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## Navigational Regimes

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## Navigational Regimes

*Office of the Staff Judge Advocate, U.S. Indo-Pacific Command\**

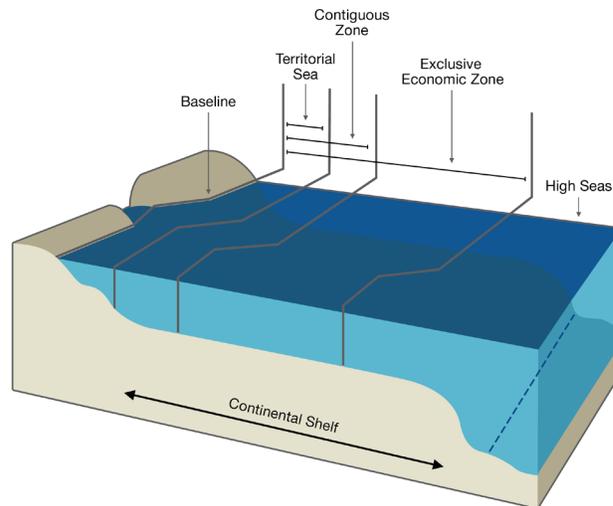
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Navigation regimes depend foremost on the waters in which the vessel or aircraft are operating or transiting.

**Internal Waters.** Foreign ships and aircraft may not enter a State’s internal waters (that is, all waters landward of the baseline) without its consent, except as rendered necessary by *force majeure* or distress.<sup>1</sup> In recent decades, coastal States have narrowed the classic rights of *force majeure* and distress entry. International Maritime Organization (IMO) guidelines currently provide that there is “no obligation” for the coastal State to grant entry into its internal waters in situations of *force majeure* or distress.<sup>2</sup> The coastal State need only weigh all the factors giving rise to the distress (for example, weather, damage to the vessel, etc.) and risks associated with allowing entry (for example, cargo, safety, and threat to the marine environment) in a balanced manner and give shelter when “reasonably possible.”



An inclusive list of activities considered to be non-innocent include:

- Any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the UN Charter.
- Any exercise or practice with weapons.
- Any act aimed at collecting information to the prejudice of the defense or security of the coastal State.
- Any act of propaganda aimed at affecting the defense or security of the coastal State.
- The launching, landing, or taking on board of any aircraft or military device.
- The loading or unloading of any commodity, currency, or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.
- Any act of willful and serious pollution.
- Any fishing activities.
- The carrying out of research or survey activities.
- Any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State.
- Any other activity not having a direct bearing on passage.

### **Territorial Sea/Innocent Passage.**

Coastal States exercise sovereignty in their territorial sea, subject to the right of innocent passage.<sup>3</sup> All ships, including warships, regardless of armament, cargo, or means of propulsion, enjoy the right of innocent passage through the territorial seas without coastal State notice or consent.<sup>4</sup> Submarines and other underwater craft engaged in innocent passage are required to navigate on the surface and show their flag.<sup>5</sup> Innocent passage must be continuous and expeditious, but may include stopping and anchoring (1) if incidental to ordinary navigation, (2) if rendered necessary by *force majeure* or distress, or (3) to render assistance to persons, ships or aircraft in danger or distress at sea.<sup>6</sup> Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State.<sup>7</sup>

**Contiguous Zone/High Seas Freedoms.** Coastal States have limited law enforcement authority over customs, fiscal, immigration and sanitation matters in the contiguous zone.<sup>8</sup> All military and commercial ships and aircraft enjoy high seas freedoms of navigation and overflight, and other internationally lawful uses of the seas associated with those freedoms, in the contiguous zone that are compatible with the coastal States limited law enforcement jurisdiction.<sup>9</sup>

**Exclusive Economic Zone/High Seas Freedoms.** Coastal States enjoy exclusive resource-rights, as well as jurisdiction over resource-related offshore installations, marine scientific research and protection of the marine environment. The coastal State must exercise this limited authority with due regard for the rights of the international community to engage in lawful activities in the exclusive economic zone (EEZ).<sup>10</sup> Within the EEZ, all military and commercial ships and aircraft enjoy high seas freedoms of navigation and overflight, laying of submarine cables and pipelines, and other internationally lawful uses of the seas related to those freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, which are compatible with the coastal State's resource rights and jurisdiction.<sup>11</sup> Military and law enforcement activities that can be lawfully conducted in the EEZ without coastal State notice or consent include, *inter alia*: intelligence, surveillance and reconnaissance (ISR) operations; oceanographic surveys and marine data collection; military exercises, use of weapons and flight operations; freedom of navigation and presence operations; maritime security operations to counter the slave trade, repress piracy, suppress unauthorized broadcasting, and suppress narcotics trafficking; and the exercise of belligerent right of visit and search during wartime and the peacetime right of approach and visit, rendering assistance, and hot pursuit.<sup>12</sup>

