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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION



THE LAW OF THE SEA

**ISSUES RELATED TO THE FREEDOM OF NAVIGATION/ SAIL IN THE
INTERNATIONAL WATERS AND STRAITS**

Prepared by

**The AALCO Secretariat
29-C, Rizal Marg,
Diplomatic Enclave, Chanakyapuri,
New Delhi – 110 021
(INDIA)**

CONTENTS

	Page no.
I. Background	1
II. AALCO's Observations and Comments	2
III. ANNEXURE 1	3

I. Background

1. The engagement of the Asian-African Legal Consultative Organization (AALCO) with the Law of the Sea dates back to 1957, when two issues of the law were brought onto its work table at its very first session, *viz.*, “Law relating to the Regime of the High Seas including Questions relating to the rights to seabed and subsoil in open sea” (raised by Ceylon (now Sri Lanka) and India) and “Law of the Territorial Sea” (raised by Ceylon).¹

2. Thereafter, particularly during 1968-82, AALCO played an important role in facilitating effective Asian-African participation in the international negotiations. The role encompassed, *inter alia*, informing the Member States of the developments in international negotiations on a continual basis and in an easily intelligible manner, helping some of them formulate their country positions, providing data on economic oceanographic, mineralogical, metallurgical and engineering aspects of the various uses and resources of the sea;² and, providing a platform to the Member States to present their positions on the diverse facets of the law-making diplomacy.

3. Pursuant to the proposal by the Government of United Arab Emirates (UAE) to introduce the sub-topic “Issues related to the Freedom of Navigation/ Sail in the International Waters and Straits” under the agenda item the Law of the Sea, by virtue of Rule 11(2) of Statutory Rules of AALCO, to be discussed at the Fifty-Eighth Annual Session of AALCO, the Secretariat has prepared a brief on the sub-topic, so as to highlight the broad contours of the relevant issues, tracing the evolution of the concept and pointing out certain challenges and threats that impede navigation through international straits.

4. The Explanatory Note on “Issues related to the Freedom of Navigation/ Sail in the International Waters and Straits” received from the UAE is attached as Annex A.

5. The Secretariat’s brief on the sub-topic aims to facilitate the Member States to deliberate upon international positions to ensure freedom of navigation in international straits in accordance with the provisions of international law.

¹ V.S. Mani (2007), “Exclusive Economic Zone: AALCO’s Tribute to the Modern Law of the Sea”, in *Fifty Years of AALCO : Commemorative Essays in International Law*, AALCO Secretariat, New Delhi, 41-61, 42.

² *Ibid.* at 42-43.

II. AALCO's Observations and Comments

6. The conduct of freedom of navigation operations is a growing trend. On this front, it must be stated that freedom of navigation requires full respect to the sovereignty of States and the application of the principle of non-intervention in the internal affairs of States, while respecting, at the same time, well-established principles and rules of international law concerning sailing in international waters and straits and the rights of coastal States.

7. The 1958 Convention on the Law of the Sea, without defining the breadth of the territorial sea had confirmed that coastal States would have sovereignty over the territorial sea subject to the right of innocent passage. The 1958 Convention defines innocent passage as a passage which is not "prejudicial to the peace, good order or security of the coastal State"³.

8. UNCLOS 1982 adds some more to the above definition, in that it lays down the activities carried out by States that would be considered prejudicial. This has led to some concerns that this provision has broadened the coastal State's rights to deny the right of innocent passage.

9. Freedom of navigation is a universally recognized principle of customary and conventional international law. All States must ensure respect for this principle. AALCO accords the highest respect to this principle.

10. Freedom of Navigation should not be used as a pretext to challenge the maritime boundaries of another State. The sovereignty of all States to safeguard their maritime frontiers is a recognized principle of international law. All States should recognize the principle of non-intervention, especially the State asserting freedom of navigation.

11. All claims of innocent passage are subject to the principles of sovereignty of the coastal State and respect for the relevant rules of safe and secure navigation under international law.

³Article 14(4) of the Convention. The definition remains the same in the 1982 Convention on the Law of Sea (UNCLOS III).

