

Article 9 ATT

A Law of the Sea Perspective

ATT Working Group on Effective Treaty Implementation
Sub-Working Group on Article 9, Meeting of 27 April 2021

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Article 9 ATT

Why law of the sea?

Article 9 – Transit and trans-shipment

Each State Party shall take appropriate **measures** to regulate (...) the transit and trans-shipment under its **jurisdiction** of conventional arms (...) through its **territory** **in accordance with relevant international law.**



Who has jurisdiction at sea (*inter alia* over foreign ships)?



Limits on regulation and enforcement?



Only land or also sea?



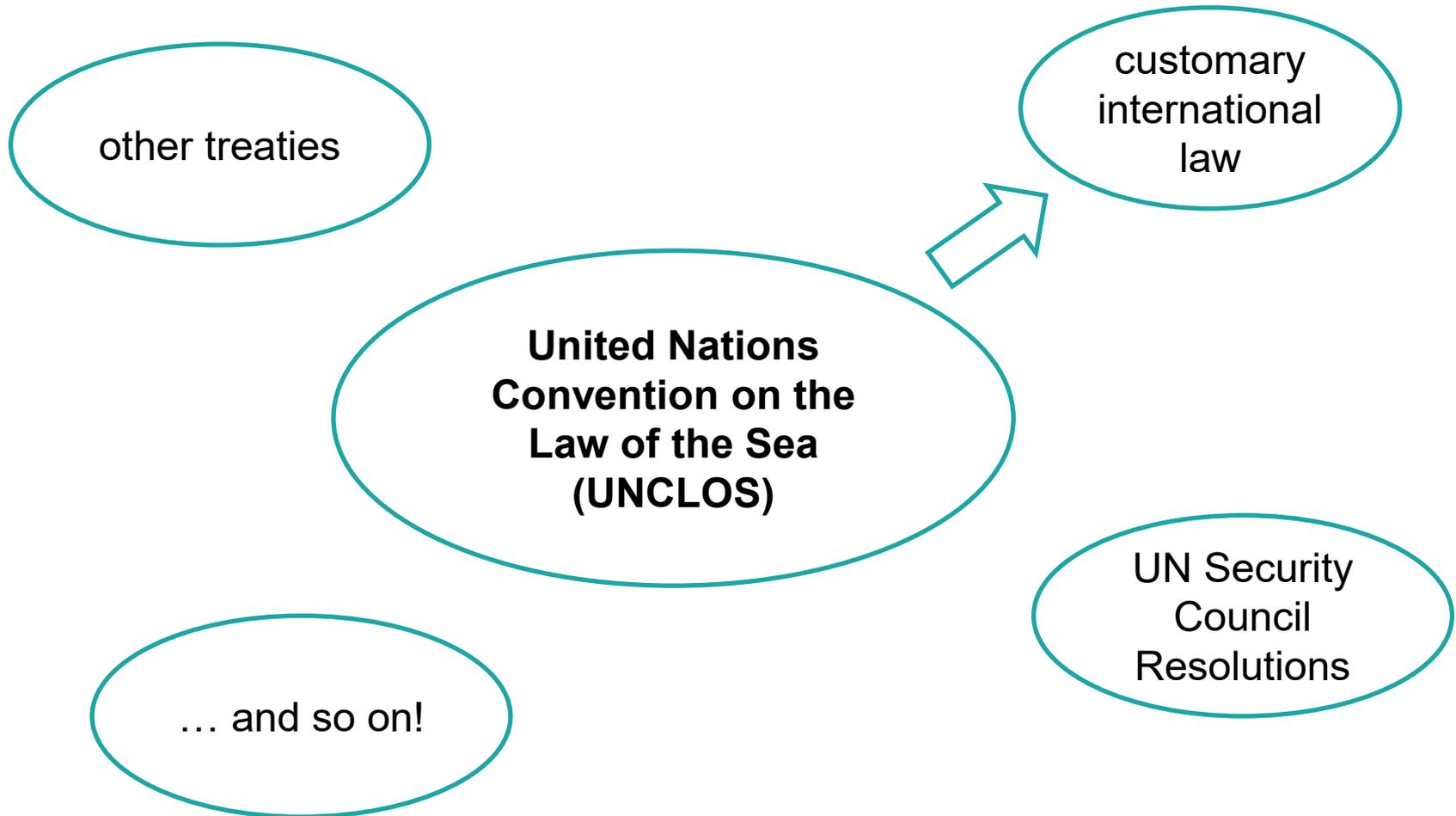
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Law of the sea

