Article 9 ATT
A Law of the Sea Perspective

ATT Working Group on Effective Treaty Implementation
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**Article 9 ATT**

*Why law of the sea?*

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**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.

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- **Who has jurisdiction at sea (inter alia over foreign ships)?**
- **Limits on regulation and enforcement?**
- **Only land or also sea?**
Law of the sea

The basics
Law of the sea

Where is to be found?

- other treaties
- customary international law
- UN Security Council Resolutions
- ... and so on!
What is it about?

UNCLOS

jurisdictional provisions

maritime zones

categories of states

substantive provisions

“all issues relating to the sea”

resources, crime, environment, …
Jurisdictional provisions of the UNCLOS
Maritime zones and categories of states

- internal waters (ports)
- territorial sea
- exclusive economic zone
- high seas

Which state(s) can do what where?

- port / coastal states
- flag states

transit / transshipment of arms
Article 9 ATT

Internal waters
Internal waters (ports)

*Maritime zone*

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 “transhipment” 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”
Article 9 ATT

Internal waters (ports)

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.

- full port/coastal state jurisdiction
- rather few limits from law of the sea (e.g. non-discrimination, not “internal affairs of the ship”)
Article 9 ATT
Territorial Sea
Territorial Sea

*Maritime zone*

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
  - …
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 coastal state jurisdiction, but...
- certain limits arising from law of the sea (e.g. innocent passage)
- territorial sea
Article 9 ATT
EEZ and high seas
Territorial Sea

Maritime zone

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
Article 9 ATT

EEZ, high seas, ships

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.

- not EEZ, high seas
- ships not territory
Article 9 ATT

Summary
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)
Thank you for your attention!