The legal regime of the exclusive economic zone and foreign military exercises or maneuvers

by Eduardo Cavalcanti de Mello Filho

Abstract: A great law of the sea controversy concerns the coastal State's power to require its consent for third States to conduct military exercises or maneuvers (MEM) in the exclusive economic zone (EEZ). To address it, this article analyzes the exclusive economic zone's legal regime as contained in the 1982 Law of the Sea Convention and in customary international law. It includes direct and residual rights attribution to the coastal State or all States, the limits of these rights, and the prohibition on the use of force in the EEZ. The present author concludes that coastal States may require their consent with absolute discretion. This is so because, since the right concerning military exercises was not directly attributed, it should be residually attributed to the coastal State as its security interests generally prevail over other States' mostly strategic interests. Alternatively — if the right is to be directly or residually attributed to all States — the coastal State's discretion is limited to activities affecting its rights and jurisdiction in the EEZ. Nevertheless, the procedure for exercising discretion still favors the coastal State, because other States shall have its rights and duties in due regard, comply with its internationally lawful laws and regulations, and refrain from the illegal use or threat of force.

Keywords: due regard; exclusive economic zone; law of the sea; military exercises or maneuvers; peaceful purposes, use of force.

1. Introduction

The contemporary law of the sea divides the sea into maritime spaces and stipulates legal regimes applicable to each of them. The exclusive economic zone (EEZ) is one such maritime space, measuring 200 nautical miles (nm) from the coastal State's designated baselines. However, its legal regime in times of peace is unclear regarding foreign military exercises or maneuvers (MEMs).

The EEZ legal regime is determined in the United Nations Convention on the

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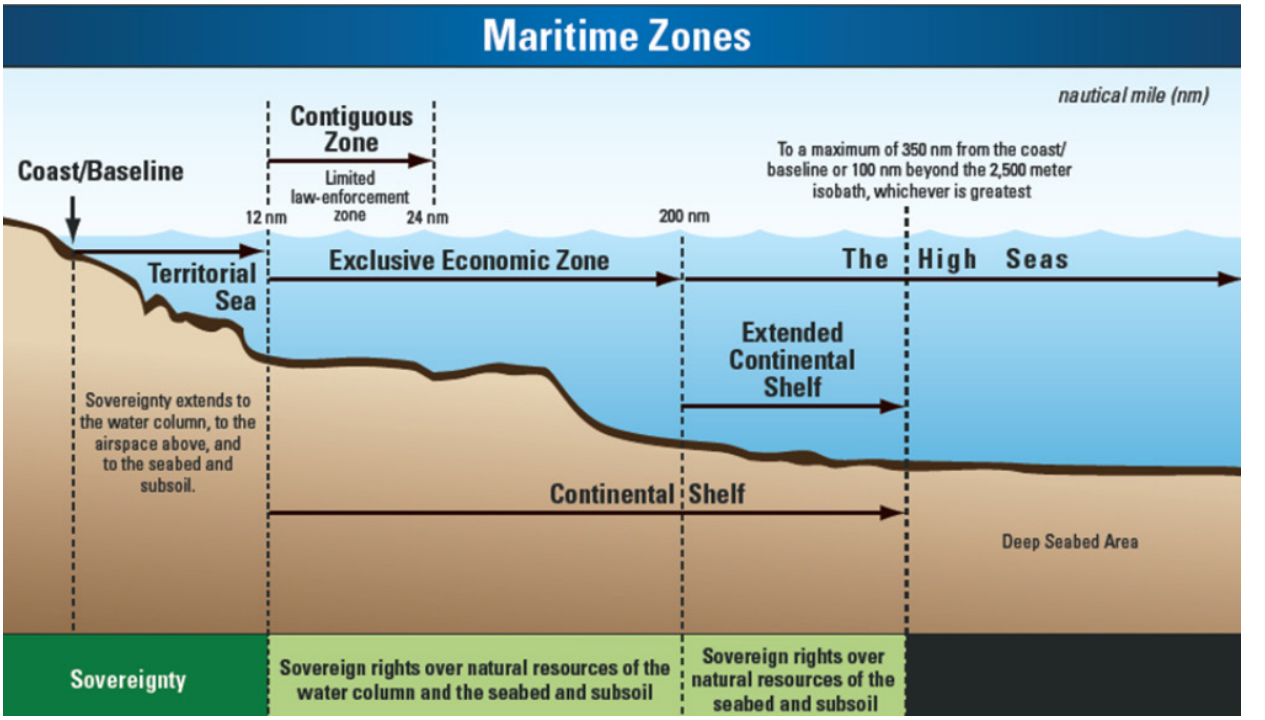

Main maritime zones recognized in contemporary international law."
Image courtesy of the NOAA Office of Ocean Exploration and Research.