The basics

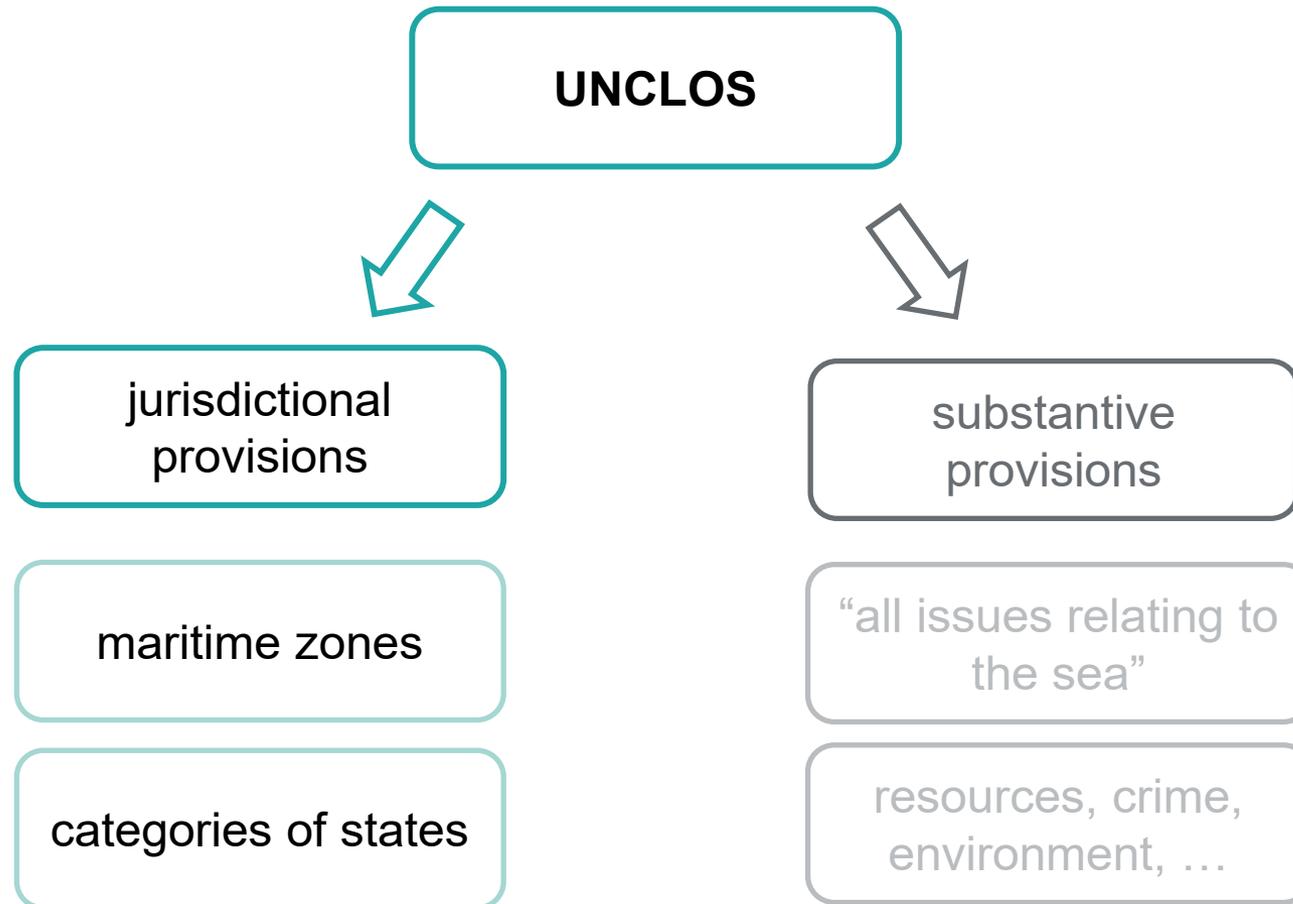
Law of the sea

Where is to be found?



