

RSIS Workshop on Understanding Freedom of Navigation – ASEAN Perspectives

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Session 2. Legal Issues

Overview of Navigation Regimes

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Organization of Presentation

- 1. Sovereignty, Land Territory & Maritime Claims**
- 2. Innocent Passage in the Territorial Sea**
- 3. Transit Passage in Straits used for International Navigation**
- 4. Archipelagic Sea Lanes Passage through Archipelagic States**
- 5. Freedoms of the Seas on the High Seas**
- 6. Freedoms of the Seas in the EEZ**

Part 1

Sovereignty, Land Territory and Maritime Claims

Sovereignty over Land Territory & Territorial Sea

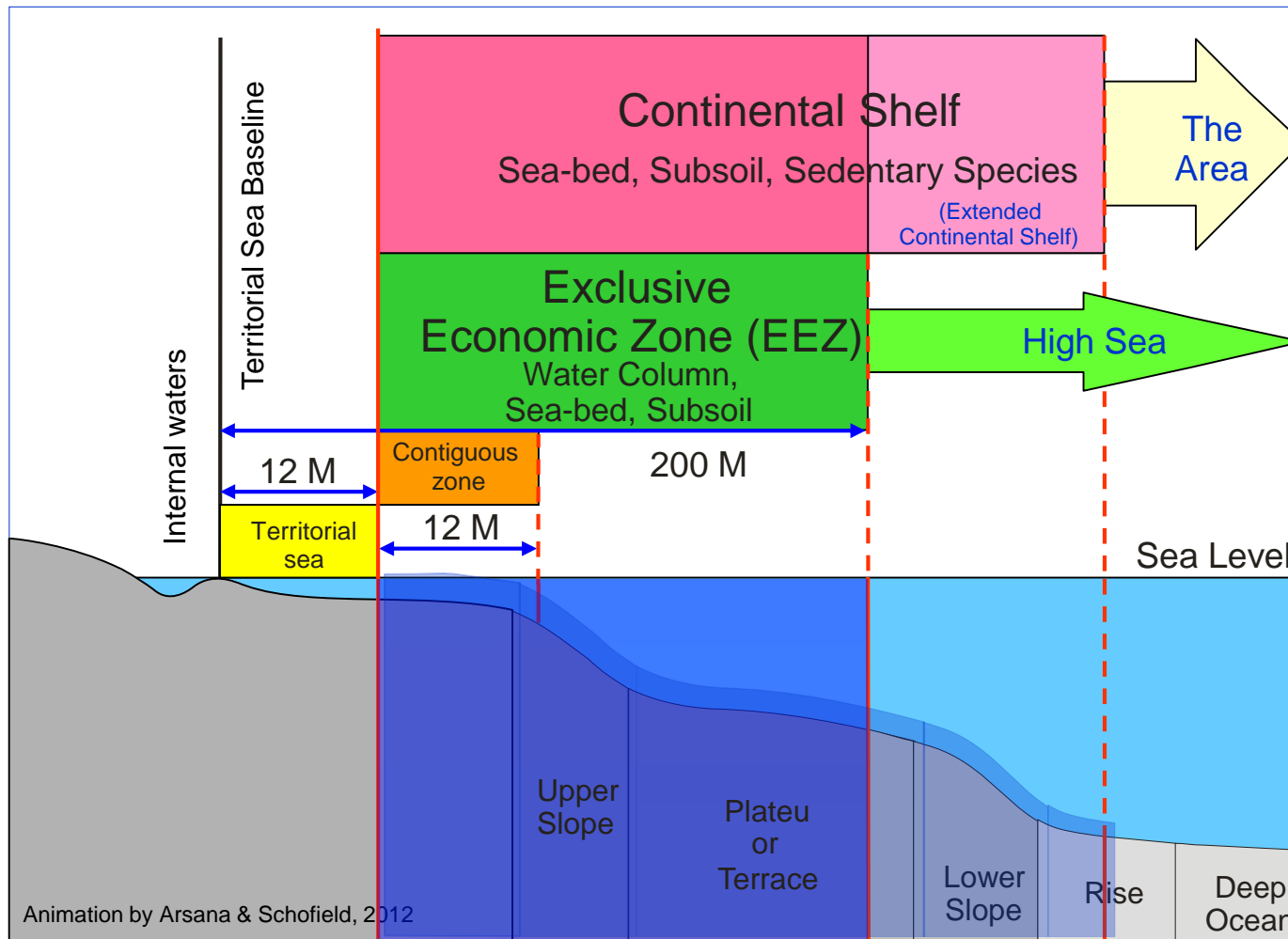
- States have **sovereignty** over their **land territory**
- **Sovereignty** of the coastal State extends beyond its **land territory** and internal waters to an adjacent belt of sea known as the **territorial sea**
- **Sovereignty** extends to **airspace** above the **territorial sea** as well as to the bed and subsoil
- **Sovereignty** of the coastal State in the territorial sea is **subject to UNCLOS** and to other rules of international law

Baselines & Maritime Zones

- Every State has a right to establish **the breadth of its territorial sea** up to a limit not exceeding **12 nautical miles**, measured from **baselines** determined in accordance with this Convention
- All maritime zones claimed from **land territory** are measured from the same “**baselines**”
- The **normal baseline** is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State
- Waters landward of the baselines are **INTERNAL waters**