Law of the Sea (UNCLOS)[1] and corresponding customary international norms.[2] Part V of the Convention brings in Arts. 56 and 58 the fundamental features of its regime. According to Art. 56 (1), the coastal State has sovereign rights over the resources and economic potential of the EEZ. It also has jurisdiction over environmental matters, marine scientific research, and the construction and use of artificial islands, installations, and structures. By Art. 58 (1), all States have the freedoms of navigation, overflight, and laying of submarine cables and pipelines, besides those of internationally lawful uses of the sea related to these freedoms. If Arts. 56 and 58 do not directly attribute a right over certain interest, it is a case of

1 United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994,1833 U.N.T.S. 397.

2 The general norms contained in Arts. 56, 58 and 59, which are the focus of this paper, can be considered customary international law. R. CHURCHILL and A. LOWE, *The Law of the Sea*, Manchester, Manchester University Press, 1999 [3rd ed.], pp. 161-162.

residual attribution via Art. 59. Finally, States shall exercise their rights and duties with due regard to the rights and duties of other States in the EEZ (obligation of due regard) and comply with the internationally lawful laws and regulations of the coastal State, under Arts. 56 (2) and 58 (3). As observed, there is no explicit mention to military activities or MEMs. In fact, this topic was controversial during the Third United Nations Conference on the Law of the Sea (TCLOS, 1973-1982), which culminated with the Convention.[3]

The TCLOS came in a moment where "the existing legal order of the seas already had begun to collapse."[4] Such order included a generally recognized freedom of the high seas and a plethora of claims from States to maritime spaces usually measured from coastal baselines. Even though, at the time, a right to a territorial sea of at least 3 nm was already consolidated, its extension was still controvert and some States also claimed jurisdiction over larger areas between the 1940s and the 1970s. Among these were mostly Latin-American and African nations. They attributed different names to the claimed areas, e.g. epicontinental sea, patrimonial sea, presential sea, continental shelf etc, which normally concerned jurisdiction over economic resources, such as fisheries and minerals.[5]

This position found justification in the fact that, with freedom of the seas encompassing most of the oceans, recent technological advances allowed vessels from developed nations to sail or exploit resources anywhere on the globe. Considering the exhaustibility of said resources and also security matters, developing States, many newly independent, wanted to ensure that their economic, military, and technological limitations would not hinder their enjoyment of the riches at sea, or their foreign policy as a whole. Their strategy therefor was to seek the protection of international law. Contrarily, maritime powers tended to privilege the freedom of the seas, particularly important for naval mobility and international trade.

Alongside with the need of regulating the international seabed Area, this multitude of diverging positions regarding maritime spaces under national jurisdiction

3 F. R. Orrego Vicuña, *The Exclusive Economic Zone* — Regime and Legal Nature under International Law, Cambridge Cambridge University Press, 1989, p. 108.

4 H. Tuerk, «The Common Heritage of Mankind after 50 years», Indian Journal of International Law, 57(2017), p. 261

5 E. C. Mello Filho, «The Law of the Sea in History: a Study Departing from the Maritime Spaces», *Perth International Law Journal*, 5 (2020), pp. 55-56

contributed to the "collapse" of the existing legal oceanic order. Having failed two previous wide-ranging codification attempts, the UN General Assembly convoked in 1971 the TCLOS. Hence, the discussions about what ultimately became the EEZ were among the most difficult ones.[6]

In this context, there were proposals to insert provisions favoring the security interests of the coastal State[7] or to make explicit that third States need the coastal State's consent to conduct MEMs in itz EEZ.[8] Notwithstanding these efforts, the absence of any mention of the issue prevailed, a result intended by the United States as a "constructive ambiguity" that would allow it to advance its interests of establishing the freedom to conduct MEMs in foreign EEZs.[9] This freedom would be within "internationally lawful uses of the sea" related to communicational freedoms (navigation, overflight, and laying submarine cables and pipelines), which involve the "operation of ships, aircraft."[10]