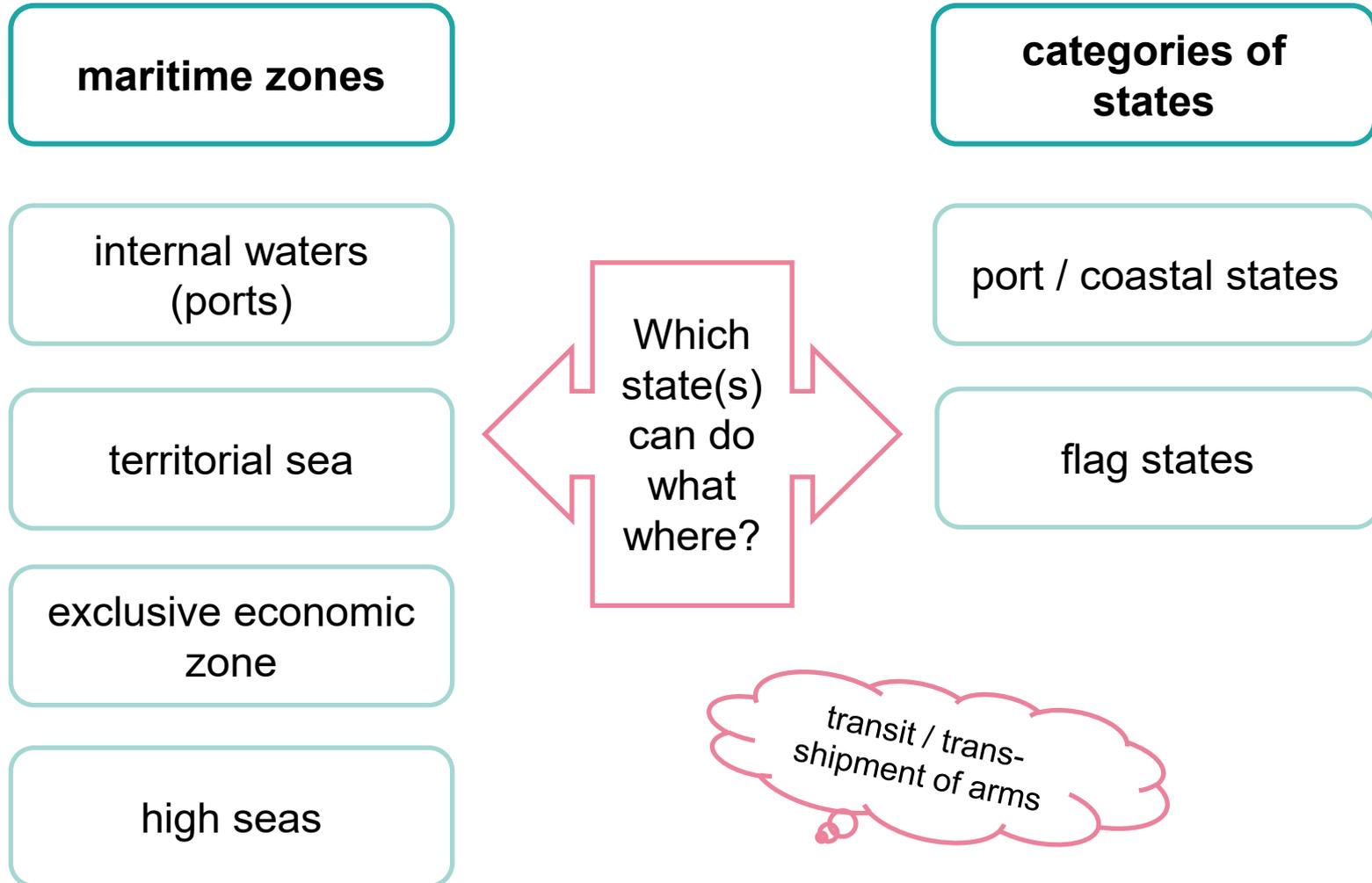
United Nations Convention on the Law of the Sea

