

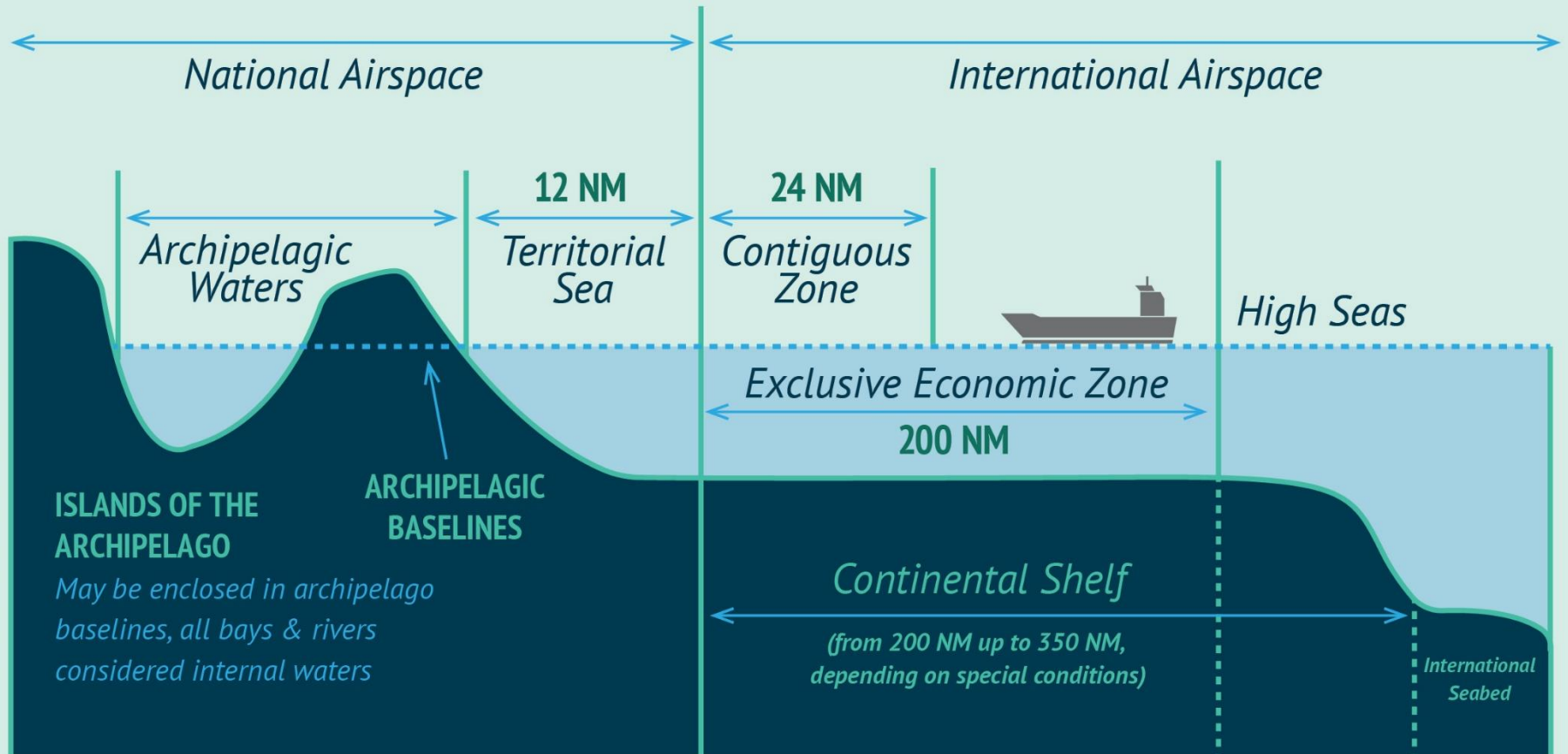
# Coastal State measures for environmental protection affecting transit passage and archipelagic sea lanes passage

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# INTERNATIONAL OCEANS GOVERNANCE REGIME