Baselines and Maritime Zones UNLCOS

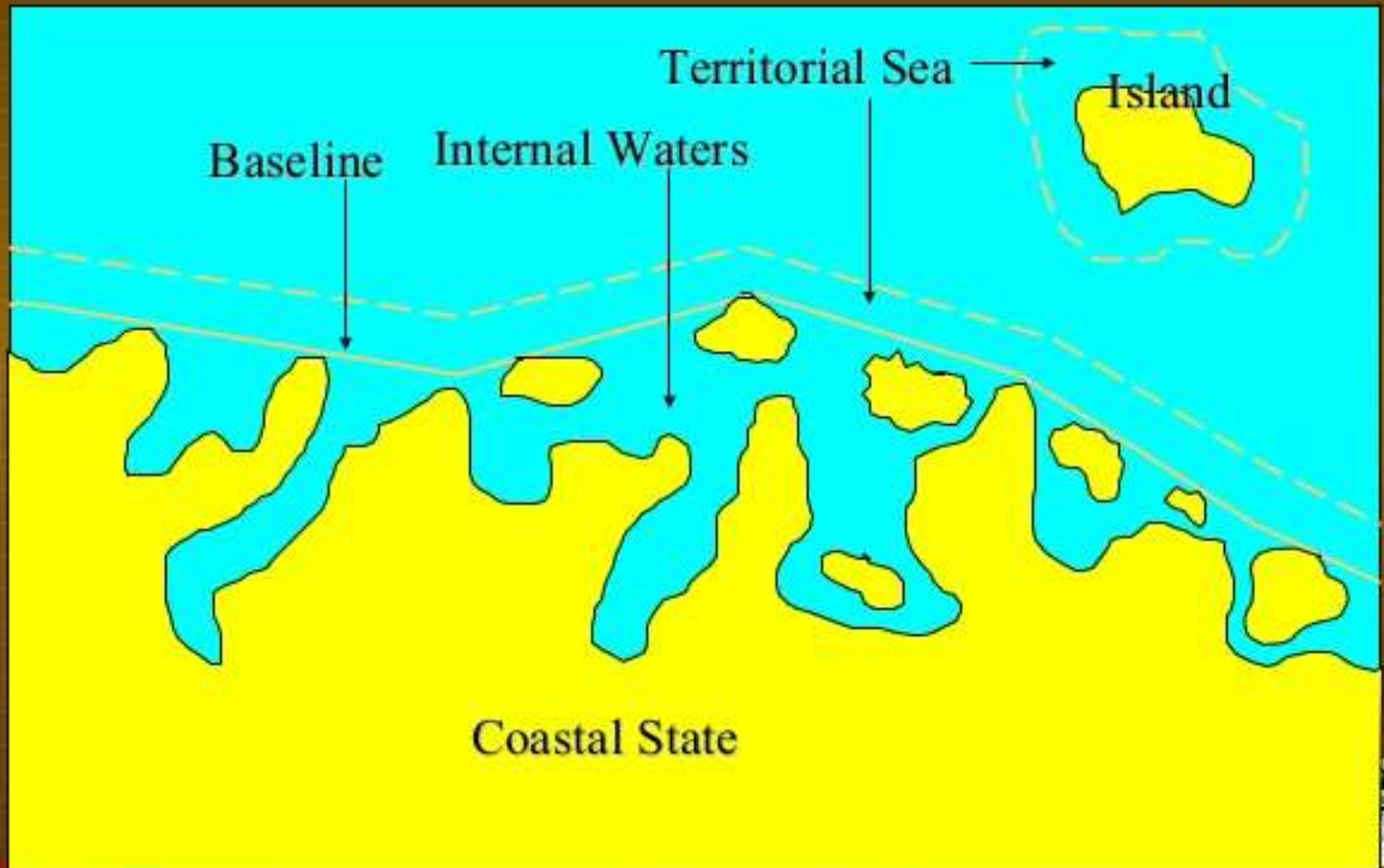
Source: TALOS Manual (5th edition, 2014)



Straight Baselines

- **Straight baselines** can be used where:
 1. the coastline is deeply indented and cut into, or
 2. if there is fringe of islands along the coast in its immediate vicinity
- **Limits on straight baselines:**
 1. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast
 2. Sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters

Straight Baselines (Example)



Islands and Rocks – Article 121

- An **island** is a **naturally formed** area of **land** surrounded by and **above water at high tide**
- An **island** is in principle entitled to the same maritime zones as other land territory
- **Rocks** which cannot sustain human habitation or economic life of their own have no EEZ or continental shelf
 - Rocks are entitled to a 12 nm territorial sea

Low-Tide Elevation (LTE)

- A LTE is a **naturally formed area of land** surrounded by and above water at low tide but **submerged at high tide**
- If a LTE is within 12 nm of other land territory, it is within the territorial sea of such territory, and it can be used as a baseline in measuring the territorial sea of that land territory
- If a LTE is more than 12 nm from any other land territory, it:
 - Is not subject to a claim of sovereignty
 - Has no territorial sea of its own

Artificial Islands, Installations and Structures

- **Artificial Islands, Installations and structures do not possess the status of islands**
- **They have no territorial sea of their own**
- **The coastal State in whose jurisdiction they lie may establish a 500 metre safety zone around them**
- **The status of a feature cannot be changed by land reclamation, construction or other artificial means:**
 - **Cannot change a Low Tide Elevation (LTE) to an Island**
 - **Cannot change a Rock to an Island**

Part 2

Innocent Passage in the Territorial Sea

Right of Innocent Passage

- Ships of all States enjoy the **right of innocent passage** through the territorial sea
- Art 19(1) Passage is **innocent** so long as it is **not prejudicial to the peace, good order or security of the coastal State.**
- Art 24. The coastal State **shall not hamper the innocent passage** of foreign ships through the territorial sea except in accordance with this Convention

Passage deemed “not innocent”

- 1. any threat or use of force**
- 2. any exercise or practice with weapons of any kind**
- 3. any act aimed at collecting information to the prejudice of the defence or security of coastal State**
- 4. any act of propaganda aimed at affecting the defence or security of the coastal State**
- 5. the launching, landing or taking on board of any aircraft**
- 6. the launching, landing or taking on board of any military device**

Passage deemed “not Innocent”

- 7. 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**
- 8. wilful and serious pollution fishing activities;**
- 9. research or survey activities**
- 10.any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State**
- 11.any other activity not having a direct bearing on passage**

Special Passage Rules in Territorial Sea

- Art 20. **Submarines** are required to navigate on the surface and to show their flag
- Art 23. **Foreign nuclear-powered ships** and ships carrying nuclear or other inherently dangerous or noxious substances shall carry documents and observe special precautionary measures established for such ships by international agreements