What is it about?



Jurisdictional provisions of the UNCLOS

Maritime zones and categories of states





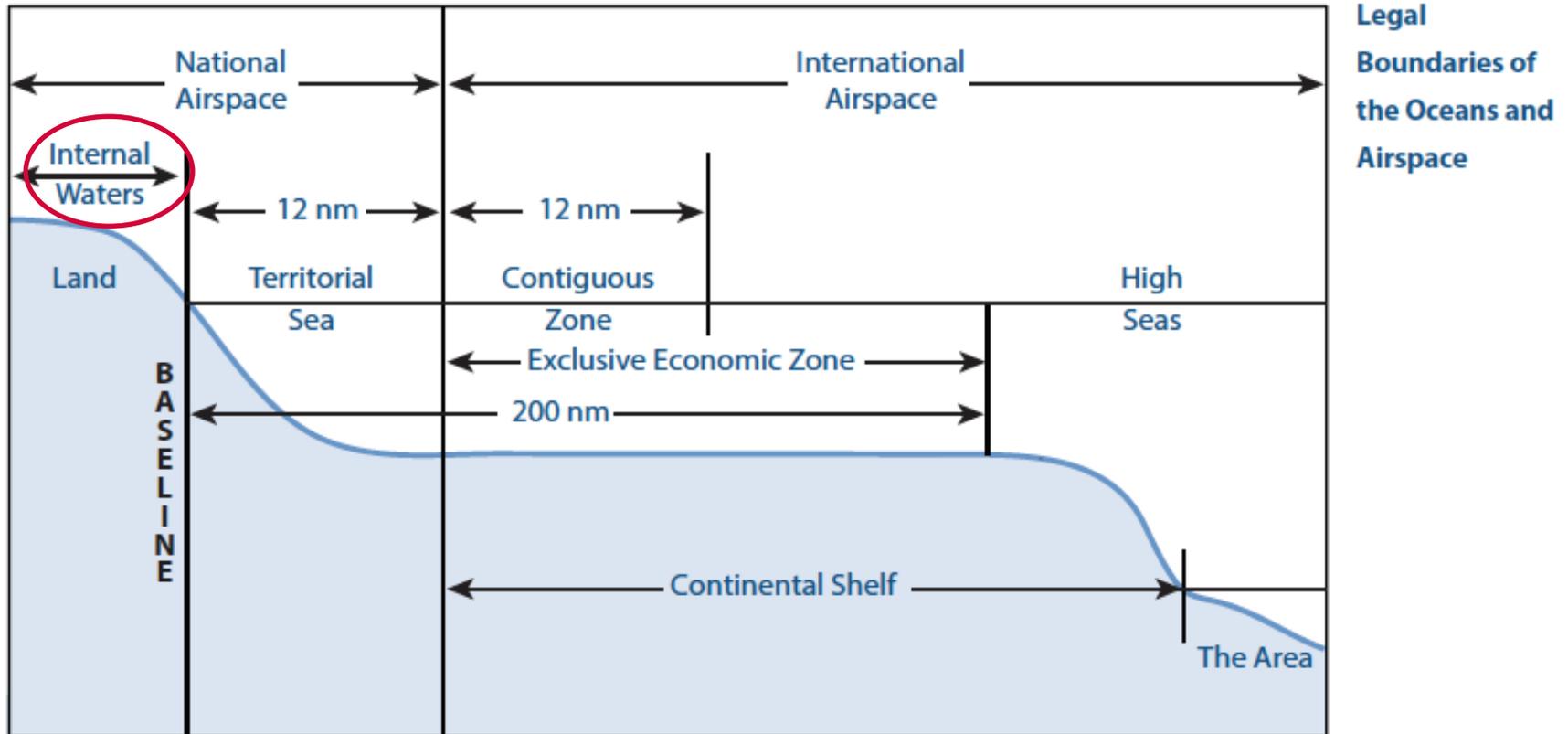
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Internal waters

