

# Freedom of Navigation and Overflight

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# Importance of Freedom of Navigation

- Freedom of navigation has worldwide political, operational and legal impact
- The seas are inter-connected and form a single world ocean
- Mobility for merchant and military vessels and aircraft and maneuverability throughout the “world ocean” is essential for global -- all nations -- security interests and economic prosperity

# Basic Navigation Rights & Duties

- High seas freedom of navigation and overflight to be exercised with due regard for the interests of other States in their exercise of the freedom of the seas
  - Customary international law
  - 1958 High Seas Convention article 2
  - 1982 LOS Convention article 87
- Same freedoms in EEZ to be exercised with due regard to the rights and duties of the coastal State and comply with its laws that comply with the Convention
  - LOS Convention article 8(1) & (3)
- Applies to all ships and aircraft regardless of nationality or status as government or non-government platform

# Navigation in Territorial Sea

- Right of innocent passage through the territorial sea to be continuous and expeditious (exceptions for *force majeure* and distress), not be prejudicial to peace, good order or security of coastal State, and must conform to rules of LOS Convention and other rules of international law
- Applies only to surface ships. Aircraft have no right of innocent passage. Submerged submarines have no right of innocent passage.
  - Customary international law
  - Territorial Sea Convention article 14
  - LOS Convention articles 17-19
- Applies to all ships regardless of nationality or status as government or non-government platform

# Navigation in Contiguous Zone

- High seas freedom of navigation and overflight applies in CZ as CZ is seaward of the territorial sea
  - Customary international law
  - Territorial Sea Convention article 24
  - LOS Convention article 33

# Government Ships

- Warships and ships owned or operated by a State and used only on government non-commercial service
  - On high seas and EEZ have complete immunity from the jurisdiction of any State other than the flag State
    - Customary international law
    - Territorial Sea Convention article 23
    - LOS Convention article 95 & 96
  - In territorial sea if ship not comply with coastal State's rules, and disregards request for compliance, can be required to leave TS immediately
    - Customary international law
    - Territorial Sea Convention article 23
    - LOS Convention articles 29-32

# Other Government Ships

- Government ship operated for commercial purposes has no immunities and is treated like any other ship
  - Territorial Sea Convention article 21

# Excessive Maritime Claims

- Excessive maritime claims are those unilateral coastal State claims inconsistent with the Law of the Sea Convention by
- ASEAN Members: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar (Burma), Philippines, Singapore, Thailand, Timor-Leste and Vietnam, and by
- China (including Taiwan), Japan and Korea (ROK and DPRK)
- Non-parties to LOS Convention: Cambodia, DPRK, Taiwan
- ASEAN States without any excessive maritime claims: Brunei, Singapore, Laos (landlocked), Timor-Leste



# Contiguous Zone

- Zone contiguous to territorial sea NTE 24 nm from baseline from which breadth of TS is measured
- Prevent or punish infringement of State's customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea (LOS Convention article 33)
- Does not include security
- Security interest claimed by Burma, Cambodia, China, Vietnam
- CZ claimed by Burma, Cambodia, China, Japan, ROK, Thailand and Vietnam are measured from straight baselines not drawn IAW international law

# Contiguous Zone (2)

- Vietnam required in 1980
  - prior permission for warships to navigate in CZ
  - submarines required to navigate on the surface and show flag in CZ
  - aircraft prohibited from being launched from or taken aboard ships in CZ
  - ships to place weapons in non-operative positions before entering contiguous zone
- Decree No. 30/C, Jan. 1980
- Not mentioned in 2012 Vietnam LOS Law

# Navigation in TS

- ASEAN + 3 States requiring prior permission for warships to enter the territorial sea
  - Burma (1977 Territorial Sea Law, sec. 9(a))
  - China (1992 Territorial Sea law, article 6, 2<sup>nd</sup> para.)
  - Malaysia (1996 article 310 declaration 4 applies to NPW)
  - Philippines (1968)
- ASEAN + 3 States requiring prior notice of intention of warships to transit the territorial sea
  - Indonesia (1962)
  - Republic of Korea (1978 Territorial Sea Act as amended, article 4)
  - Vietnam (2012 LOS Law, article 12.2)
  - Taiwan (1998 Territorial Sea Law, article 7, 3<sup>rd</sup> para.)
- Neither requirement authorized by LOS Convention

# Navigation: EEZs

- ASEAN + 3 State claiming FON in EEZ not include military exercises or other activities which may affect the rights or interests of the coastal State without its consent
  - Malaysia (article 310 declaration 3)
  - Thailand (article 310 declaration 4)
- North Korea Military Security Zone 50 nm seaward of 12 nm TS prohibits navigation by warships and requires prior permission for navigation by merchant ships and civil aircraft
- All surveys prohibited in DPRK EEZ by Decree Aug. 1977
- Mapping and surveying in all PRC sea areas requires prior consent. Mapping and Surveying Law, Presidential Order No 75, article 2, effective 1 December 2002
- None of these requirements authorized by LOS Convention

# Navigation: EEZ (2)

- China's 1996 EEZ and Shelf law
  - Claims jurisdiction over artificial islands, installations and structures in the EEZ and on the shelf with regard to security laws and regulations (article 8(2) which is not authorized by LOS Convention article 60(2))
- Vietnam's 2012 Law of the Sea
  - Claims jurisdiction over artificial islands, installations and structures in the EEZ and on the shelf with regard to security laws and regulations (article 34(2) which is not authorized by LOS Convention article 60(2))

# “Use it or loose it”

- Some States attempt to restrict navigation and overflight rights by national legislation; some by diplomatic objections; others by overt interference with the exercise of those rights
- Failure to resist those efforts can be viewed as acquiescence in those claims and/or estoppel
- May also lead to change in the law restricting navigational rights
- Important for all ASEAN countries as they are dependent on maritime commerce and trade, and need to move their forces without interference

# Options for Resolving Differences

- Compulsory dispute resolution under Part XV of LOS Convention
- If military activities involved, can proceed unless military activities exception is invoked under article 298(1)(b) prior to institution of suit
  - Only China, ROK, Thailand have exercised that right
- Consultations resulting in voluntary change in position
  - Russia in 1988 re warship right of innocent passage
  - Roll backs of territorial sea claims > 12 nm
  - Vietnam's new sea law

# Role for ARF

- Acknowledge primary role of LOS Convention in ordering rule of law at sea
- Encourage strict adherence to rule of law including the terms of the LOS Convention
- Emphasize UNGA's annual call since 1994 for harmonization of national legislation with LOS Convention and to ensure consistent application of these provisions in resolution on oceans and law of the sea
- ITLOS Judge Kolodkin called attention to this in his 2004 declaration in the *Juno Trader* case (St. Vincent & Grenadines v. Guinea-Bissau)