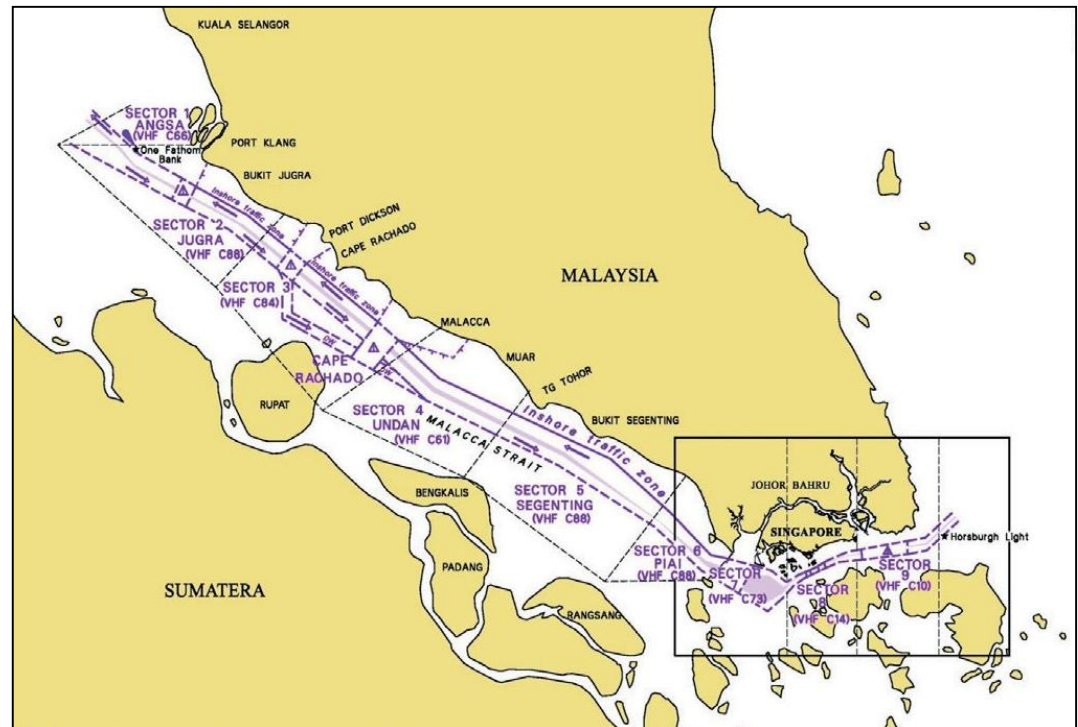
## UNCLOS Maritime and Airspace Zones



Source: Batongbacal and Baviera (2013).

# STRAITS USED FOR INTERNATIONAL NAVIGATION

- UNCLOS Pt III
- Compromise at UNCLOS III
- In the territorial sea (or internal waters) between one area of high seas or EEZ and another area of high seas or EEZ
- Transit passage – continuous and expeditious transit in “normal mode”



Source: BIMCO, Safe Passage: The Straits of Malacca and Singapore, 2014.



# UNCLOS PASSAGE REGIMES



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Innocent Passage	Transit Passage	Archipelagic Sea Lanes Passage
<ul style="list-style-type: none"> <li>- All ships</li> <li>- Traverse the territorial sea or proceed to or from internal waters</li> <li>- Continuous and expeditious</li> <li>- Not prejudicial to the peace, good order or security of the coastal state</li> </ul> <p>Coastal state laws for:</p> <ul style="list-style-type: none"> <li>- Safety of navigation &amp; regulation of maritime traffic</li> <li>- Conservation of the living resources</li> <li>- Preservation of the environment</li> <li>- Not CDEM beyond GAIRES</li> <li>- TSS and sea lanes</li> </ul> <p>No practical effect of denying or impairing innocent passage</p> <p>Coastal state may take necessary steps to prevent non-innocent passage</p> <p>May temporarily suspend</p>	<ul style="list-style-type: none"> <li>-All ships and aircraft</li> <li>-Between high seas/EEZ &amp; high seas/EEZ</li> <li>-<b>Freedom</b> of navigation and overflight solely for the purpose of continuous and expeditious transit</li> <li>-Proceed without delay</li> <li>-Refrain from threat or use of force</li> <li>-Refrain from any activity not incident to <b>normal mode</b> of continuous and expeditious transit</li> </ul> <p>Ships shall comply with generally accepted international regulations, procedures and practices for:</p> <ul style="list-style-type: none"> <li>- Safety at sea</li> <li>- Prevention, reduction and control of pollution from ships</li> </ul> <p>Transit passage shall not be impeded, hampered or suspended</p>	<ul style="list-style-type: none"> <li>- All ships and aircraft</li> <li>- Along designated archipelagic sea lanes and routes normally used for international navigation through archipelagic waters</li> <li>- Between high seas/EEZ &amp; high seas/EEZ</li> <li>- Rights of navigation and overflight in the <b>normal mode</b> solely for the purpose of continuous, expeditious and unobstructed transit</li> <li>- Proceed without delay</li> <li>- Refrain from threat or use of force</li> <li>- Refrain from any activity not incident to <b>normal mode</b> of continuous and expeditious transit</li> </ul> <p>Ships shall comply with generally accepted international regulations, procedures and practices for:</p> <ul style="list-style-type: none"> <li>- Safety at sea</li> <li>- Prevention, reduction and control of pollution from ships</li> </ul> <p>ASL passage shall not be hampered</p>