Internal waters (ports)

Maritime zone



nm – nautical mile

Source: <<https://sites.tufts.edu/lawofthesea/chapter-two/>>

Internal waters (ports)

9 ATT: «territory»?

Definition and importance in ATT context

- waters on the landward side of the baseline (art. 8 UNCLOS)
- ports generally situation on land territory / internal waters
- ships reach ports for “transshipment” or “transit” (e.g. resupply for ships)
- logical points of control

Legal status: territory in the sense of art. 9 ATT?

- sovereignty of port state extends to internal waters (art. 2(1) UNCLOS)
- = territory
- art. 9 ATT: ports / internal waters = “transit/trans-shipment ... through its territory”

Foreign ships: right to access ports?

- ports located on territory / internal waters: full sovereignty of port state
- no general right of access to ports

Internal waters (ports)

9 ATT: «jurisdiction»?

Port state jurisdiction

- internal waters fall within the sovereign territory of port state: full jurisdiction
- jurisdiction to prescribe: e.g. conditions for port entry
- jurisdiction to enforce
 - denial of landing, trans-shipment or processing of cargo
 - denial of use of other port services
 - boarding and inspection
 - detention until compliance with law
- jurisdiction to adjudicate: e.g. monetary penalties

Internal waters (ports)

9 ATT: «measures ... in accordance with international law»?

Port state jurisdiction over foreign ships

- in principle: full jurisdiction
- but various limitations: practice (comity) and international law

Jurisdiction to prescribe

- example: conditions for entry into port
- limitation: e.g. non-discrimination

Jurisdiction to enforce

- example: enforcement action against which ships?
- international law: no exercise against sovereign immune vessels (warships, ...)
- comity: no exercise of jurisdiction over foreign vessels of any type if
 - “internal affairs of the ship” and “interests of the port state” not affected
 - ATT violation arguably not “internal affairs of the ship”

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Internal waters (ports)

Article 9 – Transit and trans-shipment

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full port/coastal
state jurisdiction



rather few limits from
law of the sea (e.g.
non-discrimination, not
“internal affairs of the
ship”)



