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COMMITTEE ON THE PEACEFUL USES OF THE
SEA-BED AND THE OCEAN FLOOR BEYOND
THE LIMITS OF NATIONAL JURISDICTION
SUB-COMMITTEE II

FIJI: DRAFT ARTICLES RELATING TO PASSAGE
THROUGH THE TERRITORIAL SEA

Explanatory Note

The question of passage through the territorial sea (item 2.4 of the list of subjects and issues relating to the law of the sea) has to date been considered to be unsatisfactorily determined. Dissatisfaction with the existing rules stems largely from the subjective nature of the tests to be applied under the 1958 Convention on the territorial sea and the contiguous zone for the determination of the innocence or otherwise of passage.

The intention of this document is to contribute to the work of the Committee by submitting draft articles relating to this item with a view to establishing general rules of a more objective nature than those at present existing.

Whilst the draft articles seek to retain the traditional concept of "innocent passage", they seek also to improve upon the existing definition of "passage" and to include in that term actions taken by a passing ship to render assistance to persons or ships in danger or distress. The innocence of passage is still to be determined by relation to the peace good order and security of the coastal State, but an objective test is sought to be applied in determining what acts are in fact considered to be prejudicial to the peace, good order and security of the coastal State.

Provision is made in the draft articles for a coastal State to be empowered to designate sealanes and traffic separation schemes for the passage through its waters of ships having special characteristics. These are defined to include submarines and other underwater vehicles, tankers and other ships carrying nuclear or other inherently dangerous or noxious substances, and marine research and hydrographic survey ships. The designation of such sealanes is left to the discretion of the coastal State, although in the exercise of that discretion the coastal State is required to take into account such matters as the recommendations of competent international organizations; channels customarily used for international navigation; the special characteristics of particular channels; and the special characteristics of particular ships. Greater flexibility is sought in relation to the passage by submarines which are to be permitted to pass submerged provided that they give prior notification of their passage and confine their passage to sealanes designated by the coastal State.

The rules relating to government ships are sought to be made clearer by the specific application of the latter of the general rules relating to innocent passage and the making of the flag State liable for any damage done in the coastal State by any warship or any other non-commercial government ship as a result of its non-compliance with any of the laws or regulations of the coastal State. Provision relating to passage through the territorial sea is also sought to be made for the suspension of the right of passage of any warship that persists in non-compliance with these rules and regulations.

The draft articles are not intended to stand alone but to be fitted at an appropriate place into a more comprehensive convention relating to the territorial sea. In consequence no attempt has been made to cover such matters as archipelagic waters or straits used for international navigation to which special consideration may be required to be given. These are intended to provide merely the general framework relating to passage into which those and other special circumstances may be fitted with such modifications to these general rules as may be appropriate to meet the special requirements of each such case.

Section I. Rules applicable to all ships

Sub-section A. Right of innocent passage

Article 1

Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.

Article 2

1. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering any port in the coastal State, or of proceeding to any port in the coastal State from the high seas, or of making for the high seas from any port in the coastal State.
2. Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress; otherwise passage shall be continuous and expeditious.
3. For the purposes of these articles the term "port" includes any harbour or roadstead normally used for the loading, unloading or anchoring of ships.

Article 3

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.
2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State, if in the territorial sea it engages in any of the following activities:
 - (a) any warlike act against the coastal or any other State;
 - (b) any exercise or practise with offensive weapons of any kind;

- (c) the launching or taking on board of any aircraft;
 - (d) the launching, landing or taking on board of any warlike device;
 - (e) the embarking or disembarking of any person;
 - (f) any act of espionage affecting the defence or security of the coastal State;
 - (g) any act of propaganda affecting the security of the coastal State;
 - (h) any act of interference with any systems of communications of the coastal State;
 - (i) any act of interference with any other facility or installation of the coastal State;
 - (j) any other activity not having a direct bearing on passage.
3. The provisions of paragraph 2 of this article shall not apply to any activities carried out with the prior authorization of the coastal State or as are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons or vessels in danger or distress.
4. The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea and, in particular, it shall not, in the application of these articles or of any laws or regulations made under the provisions of these articles, discriminate against the ships of any particular State or against ships carrying cargoes to, from or on behalf of any particular State.
5. The coastal State is required to give appropriate publicity to any obstacles or dangers to navigation, of which it has knowledge, within the territorial sea.
6. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.
7. In the case of ships proceeding to any port in the coastal State, the coastal State shall also have the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to such port is subject.

Article 4

1. Subject to the provisions of paragraph 2 of this article, the coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of the territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been given due publicity.

2. Except to the extent authorized under the provisions of these articles, there shall be no suspension of the innocent passage of foreign ships through straits used for international navigation or through searlanes designated under the provisions of these articles.

Sub-section B. Regulation of passage

Article 5

1. The coastal State may make laws and regulations, in conformity with the provisions of these articles or other rules of international law, relating to passage through the territorial sea, which laws and regulations may be in respect of all or any of the following:
 - (a) the safety of navigation and the regulation of marine traffic;
 - (b) the utilization of, and the prevention of destruction or damage to, facilities and systems of aids to navigation;
 - (c) the prevention of destruction or damage to facilities or installations for the exploration and exploitation of the marine resources, including the resources of the seabed and subsoil, of the territorial sea;
 - (d) the prevention of destruction or damage to submarine or aerial cables and pipelines;
 - (e) the preservation of the environment of the coastal State, and the prevention of pollution thereto;
 - (f) research of the marine environment;
 - (g) prevention of infringement of the customs, fiscal, immigration, quarantine or sanitary regulations of the coastal State.
2. The coastal State shall give due publicity to all laws and regulations made under the provisions of this article.
3. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations of the coastal State.