**High Seas/High Seas Freedoms.** The high seas are open to all States and no State may claim sovereignty over any part of the high seas.<sup>13</sup> Freedom of the high seas enjoyed by all military and commercial ships and aircraft includes: freedom of navigation and overflight; freedom to lay submarine cables and pipelines; freedom to construct artificial islands and other installations; freedom of fishing; freedom of scientific research; and other internationally lawful uses of the sea.<sup>14</sup> Warships and military aircraft enjoy freedom of movement and operation on and over the high seas, including, *inter alia*, task force maneuvering, flight operations, military exercises, submarine operations, ISR activities, military marine data collection, and ordnance testing

and firing. All States may also take law enforcement measures to suppress the slave trade, piracy, unauthorized broadcasting, and narcotics trafficking.<sup>15</sup>

**International Straits.** There are seven types of international straits, each with its own unique characteristics and passage regimes. The three types that are of greatest importance in the Indo-Pacific area are: (1) straits used for international navigation where transit passage applies; (2) geographic straits through which a high-seas corridor exists; and (3) straits with routes through the high seas or exclusive economic zone (EEZ) that are of similar convenience.

**Straits used for International Navigation/Transit Passage.** Straits used for international navigation consist of overlapping territorial seas that connect one area of the high seas or EEZ to another area of the high seas or EEZ, and are governed by the transit passage regime.<sup>16</sup> An example is the Straits of Malacca and Singapore (See the figure below). All military and commercial ships and aircraft enjoy a right of unimpeded transit passage through such straits in their normal mode of operation without bordering States notice or consent.<sup>17</sup> “Normal mode of operation” means that submarines may transit submerged, military aircraft may overfly in combat formation and with normal equipment operation, and surface ships may transit in a manner consistent with vessel security, to include formation steaming and launch and recovery of aircraft.<sup>18</sup>



The bordering States may not

suspend transit passage for any purpose, including military exercises, and are prohibited from adopting laws or regulations that have the practical effect of denying, hampering, or impairing the right of transit passage.<sup>19</sup>

**International Straits/High-Seas Corridor.** Straits with EEZ or high-seas corridors include both geographic straits, like the Taiwan Strait, and straits with routes through the high seas or EEZ that are of similar convenience, like the Japanese Straits (Soya, Tsugaru, Osumi and Tsushima/Korea Straits).

Geographic straits, like the Taiwan Strait, are greater than 24 nm wide and are therefore not overlapped by territorial seas. In the Soya, Tsugaru, Osumi, and Tsushima Straits, Japan does not claim a 12-nm territorial sea, but rather, maintains an EEZ corridor within the straits that is of similar convenience with respect to navigational and hydrographical characteristics. In such cases, all military and commercial ships and aircraft enjoy high seas freedoms of navigation and overflight, and other lawful uses of the seas relating to such freedoms, in the high seas or EEZ corridor or high seas or EEZ route of similar convenience suitable for navigation through the strait.<sup>20</sup>

**Archipelagic Waters/Archipelagic Sea Lanes Passage.** Archipelagic States exercise sovereignty over archipelagic waters, subject to a right of innocent passage and archipelagic sea lanes passage (ASLP).<sup>21</sup> Archipelagic States may (but are not required to) designate archipelagic sea lanes (ASL) through their archipelagic waters suitable for continuous and expeditious passage of ships and aircraft. All normal routes used for international navigation and overflight are to be included in the designation, and must be adopted by the International Maritime Organization (IMO).<sup>22</sup> If the archipelagic State does not designate or makes only a partial designation of ASLs, vessels and aircraft of all nations may continue to exercise the right of ASLP in all normal passage routes used for international navigation and overflight through the archipelago.<sup>23</sup> Similar to transit passage, ASLP is the exercise of the rights of navigation and overflight in the normal mode of operation solely for the purpose of continuous, expeditious, and unobstructed transit through archipelagic waters. All military and commercial ships and aircraft enjoy the right of ASLP while transiting through, under, or over archipelagic waters and adjacent territorial seas via all normal passage routes used as routes for international navigation or overflight.<sup>24</sup> The archipelagic State may not impede or suspend the right of ASLP for any reason.<sup>25</sup> The right of innocent passage applies in archipelagic waters not covered by the ASLP regime.<sup>26</sup>

**Indonesian Archipelago.** To date, the only archipelagic State that has designated ASLs is Indonesia. The IMO determined that Indonesia's ASL proposal was a "partial system" because it did not include all normal routes used for international navigation, as required by UNCLOS, Article 53.<sup>27</sup> Accordingly, where a partial ASL proposal has come into effect, the right of ASLP "may continue to be exercised through all normal passage routes used for

international navigation or overflight in other parts of archipelagic waters” in accordance with UNCLOS.<sup>28</sup>