internal
waters / ports

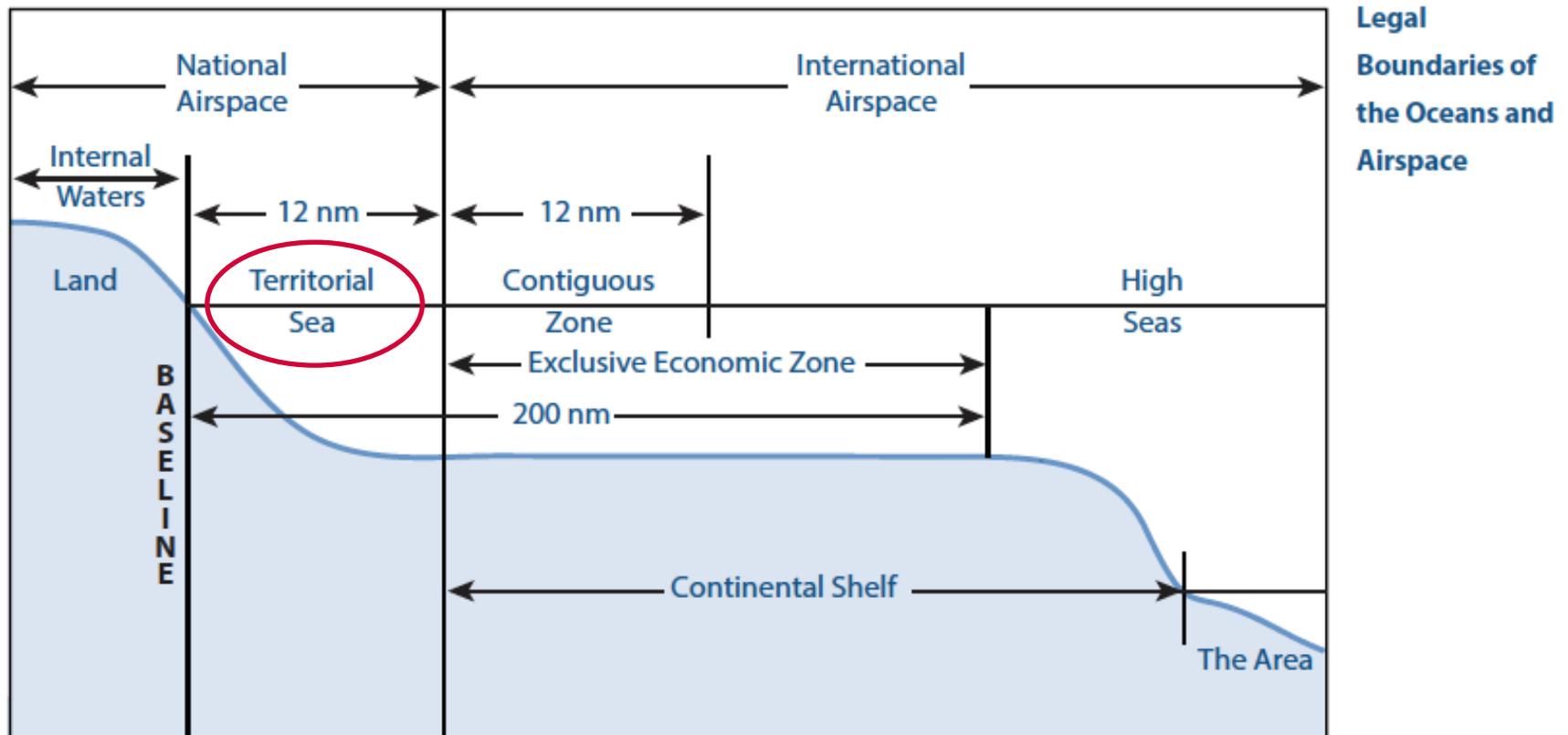


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Article 9 ATT *Territorial Sea*

Territorial Sea

Maritime zone



nm – nautical mile

Source: <<https://sites.tufts.edu/lawofthesea/chapter-two/>>

Territorial Sea (TS)

9 ATT: «territory»?

Definition and importance in ATT context

- TS extends 12 nautical miles seawards from baseline (art. 3 UNCLOS)
- important for transit

Legal status: territory in the sense of art. 9 ATT?

- sovereignty of coastal state extends to TS (art. 2(1) UNCLOS)
- like land territory
- art. 9 ATT: territorial waters = “transit or trans-shipment ... through its territory”

Territorial Sea (TS)

9 ATT: «territory»? Yes, but innocent passage

Foreign ships: right of innocent passage (art. 17 UNCLOS)

- law of the sea: balances rights of coastal and flag states
- coastal state: sovereign territory
- flag states
 - right to pass through TS with their ships
 - = right of innocent passage

Definition of “passage” (art. 18 UNCLOS)