Sub-section C. Ships having special characteristics

Article 6

1. Submarines and other underwater vehicles may be required to navigate on the surface and to show their flag except in cases where they:
 - (a) have given prior notification of their passage to the coastal State; and
 - (b) if so required by the coastal State, confine their passage to such searlanes as may be designated for that purpose by the coastal State.

2. Tankers and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to give prior notification of their passage to the coastal State and to confine their passage to such sealanes as may be designated for that purpose by the coastal State.
3. For the purposes of this article, the term "tanker" includes any ship used for the carriage in bulk in a liquid state of petroleum, natural gas or any other highly inflammable, explosive or pollutive substance.
4. Marine research and hydrographic survey ships may be required to give prior notification of their passage to the coastal State and to confine their passage to such sealanes as may be designated for that purpose by the coastal State.
5. During their passage through the territorial sea foreign marine research and hydrographic survey ships may not carry out any research or survey activities without the prior authorization of the coastal State.
6. A coastal State which designates sealanes under the provisions of this article may also prescribe traffic separation schemes including depth separation schemes for the regulation of the passage of ships through those sealanes.
7. A coastal State may from time to time, after giving due publicity thereto, substitute other sealanes for any sealanes previously designated by it under the provisions of this article.
8. In the designation of sealanes and the prescription of traffic separation schemes under the provisions of this article a coastal State shall take into account:
 - (a) The recommendations of competent international organizations;
 - (b) Any channels customarily used for international navigation;
 - (c) The special characteristics of particular channels; and
 - (d) The special characteristics of particular ships.
9. The coastal State shall clearly demarcate all sealanes designated by it under the provisions of this article and indicate them on charts to which due publicity shall be given.
10. In order to expedite the passage of ships through the territorial sea the coastal State shall ensure that the procedures for notification under the provisions of this article shall be such as not to cause any undue delay.

Section II. Rules applicable to merchant Ships

Article 7

1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.

2. Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination.

Article 8

1. The criminal jurisdiction of the coastal State shall not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed on board the ship during its passage, save only in the following cases:
 - (a) If the consequences of the crime extend to the coastal State; or
 - (b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or
 - (c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or
 - (d) If it is necessary for the suppression of illicit traffic in narcotic drugs.
2. The provisions of paragraph 1 of this article do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving any port in the coastal State.
3. In the cases provided for in paragraphs 1 and 2 of this article, the coastal State shall, if the captain so requests, advise the consular authority of the flag State before taking any steps, and shall facilitate contact between such authority and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.
4. In considering whether or how an arrest should be made, the local authorities shall pay due regard to the interests of navigation.
5. The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering any port in the coastal State.

Article 9

1. The coastal State shall not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.

2. The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its passage through the waters of the coastal State.
3. The provisions of paragraph 2 of this article are without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving any port in the coastal State.

Section III. Rules applicable to government ships

Sub-section A. Government ships other than warships

Article 10

The rules contained in Sections I and II of these articles shall apply to government ships operated for commercial purposes.

Article 11

1. The rules contained in Section I and in article 7 of these articles shall apply to government ships operated for non-commercial purposes.
2. With such exceptions as are contained in paragraph 1 of this article or in article 14 of these articles nothing in these articles affects the immunities which such ships enjoy under the provisions of these articles or other rules of international law.

Sub-section B. Warships

Article 12

1. For the purposes of this article, the term "warship" means a ship belonging to the naval forces of a State bearing the external marks distinguishing naval vessels of its nationality, under the command of an officer duly commissioned by the government of that State and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.
2. The rules contained in Section I of these articles shall apply to warships.
3. Foreign warships exercising the right of innocent passage shall not, in the territorial sea:
 - (a) Carry out any manoeuvres other than those having direct bearing on passage; or
 - (b) undertake any hydrographical survey work or any marine research activities.

4. If any warship does not comply with the laws and regulations of the coastal State relating to passage through the territorial sea or fails to comply with the requirements of paragraph 3 of this article, and disregards any request for compliance which is made to it, the coastal State may suspend the right of passage of such warship and may require it to leave the territorial sea by such route as may be directed by the coastal State. In addition to such suspension of passage, the coastal State may prohibit the passage of that warship through the territorial sea for such period as may be determined by the coastal State.

Article 13

With such exceptions as are contained in Articles 12 and 14 of these articles nothing in these articles affects the immunities which warships enjoy under the provisions of these articles or other rules of international law.

Sub-section C. Liability of government ships

Article 14

If, as a result of any non-compliance by any warship or other government ship operated for non-commercial purposes with any of the laws or regulations of the coastal State relating to passage through the territorial sea or with any of the provisions of these articles or other rules of international law, any damage is caused to the coastal State, including its environment and any of its facilities, installations or other property, or to any of its flag vessels, then liability for such damage shall be borne by the flag State of the ship causing such damage.