **other activities for the economic exploitation and exploration** of the zone, such as the ***production of energy from the water, currents and winds***

Coastal State Rights and Duties (Article 56)

Article 56 of LOSC also grants the coastal State some jurisdiction in the EEZ, with regard to:

- the establishment and use of ***artificial islands and installations***
- ***marine scientific research***
- the ***protection and preservation*** of the ***marine environment***



Rights and Duties of Other States (Article 58)

- All States enjoy the freedoms under **Article 87 of LOSC** in the EEZ (i.e. high seas freedoms of navigation and overflight etc)
- **Articles 88-115** and other rules of international law apply to the EEZ
- Other States must have due regard for the rights and duties of the coastal State in the EEZ
- Must comply with the laws of the coastal State which are in conformity with the LOSC

Art. 58 – High Seas rules on Jurisdiction over ships apply in EEZ

- **Articles 88 to 115 and other pertinent rules of international law apply to the EEZ in so far as they are not incompatible with this Part.**
- **Articles 88-115 include the rules on jurisdiction over ships on the high seas, including:**
 - **Exclusive jurisdiction of the flag state**
 - **Immunity of warships**
 - **Piracy regime**
 - **Right of Visit**
 - **Hot Pursuit**

Reciprocal “Due Regard” Obligations

Article 56(2) Rights, Jurisdiction & Duties of Coastal State in EEZ

In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the **coastal State** shall have **due regard** to the **rights and duties of other States** and shall act in a manner compatible with the provisions of this Convention.



Controversial Issue

- During the negotiation of the Law of the Sea Convention
- Since the entry into force of the Law of the Sea Convention

What are Military Activities?

“Military activities include, *inter alia*, normal ship operation, task force maneuvers, launching and landing of aircraft, military exercises, operating military devices, intelligence collection, weapons exercises, ordnance testing and military surveys.”

J. Ashley Roach & Robert W. Smith

United States Responses to Excessive Maritime Claims, 2nd Ed. 1996,
p.427

Two legal views

Military activities in the EEZ preserved under the Law of the Sea Convention

- Freedom of navigation and overflight

Military activities in the EEZ are contrary to the Law of the Sea Convention

- Require coastal State consent

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