Innocent Passage of Warships

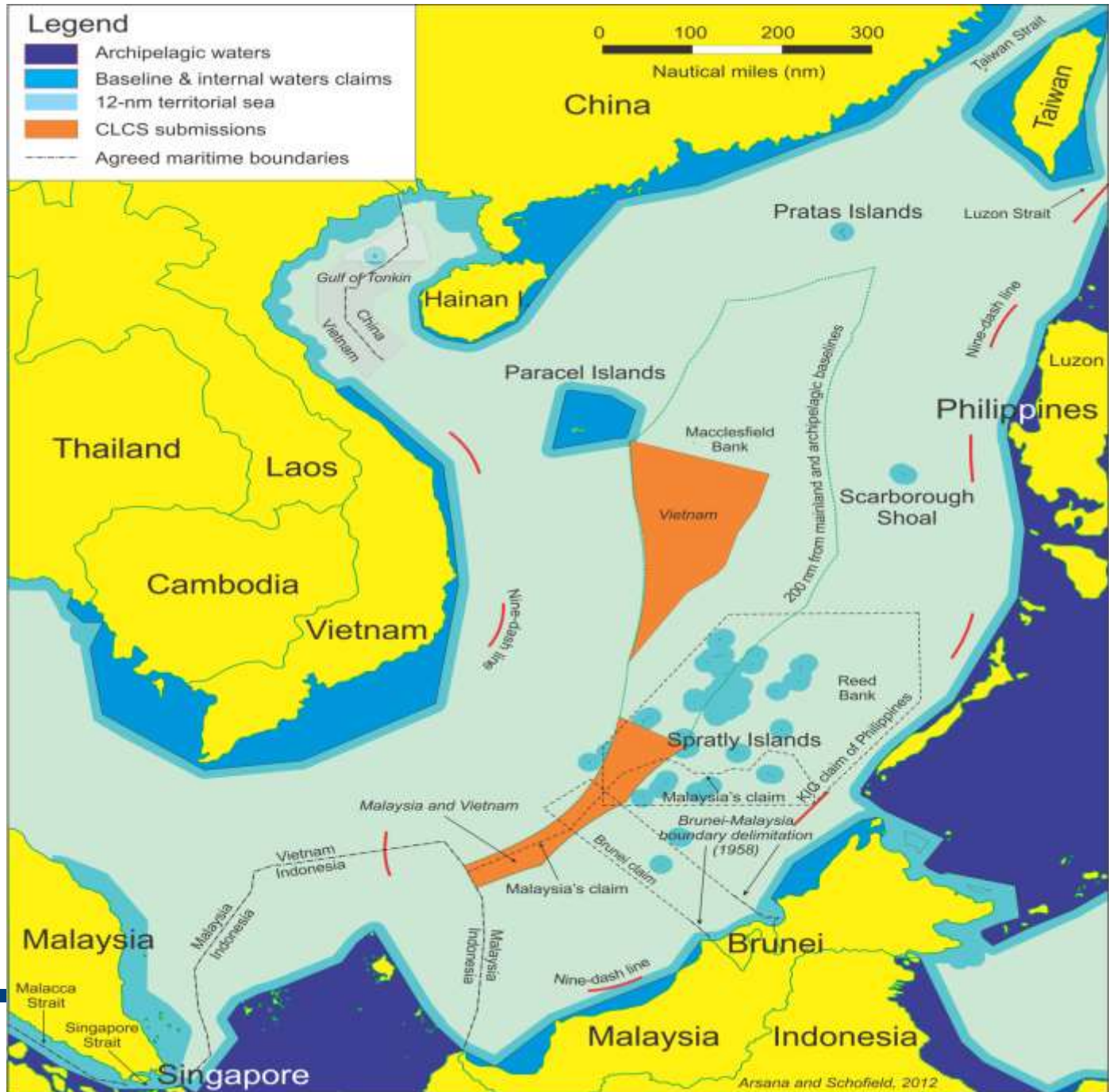
- Some States take the position that innocent passage of warships is subject either to **authorization** or **notification**
- USA maintains that any coastal State laws requiring either **authorization** or **notification** are contrary to UNCLOS – it protests any requirements
- As a matter of policy, the US Navy does not give notice or seek authorization to exercise the right of innocent passage through any State's territorial sea

Rights of Coastal State in Territorial Sea

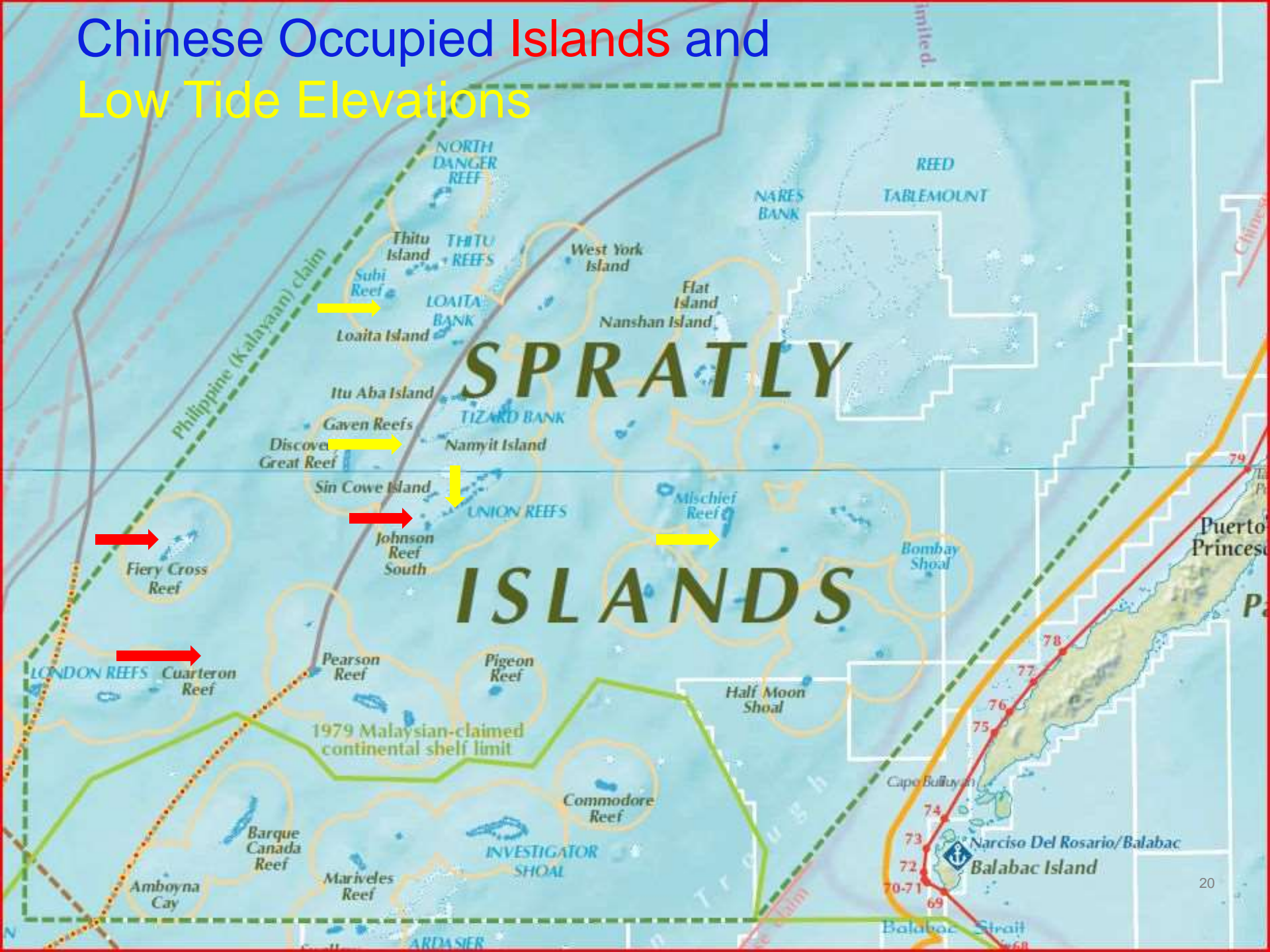
Art 25(1). May **prevent passage** which is **not innocent**

Art 25(3). May **temporarily suspend** passage if:

- without discrimination among foreign ships
- in specified areas of its territorial sea
- essential for the protection of its security, including weapons exercises.



