

**2022 APOLIA CONFERENCE (online)**  
**UNCLOS IN ASA PACIFIC: 40 YEARS & ONWARDS**  
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**Session 3.**  
**Navigational Regimes and Enforcement of  
Coastal State Jurisdiction**

**Navigational Issues and Freedoms of the Seas:  
Unresolved Issues**

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# Outline of Presentation

1. Due Regard Obligations & Military Exercises in the EEZ
2. Issues relating to Submarine Cables in the EEZ
3. Innocent Passage of Nuclear-Powered Ships and Ships Carrying Nuclear or Inherently Dangerous or Hazardous Materials
4. Rights and Freedoms of Autonomous Ships

# Part 1

# Due Regard Obligations and Military Exercises in the EEZ

# Rights & Jurisdiction in the EEZ

- Coastal State does not have sovereignty in the EEZ – it has **sovereign rights and jurisdiction** over economic activities, marine scientific research and protection of the marine environment [Art 56]
- Other States have **high seas freedoms** and “**other lawful uses of the sea related to those freedoms**” [Art 58(1)]
- If coastal State is not given jurisdiction in Part V, the high seas rules on jurisdiction apply [Art 58(2)]
- In exercising their rights and performing their duties, both States must have **due regard** to the **rights** and **duties** of the other
  - **Note: Must give due regard to rights and duties, not to “interests”**

# Unilateral Declarations of Coastal States

- Declarations of India, Malaysia and other States when signing or ratifying UNCLOS. For example, India's declaration:
  - The Government of India understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone and on the continental shelf **military exercises or manoeuvres**, in particular those involving the use of weapons or explosives without the **consent of the coastal State**.

# US State Dept Position on “Due Regard” Obligation in Article 58

- Under article 58(1), all States have the right to conduct **military activities** within the EEZ, but may only do so consistently with the obligation to have **due regard** to the rights and duties of the Coastal State
- User State must only comply with the laws and regulations adopted by the coastal State in accordance with UNCLOS and other rules of international law
- **US Position:** It is the duty of the **flag State**, not the right of the coastal State, to enforce this "due regard" obligation.

# Possible “Compromise” on Military Exercises in the EEZ involving live firing

- User State **CONSULTS** the coastal State with regard to the timing, nature and location of the exercise
  - **Not** a request for **consent or authorization** of coastal State
  - **Not** conducting exercise without **notice** to coastal State
- Coastal State can **request consultation** if it learns of planned exercise in its EEZ involving live firing of weapons
- **Purpose of consultation** is to ensure that exercise will not interfere with existing or planned activities of coastal State in the same area

# Precedent: “Due Regard” in 1967 Outer Space Treaty, Article IX

In the exploration and use of outer space . . . States Parties to the Treaty shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space, including the moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty.



# “Due Regard” in 1967 Outer Space Treaty, Article IX

- If a State Party to the Treaty has reason to believe that an **activity or experiment planned by it or its nationals** in outer space. ..., would cause **potentially harmful interference with activities of other States Parties** in the peaceful exploration and use of outer space. .  
**it shall undertake appropriate international consultations** before proceeding with any such activity or experiment.

# “Due Regard” in 1967 Outer Space Treaty, Article IX

- If a State Party to the Treaty which has reason to believe that an **activity or experiment planned by another State Party** in outer space, including the moon and other celestial bodies, **would cause potentially harmful interference** with activities in the peaceful exploration and use of outer space, including the moon and other celestial bodies, **may request consultation** concerning the activity or experiment.

## Part 2

# Issues Relating to Submarine Cables in the EEZ

# Due Regard & Submarine Cables in EEZ

- “States” have the “freedom” to lay submarine cables in the EEZ and on the continental shelf of other States (Arts 58) with two limitations:
  - They shall have **due regard** to the rights and duties of the coastal State
  - They shall comply with **laws and regulations** adopted by the coastal State in accordance with the provisions of UNCLOS
- Query: When a private company lays a submarine cable, is it exercising the high seas freedom of the State where it is registered?
- Query: Does the “**due regard**” obligation require the private company laying a submarine cable to **notify and consult** the coastal State when planning a cable route and when laying or repairing a cable?
- Query: If private company laying a cable fails to comply with the due regard obligation or violates the laws of the coastal State, is the State where the company is registered internationally responsible for its actions?

# Security of Submarine Cables

- All States have the freedom to lay submarine cables on the high seas (Art 87) and in the EEZ (Art 58)
- However, most cables are laid by private companies and unlike ships, the cables are not registered in any State, so there is no “flag State”
- Coastal States have the right to protect submarine cables **in maritime zones subject to their sovereignty** from sabotage or intentional cutting
- Coastal States have an obligation under Article 113 of UNCLOS to adopt laws and regulations making the breaking or injury of a submarine cable on the high seas (or in the EEZ) a criminal offence **if committed by their nationals or by a ship flying its flag** if the act was done wilfully or through culpable negligence