Facing said ambiguity, countries such as Bangladesh, Brazil, India, and Pakistan made interpretive declarations stating that the Convention does not authorize States to conduct MEMs in another State's EEZ without the consent of the coastal State, especially if they involve the use of weapons or explosives.[11] They relied on both Part V and the prohibition on the use of force, present in the Convention through Art. 301.[12] To deny that other States need the coastal State's

6 *Ibid*.

7 M. Nordquist; S. Rosenne; L. Sohn, *United Nations Convention on the Law of the Sea, 1982:* a Commentary, Volume V, Leiden, Brill Nijhoff, 1989, p. 568.

8 F. Francioni, «Peacetime use of Force, Military Activities, and the New Law of the Sea». *Cornell International Law Journal*, 18, 2 (1985), p. 215.

9 R. Beckman and T. Davenport, «The EEZ Regime: Reflections after 30 Years» in H. Scheiber et al (Eds.) Papers from the Law of the Sea Institute, UC Berkeley–Korea Institute of Ocean Science and Technology Conference, held in Seoul, Korea, May 2012, p. 26.

10 E. L. Richardson, «Power, Mobility and the Law of the Sea», *Foreign Affairs*, 54, 4 (1980), p. 915.

11 UNCLOS, by its Art. 309, does not allow reservations, but it does provide for interpretative declarations in Art. 310, which states that declarations shall not be used to modify or exclude the effect of a provision of the Convention.

12 The Brazilian Declaration, in the first paragraph, brings up Article 301 of UNCLOS, which contains the prohibition on the use of force, and, in the following one, states that the provisions of the Convention do not authorize third parties to conduct MEMs without the consent of the coastal State. Bangladesh, Ecuador, India, Pakistan and Malaysia made declarations similar to the Brazilian second paragraph. Thailand, Uruguay and Cape Verde stated that the freedoms of navigation (Thailand) and international communication (Uru-

consent to do so, Germany, the Netherlands, Italy, and the United Kingdom also made declarations.[13]

Since before the Convention entered into force until today, the issue has been controversial and Attard's prediction in 1987 that many states will in the future be inclined to restrict military uses in the EEZ seems to have proved itself true.[14] In 1990, a US Navy document reported that over 30 countries restricted military activities in their EEZs.[15] In 2019 and 2020, the United States, through its *Freedom of Navigation Operations* (FONOPs), deemed "excessive maritime claims" the coastal State consent requirements for conducting MEMs in the EEZ made by Bangladesh, Brazil, China, Ecuador, India, Iran, Malaysia, Pakistan, Thailand, Uruguay, and Venezuela.[16]

Indeed, subsequent practice can be an important means of interpreting the imprecise terms of UNCLOS, under Art. 31 (3) (b) of the Vienna Convention on the Law of Treaties (VLCT).[17] Furthermore, the practice of particular States reveals the topicality of the issue. Examples include China's objection, in 2010, to the conduct of joint military exercises by South Korea and the United States in the Yellow Sea, deploying aircraft carrier USS George Washington,[18] and several FONOPs, especially when they are carried out in politically tense scenarios such as the Persian Gulf or the South China Sea.

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guay and Cape Verde) exclude non-peaceful uses such as military exercises. All declarations are available at *https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec* online.

13 The reference made by these four States addresses the EEZ regime, and not directly the prohibition on the use of force. All declarations are available on the link above (note 12).

14 D. J. Attard, *The exclusive economic zone in International Law*, Oxford, Clarendon Press, 1987, p. 68.

15 S. Rose, «Naval Activity in the Exclusive Economic Zone — Troubled Waters Ahead», *Ocean Development and International Law*, 20 (1999), pp. 134-135.

16 Department of Defense, Annual Freedom of Navigation Report to the Congress: Fiscal Year 2019 (2020), *https://policy.defense.gov/Portals/11/Documents/FY19%20DoD%20FON%20Report%20FINAL.pdf?ver=2020-07-14-140514-643&timestamp=1594749943344* online; Department of Defense. Annual Freedom of Navigation Report to the Congress: Fiscal Year 2020 (2021), *https://policy.defense.gov/Portals/11/Documents/FY20%20DoD%20FON%20Report%20FINAL.pdf* online.