# COASTAL STATE PRESCRIPTIVE JURISDICTION IN STRAITS

Art 42 – Subject to provisions on transit passage, littoral States may adopt laws and regulations relating to transit passage in respect of (relevantly):

- Safety of navigation and regulation of maritime traffic as provided in art 41
- Prevention, reduction and control of pollution, “by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait”

Art 41 – Sea lanes and traffic separation schemes (TSS)

- May designate sea lanes and TSS “where necessary to promote the safe passage of ships”
- May “when circumstances require” substitute sea lanes and TSS

Art 43 – Cooperation between user and littoral States for:

- Establishment and maintenance of necessary navigational and safety aids
- Prevention, reduction and control of pollution from ships

# COASTAL STATE PRESCRIPTIVE JURISDICTION IN ARCHIPELAGIC SEA LANES

Art 42 (Pt III) applies mutatis mutandis, archipelagic State may adopt laws and regulations for:

- Safety of navigation and regulation of maritime traffic as provided in art 41
- Prevention, reduction and control of pollution, “by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait”

Art 53 – May designate archipelagic sea lanes including “**all** normal passage routes used as routes for international navigation”

- Designated by the archipelagic State following adoption by the IMO
- May prescribe TSS “for the safe passage of ships through narrow channels in such sea lanes”
- May “when circumstances require” substitute other archipelagic sea lane or TSS

# PRESCRIPTIVE JURISDICTION UNDER PT XII OF UNCLOS

Art 192 – States have the obligation to protect and preserve the marine environment

Art 194 – States shall take “all measures consistent with this Convention” necessary to prevent, reduce and control marine pollution

Art 197 – States shall cooperate on a global or regional basis to formulate international rules, standards and recommended practices and procedures consistent with this Convention for the protection and preservation of the marine environment

- Precedence of transit/ASL passage regime re Arts 194 & 197 but not 192?