- navigation for the purpose of
 - lateral passage: traversing TS without going into internal waters/port
 - inward passage: proceed from TS to internal waters/port
 - outward passage: proceed from internal waters/port
- must be continuous and expeditious

Territorial Sea (TS)

9 ATT: «territory»? Yes, but innocent passage

Meaning of “innocent” (art. 19 UNCLOS)

- 1) not innocent if prejudicial to peace, good order or security of the coastal state
 - art. 19(2) UNCLOS: list of prejudicial *activities*
 - how vessel behaves
 - external conduct, not cargo on board
 - not even ships carrying nuclear substances (art. 23 UNCLOS)
 - mere facts of having arms on board does not render passage non-innocent
- 2) must be “in conformity with this Convention and other rules of international law”
 - meaning unclear
 - 2 criteria: innocence & other rules that control the right of passage
 - innocence must be interpreted in light of UNCLOS and other rules
 - arguably room for ATT and UNSCR (embargo) considerations

Territorial Sea (TS)

9 ATT: «jurisdiction»?

Coastal state jurisdiction

- territorial sea = territory = sovereignty
 - full jurisdiction, but ...
 - ... law of the sea restrains jurisdiction over foreign ships in various ways
- leads us to art. 9 ATT – “in accordance with international law”

Territorial Sea (TS)

9 ATT: «measures ... in accordance with international law»?

Jurisdiction to prescribe & innocent passage

- can coastal state regulate innocent passage of foreign ships?
- can regulate if subject-matter is listed in art. 21(1) UNCLOS
 - exhaustive list?
 - if exhaustive: ATT transit / trans-shipment covered?
 - “prevention of infringement of the customs, fiscal, ... laws”?
- coastal state regulation shall not hamper innocent passage: art. 24(1) UNCLOS
 - not impose requirements having practical effect of denying/impairing passage
 - e.g. prior authorization (license, permit, ...)
 - e.g. advance notice
 - not discriminate ships of specific states

Territorial Sea (TS)

9 ATT: «measures ... in accordance with international law»?

Jurisdiction to enforce & innocent passage

- territorial sea = part of territory = full enforcement jurisdiction of coastal state
- coastal states can take the necessary steps to prevent non-innocent passage
 - art. 25 UNCLOS
 - full range of enforcement measures
- gradual exercise
 - request for information
 - warnings
 - interdiction, boarding, inspection
 - expelled from TS
 - ordered into port
 - ...

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Territorial Sea

Article 9 – Transit and trans-shipment

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in principle full
coastal state
jurisdiction,
but...

certain limits arising
from law of the sea
(e.g. innocent
passage)