Chinese Occupied Islands and Low Tide Elevations

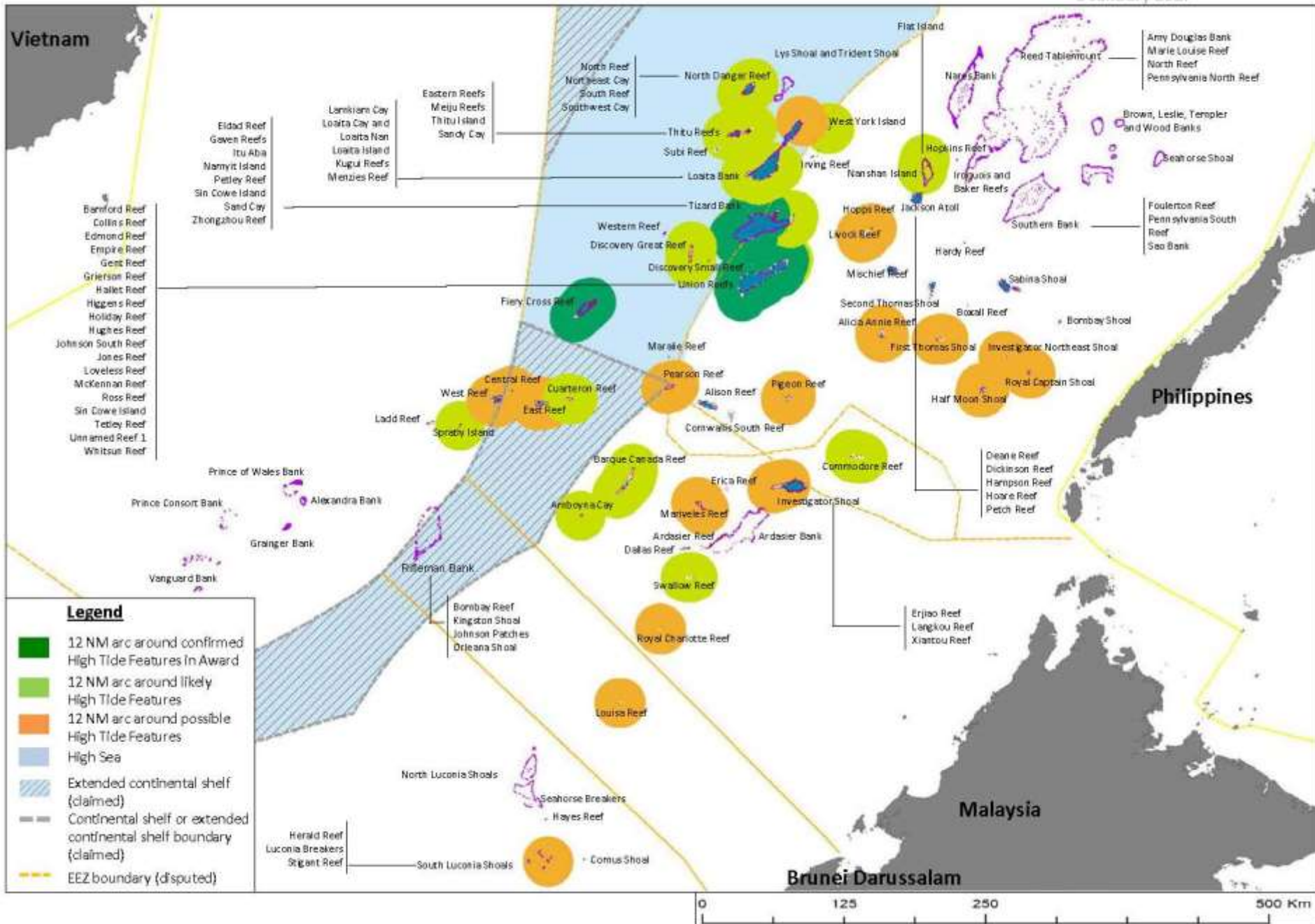


China / Philippines / Vietnam / Taiwan / Malaysia



Spratlys' Geographic Features – Maritime Zones based on the 12 July 2016 Arbitral Award