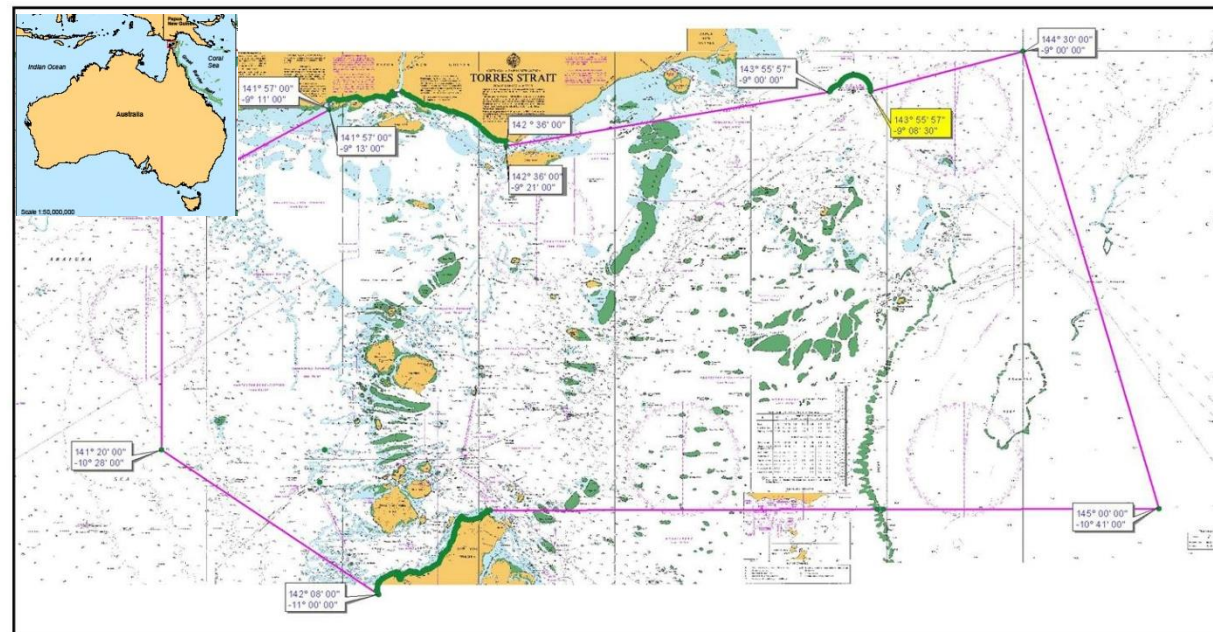


# ENVIRONMENTAL REGULATION THROUGH IMO

- The IMO is the “competent international organisation” for the regulation of international navigation
- 1948 Convention on the IMO – purposes include:
  - To encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships (art 1)
- Routeing & reporting measures (SOLAS)
  - Extended beyond art 42 sea lanes and TSS to include mandatory ship reporting and vessel traffic services
  - General increase in applications for routeing measures for environmental purposes
  - Merging of maritime safety and environmental protection
- Discharge regulation (MARPOL)
  - Extended beyond art 42 implicit reference to Annexes I & II to all Annexes
- Particularly Sensitive Sea Areas

# TORRES STRAIT

- 2003 Australia/PNG application for extension to Great Barrier Reef PSSA to include Torres Strait
- Proposed associated protective measure: mandatory pilotage
- LEG Committee unable to reach conclusion on legal basis
- MSC Resolution phrased in recommendatory language, Australia maintains that pilotage is mandatory



Source: AMSA

PROPOSED PSSA for TORRES STRAIT

- Jomard Entrance PSSA (Papua New Guinea)
  - Recommendatory two-way routes and precautionary area through archipelagic waters approved by MSC in 2014
  - Within archipelagic waters and likely “route normally used for international navigation”, archipelagic sea lanes passage therefore applicable
- Tubbataha Reefs Natural Park PSSA (Philippines)
  - Recommendatory Area to be Avoided approved by MSC in 2017
  - In archipelagic waters and likely “route normally used for international navigation”, archipelagic sea lanes passage therefore applicable
  - Originally phrased in mandatory language, later confirmed at the NCSR that it would be recommendatory only

- Tanjung Piai and Pulau Kukup PSSA (Malaysia)
  - In-progress application for Area to be Avoided and mandatory No-Anchoring Zone in the Straits of Singapore and Malacca, just outside TSS
  - Submitted to MEPC 71 in 2017 but not considered as area under maritime boundary negotiations with Indonesia
  - Malaysia intends to submit routeing measures proposal to NCSR 5 in 2018
- Lombok Strait PSSA (Indonesia)
  - In-progress PSSA application, to be submitted to MEPC 72 in 2018
  - Tentative proposal for TSS and ship reporting system on designated archipelagic sea lane

# CONCLUSIONS

- Straits and archipelagic sea lanes are the points at which the interests of coastal States in protection and flag States in navigation are at their strongest
- Evolution of IMO regulations and practice has occurred over time to respond to environmental needs and concerns of coastal States
- Balance between environmental and navigational interests requires continual re-evaluation
- Failure of international community through the IMO to act to protect the environment in straits and archipelagic sea lanes may force coastal States to take unilateral action
- Paramount need to avoid unilateral regulation of straits and archipelagic sea lanes
  - Preserve shipping industry and commercial interests
  - Maintain the position and status of the IMO

**CIL**

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THANK YOU