**National Airspace.** The airspace above internal waters, the territorial sea, and archipelagic waters is national airspace under coastal and archipelagic State sovereignty, subject to the rights of distress entry, transit passage and ASLP.<sup>29</sup> Innocent passage does not include a right of overflight through national airspace.<sup>30</sup> However, civil aircraft in distress are entitled to special consideration by the coastal State and should be allowed entry and emergency landing rights.<sup>31</sup> Military aircraft may not enter national airspace or land in the sovereign territory of another State without its authorization.<sup>32</sup> Although the Chicago Convention does not refer to a right of distress entry for military aircraft, the United States considers that military aircraft in distress may enter national airspace to make an emergency landing without prior coastal State permission as a matter of customary international law.<sup>33</sup>

**International Airspace.** Except as States may have otherwise consented through treaties or other international agreements, such as the Chicago Convention, the aircraft of all States are free to operate in international airspace without interference by other States. The Chicago Convention and its regulations do not apply to State aircraft, which includes aircraft used in military, customs, and police services.<sup>34</sup> When operating in international airspace, State aircraft shall operate with due regard for the safety of navigation of civil aircraft.<sup>35</sup>

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1. United Nations Convention on the Law of the Sea art. 8, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].
  2. IMO *Guidelines on Places of Refuge for Ships in Need of Assistance* (IMO Resolution A.949(23), December 5, 2003).
  3. UNCLOS, *supra* note 1, arts. 2, 3; Convention on International Civil Aviation (Chicago Convention) art. 1, Dec. 7, 1944, 15 U.N.T.S. 295 [hereinafter Chicago Convention].
  4. UNCLOS, *supra* note 1, art. 17.
  5. *Id.* art. 20.
  6. *Id.* art. 18.
  7. *Id.* art. 19.
  8. *Id.* art. 33.
  9. *Id.* art. 58.
  10. *Id.* art. 56.
  11. *Id.* arts. 58, 78.
  12. *Id.* arts. 56, 58, 86–87, 89, 90–92, 94–96, 98–112; *see also* 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 60–71 (Satya N. Nandan & Shabtai Rosenne eds., 1993); *see generally id.* at 491–821.
  13. UNCLOS, *supra* note 1, art. 87, 89.
  14. *Id.* art. 87, 135.
  15. *Id.* arts. 99–111.
  16. *Id.* arts. 37, 38.
  17. *Id.* art. 38.
  18. *Id.* art. 39.
  19. *Id.* art. 42.
  20. *Id.* art. 36.
  21. *Id.* arts. 49, 52, 53.
  22. *Id.* art. 53.
  23. *Id.* art. 53(12); IMO Doc. SN/Circ.206/Corr.1, Guidance for Ships Transiting Archipelagic Waters, Mar. 1, 1999; IMO Doc. A.571(14), General Provisions on Ships' Routing, Nov. 20, 1985, Part I; IMO Doc. SN/Circ. 206, Guidance for Ships Transiting Archipelagic Waters, Mar. 1, 1999, ¶ 2.1.1.
  24. UNCLOS, *supra* note 1, art. 53.
  25. *Id.* art. 54.
  26. *Id.* art. 52.
  27. IMO Doc. MSC.72(69), Adoption, Designation, and Substitution of Archipelagic Sea Lanes, May 19, 1988; IMO Doc. A.571(14), General Provisions on Ships' Routing, Nov. 20, 1985, Part I. *See also*, IMO Doc. SN/Circ. 200, Adoption, Designation, and Substitution of Archipelagic Sea Lanes, May 26, 1998; IMO Doc. SN/Circ. 200/Add.1, Adoption, Designation, and Substitution of Archipelagic Sea Lanes, July 3, 2008; and IMO Doc. SN/Circ. 202, Adoption, Designation, and Substitution of Archipelagic Sea Lanes, July 31, 2008.
  28. IMO Doc. A.571(14), General Provisions on Ships' Routing, Nov. 20, 1985, Part H, ¶ 6.7; IMO Doc. SN/Circ. 206, Guidance for Ships Transiting Archipelagic Waters, Mar. 1, 1999, at para. 2.1.1.
  29. UNCLOS, *supra* note 1, arts. 2, 49; Chicago Convention, *supra* note 3, arts. 1, 2.

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30. Chicago Convention, *supra* note 3, arts. 1–3*bis*; UNCLOS, *supra* note 1, art. 18.
  31. Chicago Convention, *supra* note 3, arts. 3*bis*, 5, 25.
  32. *Id.* art. 3.
  33. U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCWP 5-12/COMDTPUB P5800.7A, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 2.7.1 (2017).
  34. Chicago Convention, *supra* note 30, art. 3.
  35. *Id.*