# Jurisdiction over Cutting or Sabotage of Cables in the EEZ

- If foreign ship in the EEZ of a coastal State is intentionally cutting submarine cables that land in the coastal State, a warship of the coastal State does not have the right to board the suspect ship without the express consent of the flag State or the master of the ship
- Even if it boarded the suspect ship, the warship would not be able to arrest the ship and its master because the foreign ship would not have committed an offence under the laws of the coastal State
- **Recommendation:** Coastal States should amend their criminal laws to make the intentional cutting of submarine cables in their EEZ a crime
- **Recommendation:** A new international convention making such offences “international maritime crimes” should be adopted

## Part 3

# Innocent Passage of Nuclear-Powered Ships or Ships Carrying Nuclear or Inherently Dangerous or Noxious Substances

# Laws and Regulations relating to Passage in the Territorial Sea

- A Coastal State may adopt laws and regulations relating to the passage of foreign ships in its territorial sea (Art. 21(1))
- However, such laws shall not hamper the innocent passage of foreign ships
- A Coastal State may not impose requirements that have the practical effect of denying or hampering the right of innocent passage
- A Coastal State may not discriminate in form or in fact against the ships of any State or against ships carrying cargoes to and from or on behalf of any State



# Laws and Regulations relating to Passage in the Territorial Sea

- Article 21(2) provides that the laws of the coastal State **shall not apply to the design, construction, manning or equipment** of foreign ships unless they are giving effect to **generally accepted international rules or standards**
  - The rationale for this restriction is that these matters are governed by international Conventions adopted by the IMO
    - 1974 Safety of Life at Sea Convention (SOLAS)
    - 1973/78 International Convention for the Prevention of Pollution from Ships (MARPOL 73/78)
    - 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW)

# Article 23: Nuclear-Powered Ships and Ships Carrying Hazardous Cargo

1. Nuclear-Powered ships and ships carrying nuclear or other inherently dangerous or noxious substances must carry documents and observe special precautionary measures established by the IMO and IAEA
2. Coastal States may require such ships to use sea-lanes or traffic separation schemes

# Nuclear-Powered Ships and Ships Carrying Hazardous Cargo

**Issue:** Some coastal States have domestic laws requiring that nuclear-powered ships and ships carrying **nuclear or other inherently dangerous or noxious substances** must seek **authorization** or provide **notice** before exercising the right of innocent passage through the territorial sea

- Western maritime powers have challenged the such requirements as contrary to UNCLOS
- In practice, ships carrying **nuclear waste** have often avoided passing through the territorial waters of States

# Declaration of Malta

- The exercise of the **right of innocent passage of warships** through the territorial sea of other States, should also be perceived to be a peaceful one.
- Effective and speedy means of communication are easily available, which makes the **prior notification** of the exercise of the right of innocent passage of warships reasonable and not incompatible with the Convention. Such notification is already required by some States. Malta reserves the right to legislate on this point.
- **Malta is also of the view that such a notification requirement is needed in respect of nuclear-powered ships or ships carrying nuclear or other inherently dangerous or noxious substances.**
- Furthermore, no such ships shall be allowed within Maltese internal waters without the necessary authorisation.

# Notice & Duties of Coastal State

**Query:** is a “notice requirement” for nuclear-powered ships or ships carrying nuclear or hazardous materials consistent with Article 24?

## Art 24 Duties of Coastal State

1. The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention.

In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not:

- (a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; . .

## Part 4

# Rights and Freedoms of Autonomous Ships

# Autonomous Ships

- Under UNCLOS all “ships” have the right of innocent passage through the territorial sea, but “submarines and other underwater vehicles” must navigate on the surface and show their flag
- “Warship” is defined in Article 29, and requires that it be under the command of an officer and manned by a crew
- UNCLOS has no definition of “ship”, “vessel” or “underwater vehicle”

## Issues:

1. Are “unmanned systems” that operate on the surface or underwater entitled to the same passage rights as ships under UNCLOS ?
2. Are “unmanned systems” owned and operated by Governments entitled to sovereign immunity ?
3. Can an unmanned underwater system “surface & fly its flag”?

# Autonomous Ships – US Commander’s Handbook (2022 Edition)

1. **Unmanned Systems (UMSs)** are either autonomous or remotely navigated on the surface or underwater. (2.3.4)
2. When flagged as a ship, UMSs may be used to exercise any internationally lawful use of the sea (2.3.5)
3. In all cases, U.S. Navy UMSs are the sovereign property of the US and **immune** from foreign jurisdiction (2.3.5)
4. **Unmanned systems** may be designated as **US “warships”** if they are under the command of a commissioned officer and manned by a crew under regular armed forces discipline, by remote or other means (2.3.5)



# Issues concerning Autonomous Ships

1. Can an unmanned underwater system exercising the right of innocent passage “surface and fly its flag”?
2. Can an unmanned system be a “warship” if it has no master or crew on board?
3. Can a coastal State require that unmanned systems exercising passage in its territorial sea confine their passage to **sea lanes and traffic separation schemes**?
4. When exercising innocent passage, a ship may not engage in any **research or survey activities**. Neither term is defined in UNCLOS. How does the coastal State ensure that unmanned systems do not engage in research or survey activities in their territorial sea or archipelagic waters?
5. How does the coastal State communicate with an unmanned surface or underwater system that is navigating in its territorial sea or archipelagic waters?

**Thanks for your attention!**

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