17 Vienna Convention on the Law of Treaties, adopted 22 May 1969, entered into force 27 January 1980, 1155 U.N.T.S. 331.

18 *Wall Street Journal*, «A Sea Change in US-China Naval Relations?» (2010), *https://www.wsj.com/articles/BL-CJB-9661* online

However, while China, North Korea, and Peru[19] have occasionally adopted more confrontational reactions, most States defending the need of consent are usually less energic, issuing diplomatic protests or even remaining in silence.[20] A recent case concerned a FONOP in Indian EEZ envisaging its position that consent for MEMs in its EEZ is needed. India reaffirmed it, including legally, but did not react energically vis-à-vis its ally. In fact, its legal position is more concerned with Chinese MEMs, rather than US-American.[21]

As such, after UNCLOS entered into force, practice beyond diplomatic manifestations concernining foreign MEMs in the EEZ has been limited — this affirmation does not include military activities in general, which encompass reconaissance operations, for instance. Moreover, the present specific issue has not been the object of international judicial appreciation and is not likely to be anytime soon.[22] Therefore, there is international jurisprudence only on general aspects of the EEZ regime and the prohibition on the use of force. As a consequence, most interpretative support is found in the formal position of States and in the writings of renowned publicists. Considering the *lex lata* analyzed with the tools above, this article's method of approach is deductive and its research is explanatory, qualitative, and theoretical.

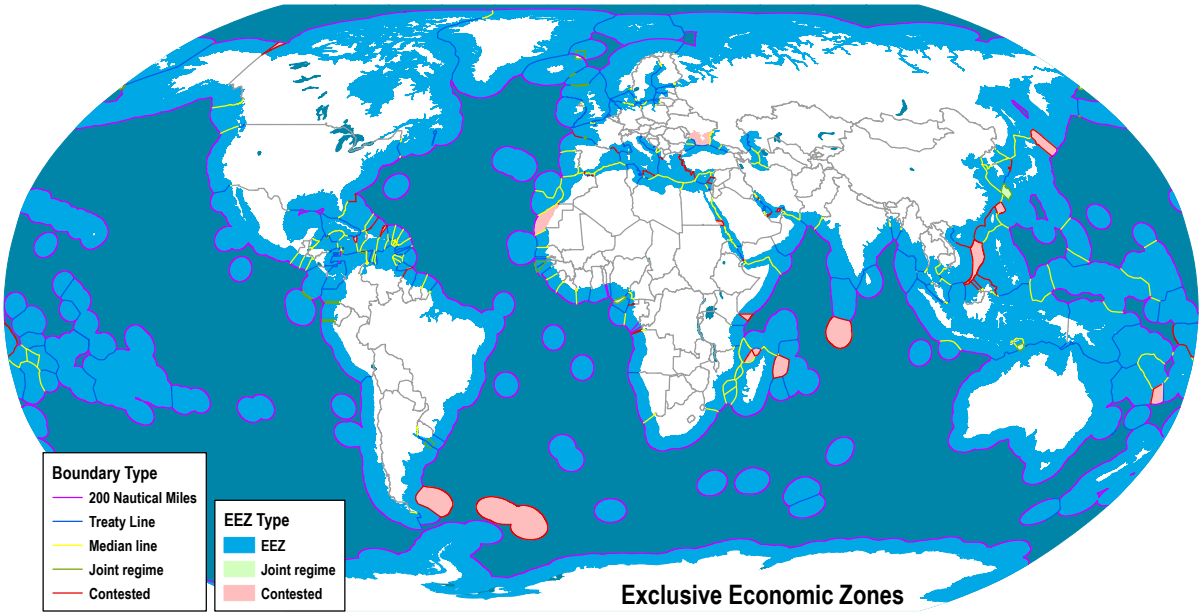
All this will serve to this article's ultimate aim: to analyze the legal regime of the EEZ on foreign MEMs. Clarification of this issue is necessary to determine whether coastal States can require their consent for MEMs to be conducted in

19 Peru and North Korea are not parties to the Convention and do not claim that consent is needed for foreign MEMs in ther EEZs. But Peru claims a larger than 12 nm territorial sea and North Korea, a 50 nm security zone. Regarding MEMs, these maritime spaces have similarities with the 200 nm EEZ, as defended by those supporting the need of consent.