**UNITED ARAB EMIRATES
MINISTRY OF FOREIGN AFFAIRS &
INTERNATIONAL COOPERATION
INTERNATIONAL LAW DEPARTMENT**

Explanatory note to include a sub-item in item (b) on the law of the sea at the fifty-eighth session of the AALCO Conference

It is well established and agreed that the passage through international straits and navigation on the high seas is governed by the principle of freedom for all ships of various types and whatever flag they fly.

This has been confirmed since the Geneva Convention for the Regional Sea of 1958, and this principle is enshrined in the 1982 United Nations Convention on the Law of the Sea.

Recently, however, some countries and some rebel movements in some countries situated on the international straits have emerged as a clear challenging threat to the freedom of navigation, flying over high seas and international straits and an attack which, according to the United Arab Emirates, requires the inclusion of this issue under item of the law of the sea to be discussed during the 58th session of AALCO, in view of the great importance of the need to ensure freedom of navigation on the high seas and the international straits of the international community as a whole.

Attached is a note explaining the subject

Maritime corridors are those marine areas connecting two seas, which are either man-made industries. They are then called "canals" and the most famous example is the "Suez Canal". These sea lanes may be natural and are known as straits.

Canals navigation not problematic, as it is usually governed by either national laws or international treaties regulating navigation, especially if it is, for the most part, located in the territory of a single State.

As for the straits, navigation has raised in the past and still till date some real problems, despite the general trend towards the establishment of a set of basic principles representing the legal system governing navigation in the straits in general, as revealed by some positions of the states with regard to navigation in the straits posing a threat to the application of the principle of freedom of navigation therein. Although the United Nations Treaty has developed an integrated regulation of navigation and flying over international straits . However, there

are events and claims by some States or some rebel or revolutionary movements that call into question the application of the rules of the Convention. This requires that the issue of freedom of navigation through the straits and its provisions be included in the agenda of the fifty-eighth session of the Conference when studying the subject of the law of the sea.

Perhaps the most important affirmation of the International Court of Justice is the principle of "freedom of innocent passage through international straits", in which it is decided: "It has become internationally stable and consistent with the international custom that states have the right in peacetime to cross their warships in straits prepared for international navigation which lies between the two parts of the general seas without the need for prior authorization for such passage as long as it is the innocent passage of these vessels". (Judgment of the International Court of Justice in the Corfu Strait Case, Court Rulings 1949, p. 28).

Then, the 1958 Geneva Convention on the Territorial Sea adopted this rule, with the addition of a new provision dictated by some political circumstances arising from the Arab-Israeli conflict. The said treaty not only ensured freedom of navigation in the Straits that the Strait should be connected between two general seas, but sufficient to general seas and sea regional.

Causes of the development of the legal system of straits

Discussions at the meetings of states delegations at the Third Conference of the Law of the Sea revealed the interest of States - for various reasons - to develop an advanced legal system governing the straits, which could be summarized in two categories of reasons.

First: Some coastal states, especially from third world countries, are moving towards the expansion of their territorial seas, threatening the loss of the straits to their international status if it is no longer connected between two general seas, which may place restrictions on innocent freedom of passage in the straits and restrictions on the passage of warships and submarines in the straits.

Second: Some of the countries on the Straits, feel concerned about the expansion of the principle of free passage in the straits, which may threaten their national security, on the one hand, and may harm the marine environment on the other.

The United Nations Convention on the Law of the Sea has evolved a provision in which it has attempted to reconcile the previous considerations. The result of this provision is that the general rule is the freedom of navigation and passage through the Straits if the international character is met. In other words, it connects two general seas or a general sea and an economic zone or between two economic zones. Then the passing through these straits or flying over them is called "**transit passage**" as guarantee to all ships and aircraft of all kinds, Provided that it is a rapid and continuous passage.

If the strait does not have this status, then the rules of the Convention relating to other air zones (inland waters) and (territorial waters) shall apply to transit ships and flying aircraft.

On the occasion of the fifty-eighth session of the Conference and the inclusion of the law of the sea in the agenda, the United Arab Emirates considers the importance of raising the issue of freedom of navigation in the Straits and the current challenges it faces in the face of certain threats that arises from time to time to impede navigation through international straits, with a view to arrive at the clear international positions to ensure freedom of navigation in international straits in accordance with the provisions of international law.