Youna Lyons
Centre for International Law
9 January 2017

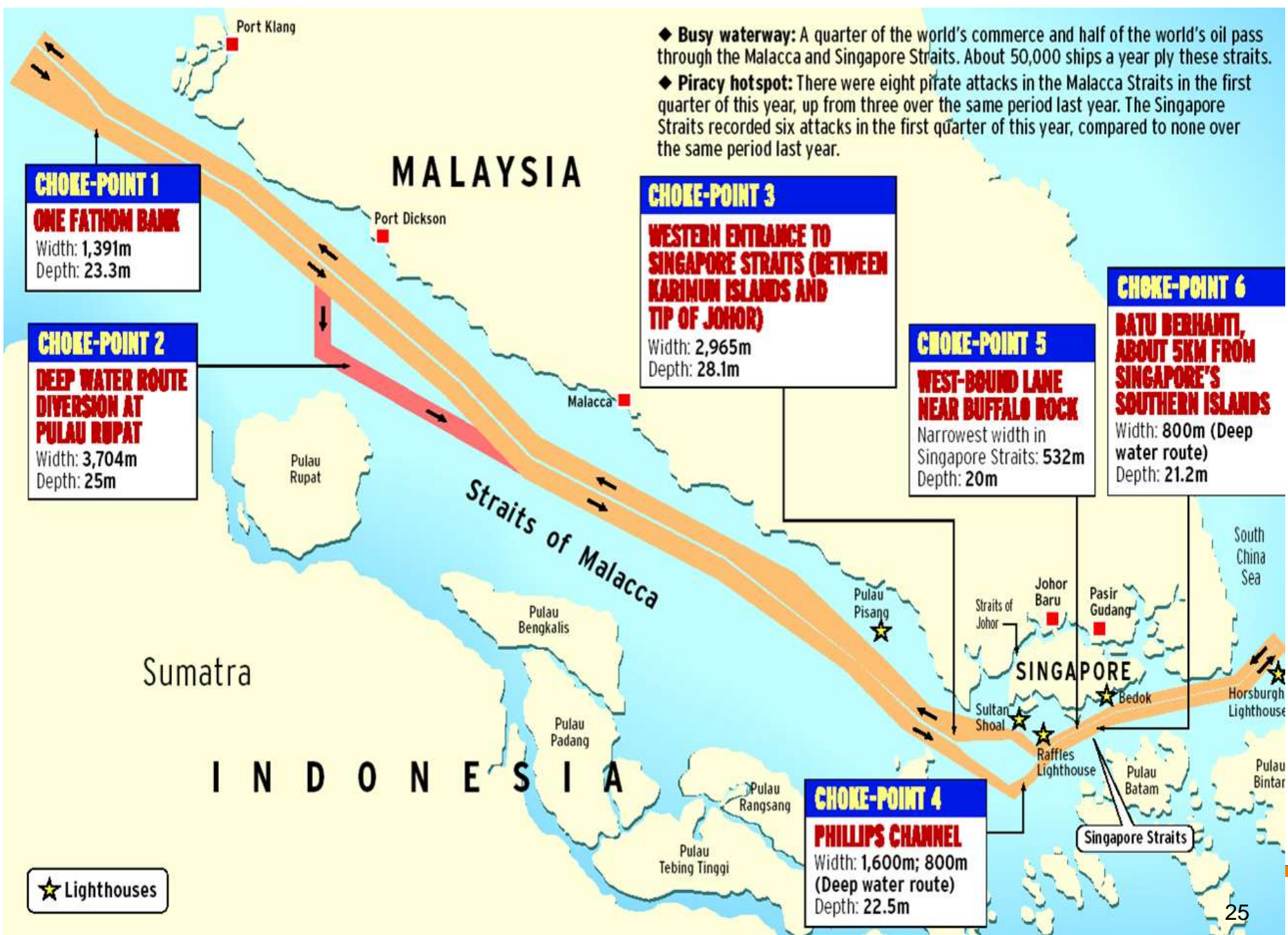


Part 3

Transit Passage in Straits Used for International Navigation

Straits Used for International Navigation

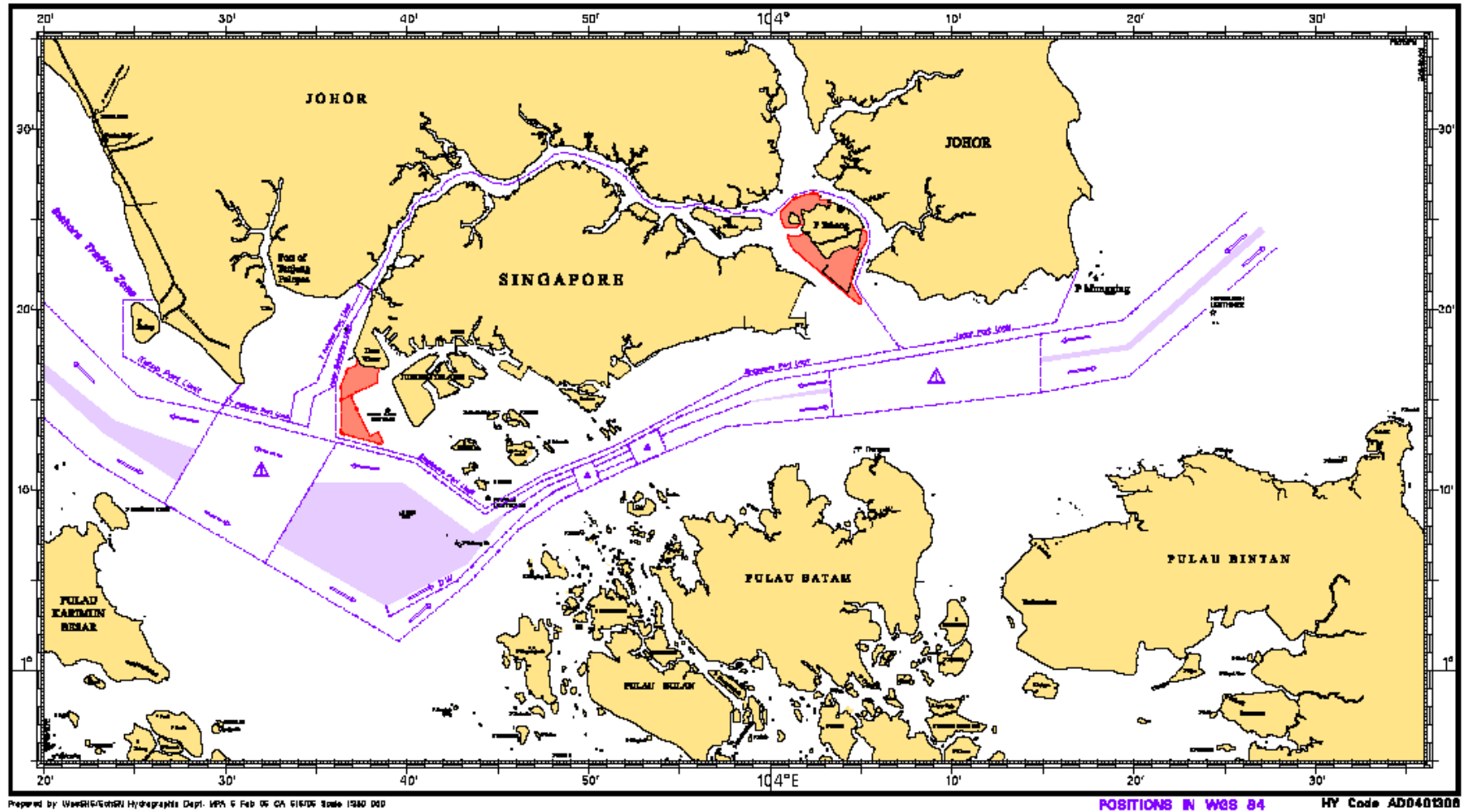
- Straits used for international navigation are often within the territorial sea of littoral States
- However, the **sovereignty** and **jurisdiction** of littoral States must be exercised subject to the provisions in Part III of UNCLOS and to other rules of international law
- Right of littoral States to regulate ships exercising transit passage or interfere with their passage is severely limited



◆ **Busy waterway:** A quarter of the world's commerce and half of the world's oil pass through the Malacca and Singapore Straits. About 50,000 ships a year ply these straits.

◆ **Piracy hotspot:** There were eight pirate attacks in the Malacca Straits in the first quarter of this year, up from three over the same period last year. The Singapore Straits recorded six attacks in the first quarter of this year, compared to none over the same period last year.