20 R. Pedrozo, «Military Activities in the Exclusive Economic Zone: East Asia Focus,» International Law Studies, 90 (2014), p. 528.

21 A. Malhotra, Opinion: US Navy intrusion in Indian EEZ is beyond comprehension but objectionable (2021) *https://www.wionews.com/opinions-blogs/opinion-us-navy-intrusion-in-indian-eez-is-beyond-comprehension-but-objectionable-376876* online.

22 This is for two main reasons. First, Article 298 (1) (b), UNCLOS, provides for an optional exception to the material jurisdiction of tribunals in UNCLOS' compulsory dispute settlement system in Part XV: the exception of military activities. For example, besides the United States, not a party to UNCLOS, Russia, China, France, and the United Kingdom have all made declarations opting for the military activities exception. Second, following general practice, it does not seem likely that a State would take another one to an international tribunal based solely on MEMs in the EEZ.



their EEZ or whether third States are free to do so — and, if positive, to examine the limits of this freedom. Even though there has been a considerable amount of scholarly writing on military activities in the EEZ, this contribution has a distinguished proposition: it addresses specifically military exercises or maneuvers. In that regard, it aims at providing precise answers considering the whole of the EEZ regime, including the prohibition on the use of force as applied to the EEZ.

To achieve this purpose, there are four intermediate objectives. First, Section 2 verifies the direct attribution of jurisdiction to the coastal State and freedoms to all States in Part V on the subject-matter of MEMs. Second, Section 3 analyzes the eventual residual attribution via Art. 59. Third, Section 4 examines how an eventual freedom to conduct MEMs in foreign EEZ would be limited by the obligations of Art. 58 (3) — that of taking the rights and duties of the coastal State in due regard and that of complying with the internationally lawful laws and regulations of the coastal State. Fourth, Section 5 assesses how the prohibition on the use of force applies to MEMs in the EEZ. Based on these intermediate objectives, a final general conclusion is structured.

2. *The direct attribution of a right concerning military exercises or maneuvers in the EEZ*

In Part V of the Convention, the direct attribution of rights is made by Arts. 56 and 58. The doctrine does not seem to hypothesize that Art. 56 gives the coastal State jurisdiction over MEMs.[23] The debate is in Art. 58 (1): does it include the freedom to conduct MEMs?

Important names, almost all US-American, understand that "other internationally lawful uses of the sea" related to communicational freedoms, encompass the freedom to conduct MEMs.[24] The arguments for this interpretation are threefold: (1) at the Third Conference, the attempt to limit this century-old freedom failed and military activities are within "other internationally lawful uses of the sea" related to communicational freedoms; (2) through a systemic interpretation, one can observe that the Convention explicitly limits MEMs in other maritime spaces, but not in the EEZ; (3) the practice of States favors this interpretation.[25]

Regarding the first argument, two considerations are pertinent. The freedom to conduct military exercises as a long-existing international custom has always been related to the *high seas* regime, since everything beyond territorial waters was high seas before the TCLOS. But only after the Convention was the EEZ es-

23 Art. 56 only becomes relevant when analyzing military activities of a more intellectual dimension, such as hydrographic surveys for military purposes and reconnaissance operations. It is controversial whether such activities should be considered marine scientific research, and therefore under the jurisdiction of the coastal State. R. XIAOFENG and C. XIZHONG, «A Chinese Perspective», *Marine Policy*, 29 (2005), p. 140. The present paper deals only with MEM, i.e., material dimension activities. The distinction between military activities of intellectual and material dimensions was made by Prezas. I. PREZAS , "Foreign Military Activities in the Exclusive Economic Zone: Remarks on the Applicability and Scope of the Reciprocal 'Due Regard' Duties of Coastal and Third States», *International Journal of Marine and Coastal Law*, 34 (2019), pp. 97–116.