territorial sea



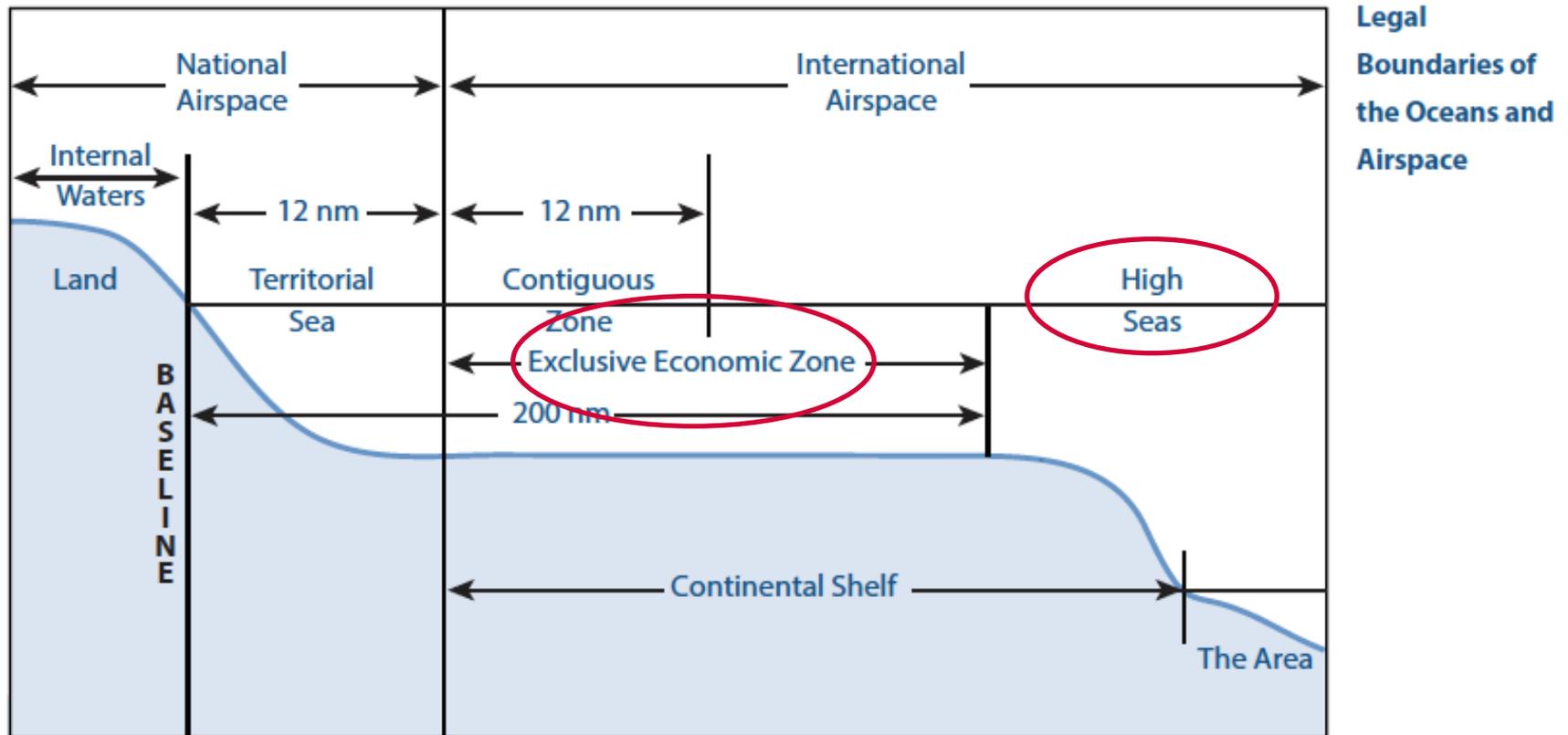
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EEZ and high seas

Territorial Sea

Maritime zone



nm – nautical mile

Source: <<https://sites.tufts.edu/lawofthesea/chapter-two/>>

Exclusive Economic Zone and High Seas

9 ATT – not «territory»

EEZ

- 200 nm from baseline (arts. 55 and 57 UNCLOS)
- states must establish EEZ (different from TS and internal waters)
- does not belong to “territory”, only functional jurisdiction over resources (not area)
- art. 9 ATT: “transit ... through its territory” not fulfilled

High Seas

- negative definition – beyond TS/EEZ (art. 86 UNCLOS)
- high seas under no state jurisdiction – no state’s territory (art. 89 UNCLOS)
- flag states
 - must exercise jurisdiction over their ships (art. 94 UNCLOS)
 - but ships are not considered territory
- art. 9 ATT: “transit ... through its territory” not fulfilled

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EEZ, high seas, ships

Article 9 – Transit and trans-shipment

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- not EEZ, high seas
- ships not territory



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Summary

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Why law of the sea?

Article 9 – Transit and trans-shipment

Each State Party shall take appropriate **measures** to regulate (...) the transit and trans-shipment under its **jurisdiction** of conventional arms (...) through its **territory** in accordance with relevant international law.



in principle full jurisdiction, but the further seawards we go, the weaker



limits become more important the further seawards we go



internal waters, territorial sea (but not EEZ and high sea, not ships)



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Thank you
for your attention!