SINGAPORE STRAIT - PORT LIMITS AND TRAFFIC SEPARATION SCHEME



Transit Passage in Straits Used for International Navigation

- All Ships enjoy the **Right of Transit Passage**
- Transit Passage **cannot be suspended**
- Littoral States cannot impede transit passage
- Ships exercising transit passage must refrain from any activities other than those incident to their **normal modes** of continuous and expeditious transit
- All ships exercising transit passage must comply with **generally accepted international rules and standards** on safety and ship-source pollution (SOLAS, COLREG, STCW, MARPOL, Load Lines)

How transit passage differs from innocent passage

1. Includes **overflight** for aircraft
2. **Submarines** can transit in **normal mode** of transit - submerged
3. **Cannot be suspended**
4. Coastal States laws on safety and pollution may only “**give effect to**” international rules and standards

Part 4

Archipelagic Sea Lanes Passage through Archipelagic States

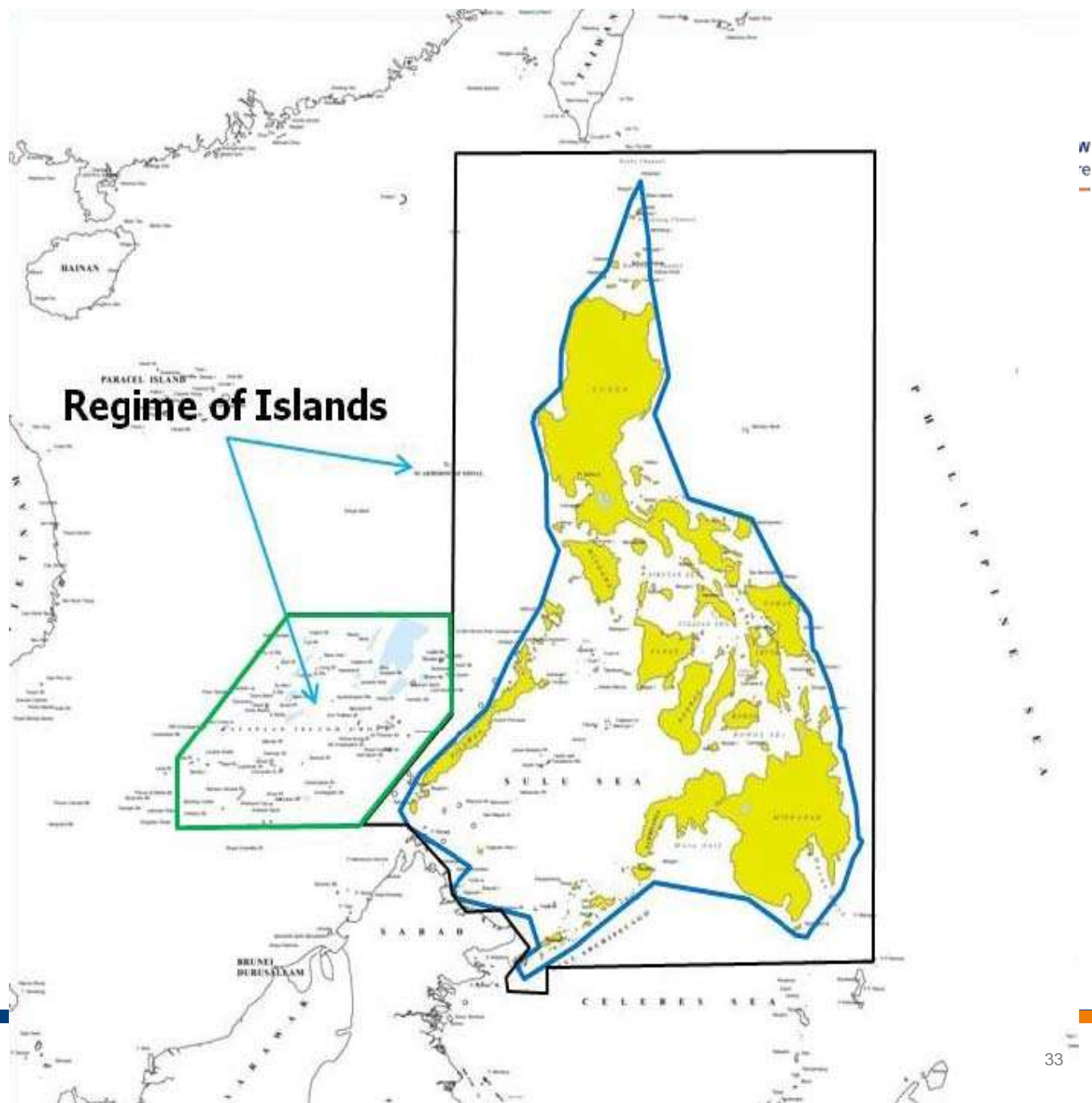
Archipelagic Waters

- **States** that are **constituted wholly by one or more archipelagos** may draw straight baselines connecting the outermost parts of its outermost islands and drying reefs
 - States with island archipelagoes must use normal baseline method (e.g., Hawaiian islands)
- Waters inside the archipelagic baselines are known as **archipelagic waters**
- Maritime zones are measured from the **archipelagic baselines**
- States have **sovereignty** over their archipelagic waters, subject to Part IV of UNCLOS

Archipelagic Baselines

- **An Archipelagic State is defined as a State constituted wholly by one or more archipelagoes and may included other islands**
- **Archipelagic States are permitted to draw straight baselines connecting the outermost islands and drying reefs**
- **There are technical rules placing limits on archipelagic baselines**
- **States that are not “archipelagic States” are not permitted to draw straight baselines around mid-ocean archipelagoes under their sovereignty**