24 RICHARDSON, *cit*., p. 916; B. OXMAN, «The Regime of Warships Under the United Nations Convention on the Law of the Sea», *Virginia Journal of International Law*, 24 (1984), p. 837; FRANCIONI, *cit*., p. 216; D. STEPHENS, «The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operation», *California Western International Law Journal*, 29, 2 (1999), p. 290; R. PEDROZO, «Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone», *Chinese Journal of International Law*, 9 (2010), p. 10; J. KRASKA, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics*, Oxford, Oxford University Press, 2011, p. 270.

25 PEDROZO, *ibid*., p. 11.

tablished. And that the attempt to limit explicitly such freedom in the EEZ failed does not clarify that third States are free to conduct military exercises without prior consultation or consent.

On the first consideration, one should address the EEZ's *sui generis* legal regime, different from the high seas' one.[26] Some contend it is a high seas area with a layer of rights pertaining to the coastal State.[27] Thus, if a right is not attributed to the coastal State, it is within all States' freedoms. This is in asynchrony with Part V's ratio.[28] If no right is attributed to the coastal State (Art. 56) or to all States (Art. 58), it should be residually attributed via Art. 59 and no recourse may be made to the high seas regime beyond the indications given by Art. 58. Even though Art. 58 incorporates some rules of the high seas regime, through paragraphs (1) and (2), these are modified by the provisions themselves. They provide that the freedoms of Art. 58 (1) are "consistent with the other provisions of this Convention," i.e., with Part V itself which provides for the rights and jurisdiction of the coastal State, and that Arts. 88-115 apply to the EEZ "insofar as they are not inconsistent with this Part [V]."

About the second consideration, when negotiations in the TCLOS began, following Latin-American and African developments, there was mention only to the freedoms of navigation and overflight. Upon a proposal by the informal negotiating group Evensen, the Second Committee added "other internationally lawful uses of the sea related to the freedoms of navigation and communication." The Group of 77 (G-77) proposed that other States must take particular account of the security interests of the coastal State. Latin-American countries also tried to introduce the need for consent to conduct non-navigational operations. Both

26 The first person to ever refer to the EEZ as a *sui generis* maritime space was Andrés Aguilar, the president of the Second Committee of the TCLOS, while introducing the Revised Single Negotiating Text in the Fourth Session: "nor is there any doubt that the exclusive economic zone is neither the high seas nor the territorial sea. It is a zone sui generis". See UNCLOS III, Official Records, Vol. 5. A/CONF.62/WP.8/Rev.1/PartII, 1976, p. 152. This perspective has been widely adopted ever since.

27 B. Oxman, «The Third United Nations Conference on the Law of the Sea: the 1976 New York Sessions», *American Journal of International Law*, 71 (1977), p. 263.

28 "During the negotiations of the Convention, the sui generis character of the EEZ in terms of function required that the freedoms of the high seas were not made applicable to the EEZ in an undifferentiated manner." A. Proelss, «The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited», *Ocean Yearbook*, 26 (2012), p. 89.

attempts were unsuccessful.

Believing that the Evensen Group's formula was still too restrictive for US-American interests, the head of the US delegation, Elliot Richardson, led the Castañeda Group's last proposal. It adopted the formula "other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines" besides referring to communicational freedoms mentioning Art. 87, on the freedoms of the high seas.

Richardson spelled out his proposal. He highlights the fact that Art. 58 (1), when mentioning communicational freedoms, refers to them as "Art. 87 freedoms," i.e., of the high seas. Traditionally, on the high seas, the freedoms of navigation and communication comprised that of conducting MEMs. Finally, he points out that the exemplification "such as those connected with the operation of ships, aircraft" would also include the conduct of MEMs.[29] Thus, in addition to the failure of the G-77's and Latin-American countries' proposals, since the last word was US-American, that the United States proposed such a text precisely to encompass military activities would imply that this provision includes the freedom to conduct MEMs.[30]

This perspective, however, is problematic. The US strategy was not to achieve a text that categorically supported its position, but to create a constructive ambiguity that would allow it to sustain such a position.[31] Therefore, one cannot precisely affirm that Art. 58 (1) contains such a freedom. Rather, following Art 31 (1) of the VCLT, analyzing the ordinary meaning of the words in their context, the most reasonable conclusion is that Art 58 (1) does not include the freedom to conduct MEMs. For some authors, in the EEZ's context, the conduct of MEMs, especially those involving the use of weapons and explosives, has no legitimate link with the freedoms of navigation and overflight.[32] Nonetheless, the majority understands that Art. 58 (1) is ambiguous enough for both positions to be upheld.[33]

29 Richardson, *cit*., p. 915.

30 G. Galdorisi and A. Kaufman, «Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict», *California Western International Law Journal*, 32, 2 (2002), pp. 271-272.

