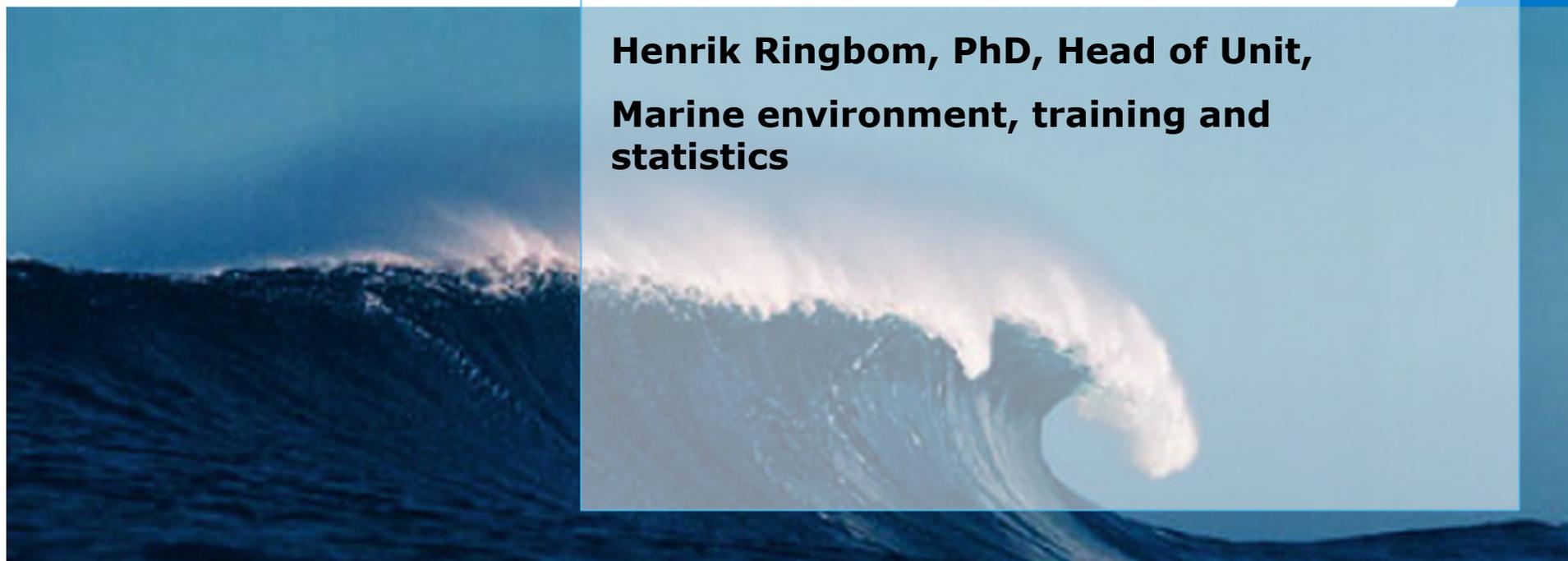


International Law Aspects to Regional GHG Rules

ECCP, Brussels, 15 November 2011

**Henrik Ringbom, PhD, Head of Unit,
Marine environment, training and
statistics**

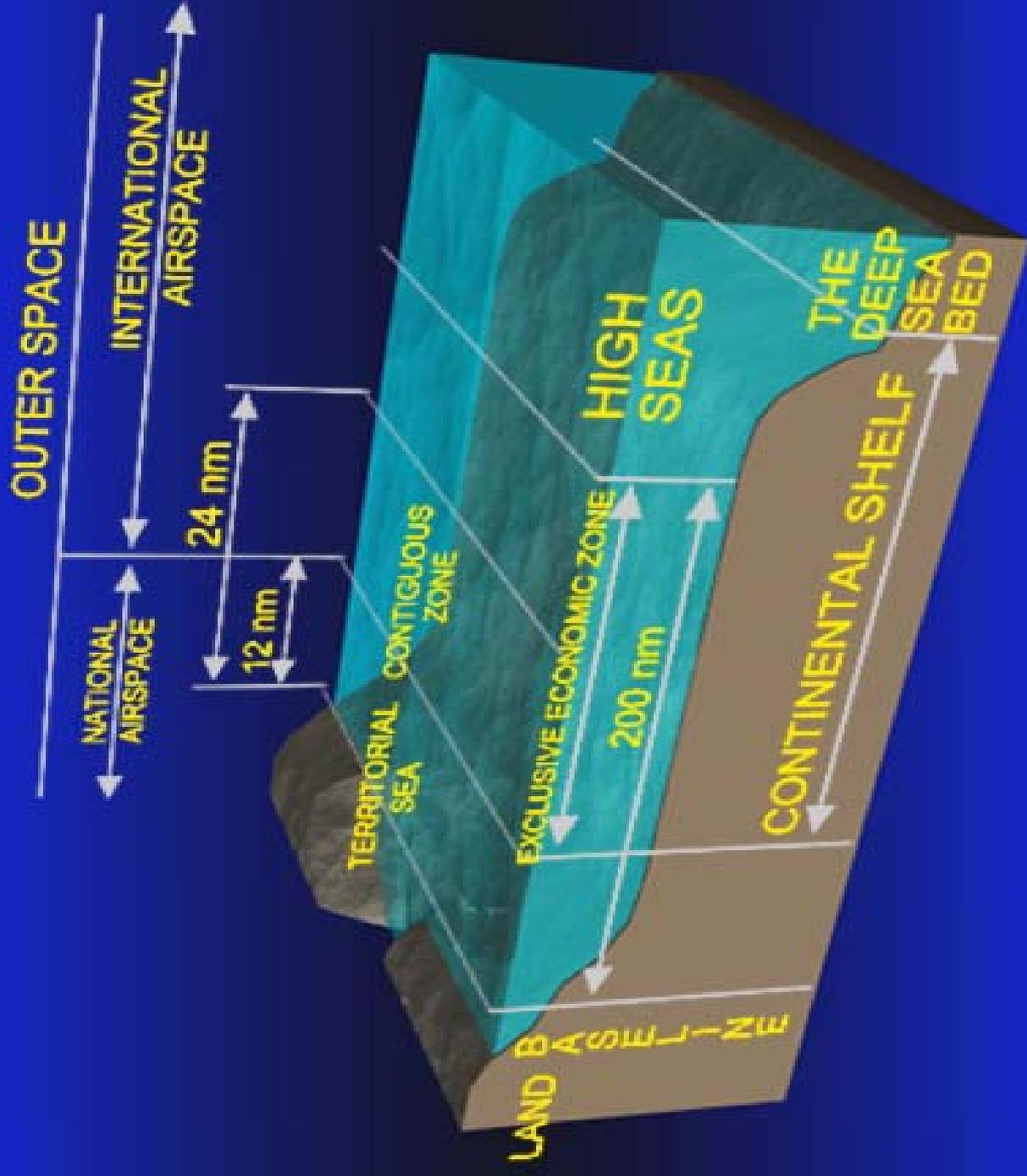


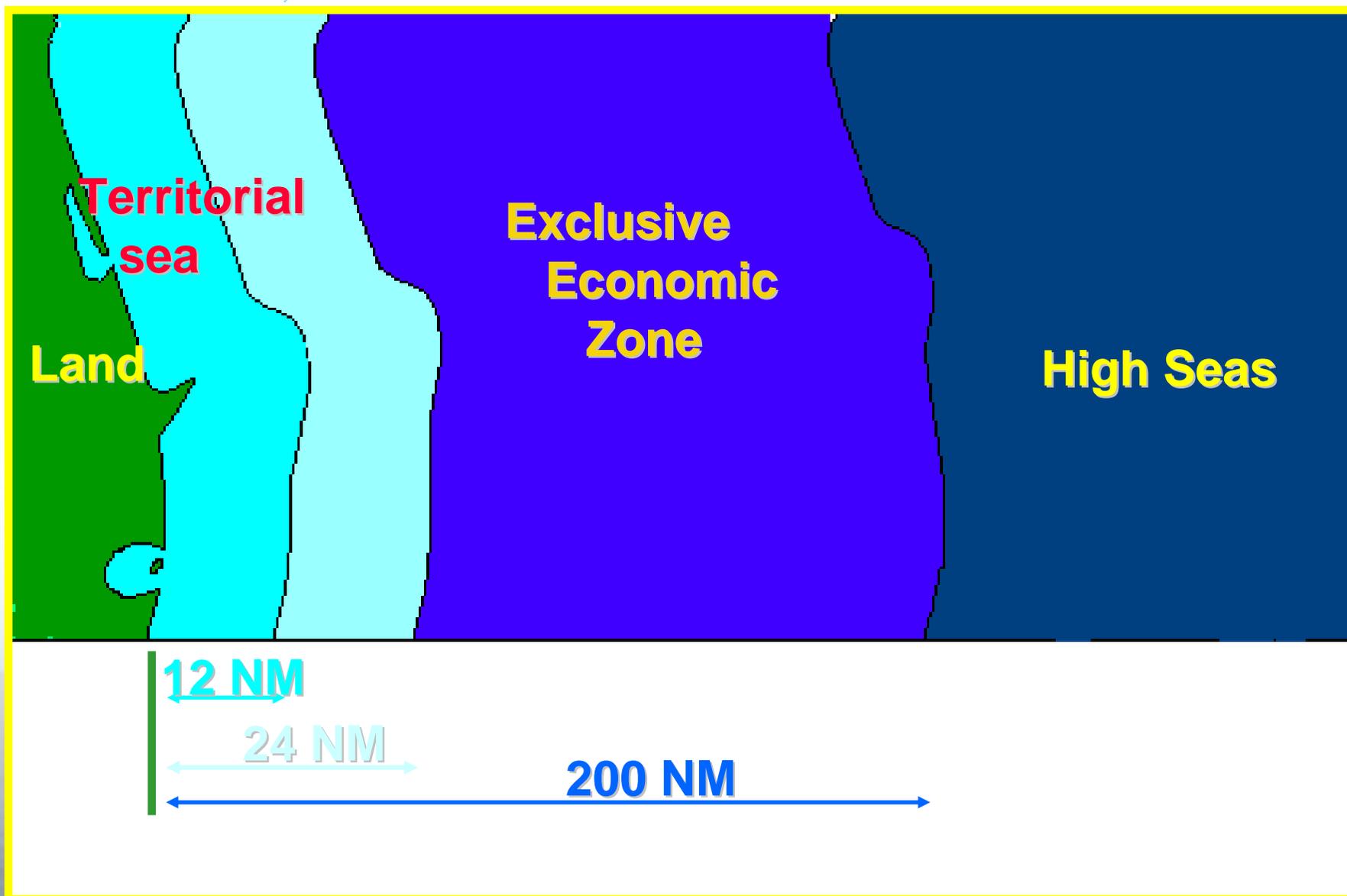
Content

- General background
- Law of the sea considerations
 - UNCLOS
 - general international law
- Other relevant areas of international law
 - Principles on extra-territorial jurisdiction
 - International trade law
- Concluding remarks

Background

- UNCLOS: 'Constitution of the Oceans', 161 parties, including the EU, largely customary law
- EU party, no special rights or obligations
- Prescriptive and enforcement jurisdiction (both are needed)
- Not everything is regulated in UNCLOS, general international law complements





	Flag State	Coastal- / port State
High seas	Minimum: 'Generally accepted international rules and standards' (GAIRAS) (i.e. SOLAS, Marpol, STCW etc.)	No, but limited environmental enforcement jurisdiction
EEZ		Max: GAIRAS
Terr. sea		Internal rules, + Max: GAIRAS CDEM
Internal waters, ports		Internal rules (implicitly) Max: ?

Prescriptive jurisdiction in the law of the sea

	Coastal- / port State
High seas	<p>Flag State jurisdiction, subject to exceptions:</p> <ul style="list-style-type: none"> • pollution incidents (art 221); • enforcement of pollutions in violation of international rules (art 218)
EEZ	<p>Maximum limits (211(5)): 'Generally accepted international rules and standards' (GAIRAS) adopted by 'competent international organization' → usually IMO rules (UNFCCC?)</p>
Terr. sea	<p>National rules, but maximum: GAIRAS for rules on construction, design, equipment and manning (art 21(2))</p>