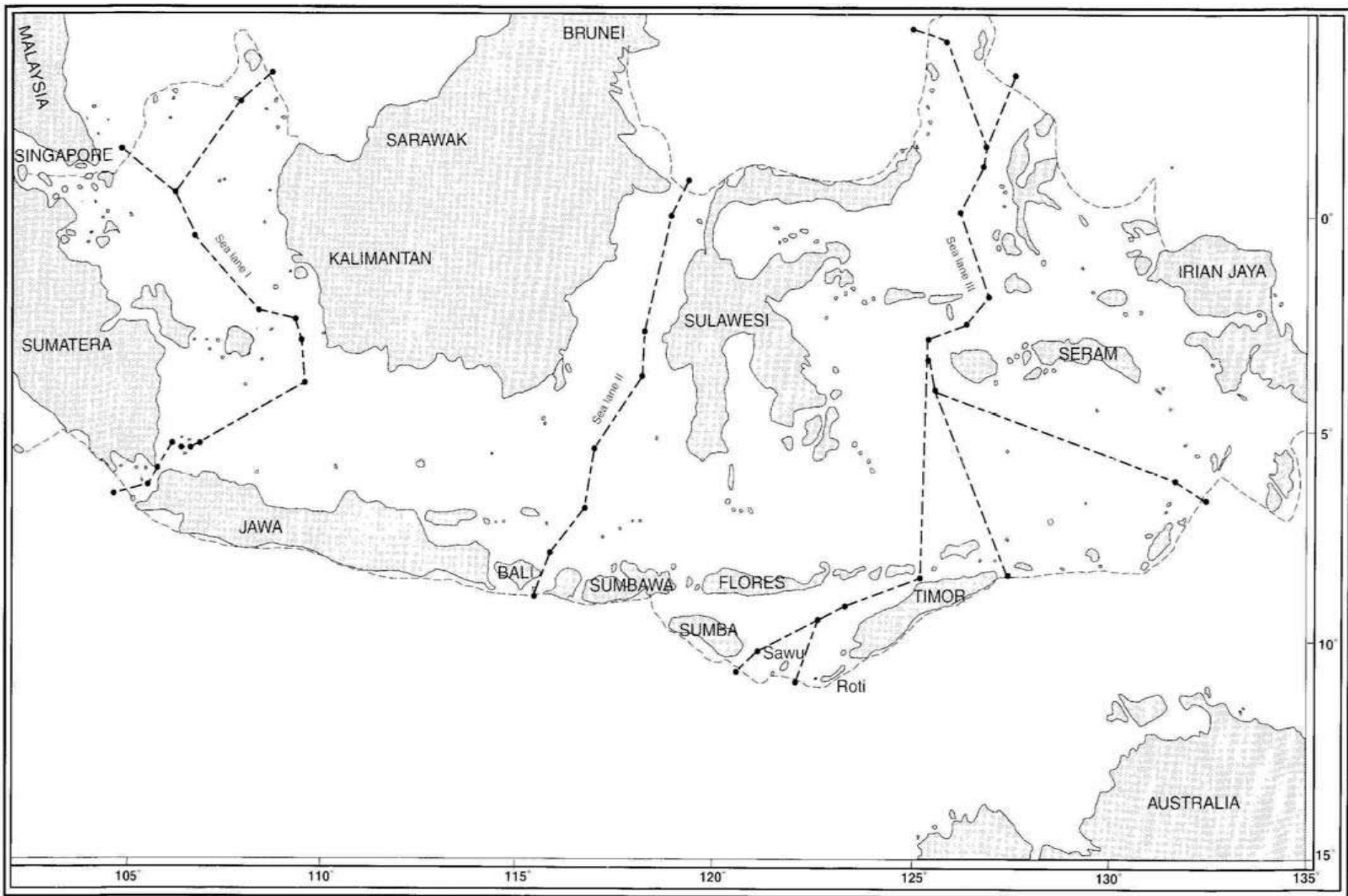
Regime of Islands

Archipelagic Sea Lanes Passage (ASLP)

- Ships and aircraft enjoy the **right of archipelagic sea lanes passage** through the archipelago on (or over) routes normally used for international navigation
- ASLP is almost identical to transit passage
- Outside designated sea lanes, ships enjoy **innocent passage** for the purpose of transiting the archipelagic waters

Archipelagic Sea Lanes

- Archipelagic States may designate **archipelagic sea lanes** through their archipelagic waters
- Once archipelagic sea lanes are designated, the right of ASLP may only be exercised through those designated sea lanes
- If no archipelagic sea lanes are designated, right of ASLP may be exercised through the **routes normally used for international navigation**
- Indonesia's three north-south sea lanes are only a "**partial designation**" – ships continue to have right of ASLP on routes normally used for international navigation

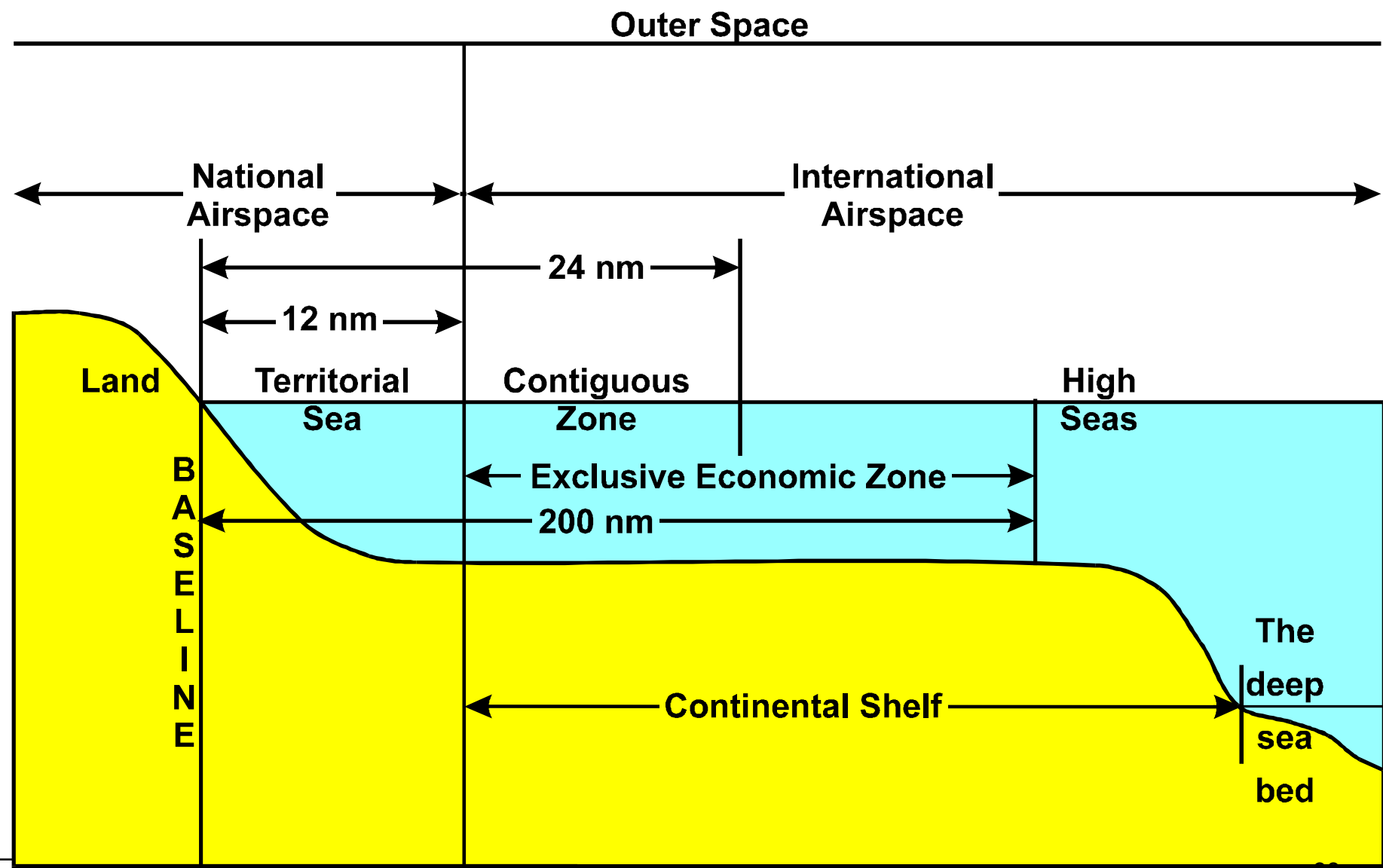


INDONESIAN ARCHIPELAGIC SEA LANES I, II AND III

Part 5

Freedoms of the High Seas

LEGAL REGIMES OF THE OCEANS AND AIRSPACE



Principles Governing High Seas

- **The high seas are open to all States, whether coastal or land-locked.**
- **No State may validly purport to subject any part of the high seas to its sovereignty.**
- **The high seas shall be reserved for peaceful purposes.**
- **Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.**

Freedom of the High Seas

Freedom of the high seas comprises, *inter alia*, both for coastal and land-locked States:

- (a) freedom of **navigation**;
- (b) freedom of **overflight**;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;
- (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.