31 Beckman and Davenport, *cit*.,p. 26.

32 C. Quince, *The Exclusive Economic Zone*, Wilmington,Vernon Press, 2019, p. 97; Xiaofeng and Xizhong, *cit*., p. 142; B. Boczek, «Peacetime military activities in the exclusive economic zone of third countries», *Ocean Development and International Law*, 19, 6 (1988), p. 451.

33 A. Proelss, «Article 58», in A. proelss et al. (Eds.), U*nited Nations Convention on the*

The second argument refers to the absence of an explicit limitation, while MEMs are non innocent in the territorial sea and are not within the right of passage through the archipelagic maritime routes.[34-35] As Pedrozo argues, had the negotiators wanted to restrict this freedom in the EEZ, they would have done so. However, this interpretation is inappropriate with constructive ambiguity. The maritime powers would not have accepted an explicit limitation, nor would many of the developing coastal States have accepted an explicit freedom.[36] In the present author's view, Art. 58 (1) is unambiguous: it does not comprise the freedom to conduct MEMs. But even if one considers the provision ambiguous, the second argument is still inadequate, because a systemic interpretation is flawed in case of constructive ambiguity.

For authors supporting Art. 58's ambiguity, looking at the practice of States can be enlightening.[37] Here, practice is not only a constitutive element of customary law but also a rule of interpretation, according to Art. 31 (3) (b) of the CVDT, which codifies customary norm.[38]

This is the third argument: contemporary States' practice speaks in favor of

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Law of the Sea: a Commentary, Munique, CH Beck Hart Nomos, 2017, p. 453; R. Churchill and A.Lowe, *The Law of the Sea*, Manchester, Manchester University Press, 1988, p. 311; J. Charney, «The exclusive economic zone and public international law», *Ocean Development and International Law*, 15, 3/4 (1985), p. 256.

34 Pedrozo, *cit*., p. 11.

35 Art. 19 (2) (a), UNCLOS, provides that a passage is considered not innocent if it violates the prohibition on the illegal use of force. In addition, sub-paragraphs "b" and "f" provide for weapons exercises or practices and the launching or landing of military devices as not innocent. Art. 52 applies this regime of innocent passage to archipelagic waters. As an exception to this provision, Art. 53 guarantees the right of passage through archipelagic shipping lanes on certain pre-designated (or high-flow) routes, which is more akin to the right of transit passage. Under Art. 53, vessels must follow their passages in the normal mode, not doing anything unrelated to them.

36 It is important to note that the rules of procedure of the TCLOS foresaw approval by consensus and that the Convention would be a package deal in which reservations are not allowed, i.e., it does not approve isolated provisions, but a package at once. Thus, recognizing that the system should bind the main subjects to be effective, even if the maritime powers were a minority, the rules of procedure resulted in a system in which everyone should be minimally satisfied. A. pereira da silva, *O Brasil e o Direito Internacional do Mar Contemporâneo:* Novas Oportunidades e Desafios, São Paulo, Almedina, 2015, p. 59.

37 J. M. Van Dyke, «Military ships and planes operating in the exclusive economic zone of another country», *Marine Policy*, 28 (2004), p. 32.