Internal waters, ports	<p>Not explicit, but internal rules apply and may be enforced No right of access to foreign ports, → access conditions Accepted in UNCLOS arts 25(2) and 211(3). Limitations imposed by: other treaties (e.g. trade law); general 'reasonableness criteria' (good faith, prohibition of abuse of rights, non-discrimination, proportionality etc)</p>

Main questions

- What is the 'competent international organization' when it comes to regulating shipping and climate change?
- What are the limits of how far a State (or region) go in imposing unilateral port entry conditions?
 - 'Static' rules (CDEM requirements, violation takes place in port)
 - Discharges (UNCLOS article 218)
 - Other 'operational' rules regulating conduct beyond port State
- What enforcement measures are available?
- How relevant is the jurisdictional scheme of the law of the sea for MBIs?

Enforcement measures

- Withholding benefits to which foreign ships are not entitled under international law:
 - Prohibition to use port services (fuelling, supplies, repairs etc.)
 - Prohibition to access port at all
 - (Future) 'banning' from port(s)
- More punitive character:
 - Detention
 - Monetary or other penalties
- In any case, proportionality and other reasonableness criteria apply + UNCLOS safeguards (undue delay, involvement of flag State etc.)

Key considerations for port State measures

- Law of the sea: port State measures are available but have to be non-discriminatory, reasonable, proportionate to achieve the aim, not constitute abuse of rights and must respect 'safeguards' in UNCLOS. Punitive enforcement measures (including fines) might not be available if prescriptive basis is weak.