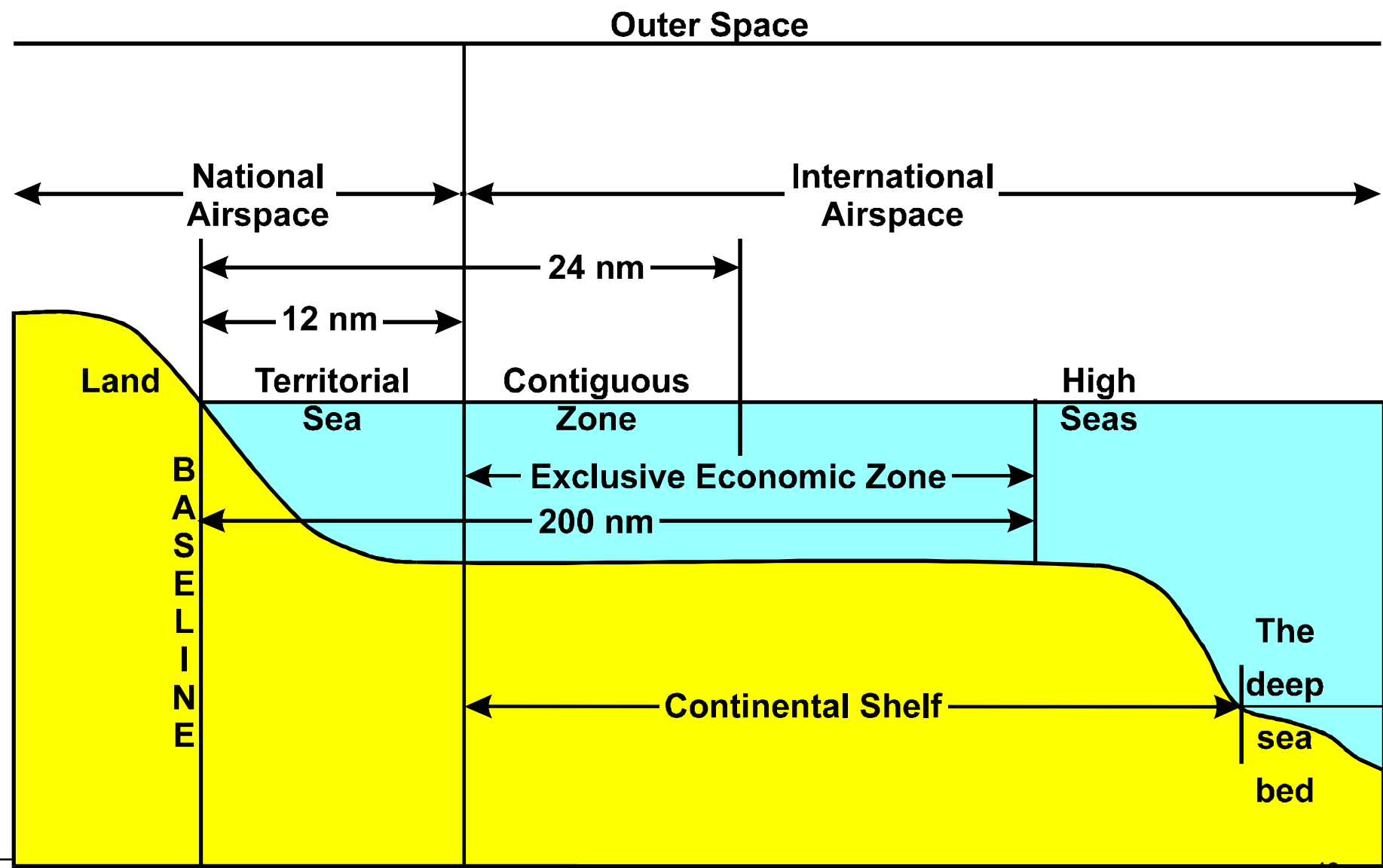
Military activities on the high seas

- It is generally agreed that the phrase “**inter alia**” in Article 87 is intended to ensure that freedom of the high seas includes the conduct of **military activities**, including the conduct of military exercises, the testing of weapons and military reconnaissance

Part 6

High Seas Freedoms in the EEZ

LEGAL REGIMES OF THE OCEANS AND AIRSPACE



Nature of EEZ Regime

- **EEZ is a maritime zone beyond and adjacent to the territorial sea, extending out to 200 nautical miles from the baselines from which the territorial sea is measured**
- **EEZ is not part of the high seas**
- **EEZ is not subject to the sovereignty of coastal State**
- **EEZ is a **specific legal regime** in which the rights and jurisdiction of coastal States and the rights and freedoms of other States are set out in the Convention**

Overview of EEZ Regime

Article 55. Specific Legal Regime

Article 56. Rights, Jurisdiction & Duties of Coastal States

Article 58. Rights and Duties of Other States

Article 56. Rights of Coastal State

In the EEZ, 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;
- (c) **other rights and duties provided for in this Convention**

Article 56. Jurisdiction of Coastal State

In the EEZ, the coastal State has:

(b) **jurisdiction** as provided for in the relevant provisions of this Convention with regard to:

- (i) the **establishment and use of artificial islands, installations and structures**; [Part VI]
- (ii) **marine scientific research**; [Part XII]
- (iii) the protection and preservation of the **marine environment**; [Part XII]

Article 56 - Due Regard Obligation of Coastal States

2. In exercising its rights and performing its duties under this Convention in the EEZ,

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.

Article 58 – Freedoms of Other States

1. In the EEZ, all States, . . . enjoy, subject to the relevant provisions of this Convention, the **freedoms** referred to in article 87 of **navigation and overflight** and of the laying of submarine cables and pipelines, and **other internationally lawful uses of the sea related to these freedoms**, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

Article 58. Obligations of Other States in the EEZ

3. In exercising their rights and performing their duties under this Convention in the EEZ, States shall have **due regard** to the **rights and duties** of the coastal State and shall comply with the **laws and regulations adopted by the coastal State** in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

Article 58 – High Seas Rules on Jurisdiction in the 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.
- **Note: 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**

Thanks for your attention!

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