- International law principles on extra-territorial jurisdiction: relatively imprecise, no 'hard' law. Idea gaining ground of a single principle of jurisdiction based on 'genuine and reasonable interest' and balancing of interests in relation to the jurisdiction of other States.
- International trade law: limitations to be assessed in view of object and purpose of measures, discriminatory effect, international cooperation efforts, available alternatives, overall balancing of interests.

Considerations when balancing the interests

- Effort required by ship owners/operators (financial, administrative etc.)
- Effect on navigational rights/principle of global regulation
- Objective (global concern, broader implications than shipping, support in international fora (UNFCCC))
- Available alternatives
- Effectiveness
- Efforts to achieve a multilateral solution
- Discriminatory?
- Benefit for the region?
- Perspective decisive → forum of a legal dispute

Summary

Coastal State requirements (covering passing ships):
Mainly governed by the law of the sea

- Key issues:
 - Distance from shore (freedom of navigation)
 - International status of the rules
 - Whether CDEM or not, effect on right of IP (in the territorial sea)

Port State requirements (covering port-bound ships):
Governed by the law of the sea and general international law
(territorial sovereignty, extra-territorial jurisdiction, other treaties)

- Key issues:
 - Nature of the measure (static or not, geographical extent etc.)
 - Enforcement measures chosen (sanctions, refusal of entry)
 - Reasonableness in view of underlying purpose, proportionality, discrimination, available alternatives, effects on maritime transport, international trade etc.