38 O. Dörr, «Article 31», in O. Dörr and K. Schmalenbach (Eds.), *Vienna Convention on the Law of Treaties: A Commentary*, 2d ed, Berlin, Springer, 2018, p. 598.

the US position. In the most cited article in the *Chinese Journal of International Law*, retired US Navy Captain and professor of international law at the US Naval College Raul (Pete) Pedrozo insistently affirms that the practice of States favors the US interpretation, but offers no proof thereof.[39] This was the criticism made by Zhang.[40] Kraska, who defends the freedom to conduct MEMs in foreign EEZ, also does not provide a comprehensive listing of countries conducting them, mentioning Australia, Russia, Canada, and Japan.[41] Interestingly, Australia and Canada ask the coastal State for permission to conduct military hydrographic surveys.[42] In the same direction, based on a State practice study — referring to military activities in general—, Van Dyke concludes that:

> «In light of the creation and acceptance of the EEZ and the recognition of coastal state resource rights, ‹further limitations on the said freedoms [of navigation and overflight] must be accepted›. These limitations are [...] ‹of a political nature› related to the security concerns of coastal states.»[43]

Van Dyke's conclusion is connected to this Section's first consideration on the first argument presented by authors who understand that no consent is needed. The very legal regime of the EEZ entails that additional limitations on the traditional conceptions of the communicational freedoms, as applied to the high seas, must be accepted in the EEZ.

Ergo, freedom is not present in Art. 58 (1), but neither is any jurisdiction attributed to the coastal State over military activities. Therefore, if there is no attribution of jurisdiction or freedom, Art. 59 shall apply. This is the same consequence envisaged by those seeing ambiguity in Art. 58.[44]

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39 Pedrozo, *cit*., p. 16. Pedrozo's most recent work on the topic (2020) follows essentially what he wrote in 2010. R. Pedrozo, «Maintaining Freedom of Navigation and Overflight in the Exclusive Economic Zone and on the High Seas», *Indonesian Journal of International Law*, 17, 4 (2020), pp. 477-494.

40 H. Zhang, «Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States — Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ» (2010) 9 *Chinese Journal of International Law*, 9 (2010), p. 37

41 Kraska, *cit*., p. 269.

42 Zhang, *cit*., p. 45.

43 Van Dyke, *cit*., 38. Van Dyke considered the interpretative declarations, positions adopted during the TCLOS, national legislations, and concrete cases to reach this conclusion.

44 Proelss, «Article 58» … *cit*., p. 453.

3. The residual attribution of the right relative to military exercises or maneuvers in the EEZ

The relevant provision here is Art. 59, which is not applicable if there is a conflict of rights, but a conflict of interests over a right not directly attributed under Part V. Art. 59 states that the conflict of interests between the coastal State and any other shall be settled on the basis of equity and in light of all relevant circumstances, taking into account the importance of the interests in question to the parties and to the international community. This unassigned right is a "residual right."[45]

The solution in light of all relevant circumstances, alongside the adoption of equitable principles, implies that Art. 59 does not apply in the abstract, to determine to whom the eventual residual right will be attributed, but in concrete, on a case-by-case basis. Accordingly, its last part mentions the importance of the interests in conflict for the parties and the international community. Here, the majority doctrine understands that there is no priority of the international community vis-à-vis individual States.[46-47]

Most commentators referring to this provision in the context of military activities do not dive into deep waters.[48] Sienho Yee stands out. On the premise that Art.

45 M. Hayashi, «Military and intelligence gathering activities in the EEZ: definition of key terms», *Marine Policy*, 29 (2005), p. 127.

46 Churchill and Lowe, 1988… *cit*., p. 144; Beckman and Davenport, *cit*, p. 12.

47 Another relevant position is that if the conflict of interests indirectly touches on the EEZ resources, there is a relative presumption in favor of the coastal State. Otherwise, the presumption militates in favor of the other States and the international community. nordquist; rosenne; sohn, *cit*., p. 569.. This position seems mistaken, since the existence of Art. 59, as seen in note 49 below, is proof that the coastal State may have rights in the EEZ beyond those over economic resources. The perspective would make sense if it were a case of conflict of rights already attributed by Arts. 56 and 58. Another position, more based on ideological than legal convictions, is that there is a presumption in favor of the international community, because the creation of the EEZ by itself would already represent a loss for the international community (more than 30% of the high seas) and therefore any doubt about residual rights would be resolved in favor of it and against the coastal State. kraska, *cit*., p. 278. In this argument, there is clear arbitrariness in defining what the interests of the international community are.

48 In this regard, Tanaka: «In light of the high degree of political sensitivity involved in this subject, it appears difficult, if not impossible, to give a definitive answer to this question. Thus only tentative comments can be made here.» Y. Tanaka, *The International Law of the Sea*, 2d. ed.,Cambridge, Cambridge University Press, 2015 [2nd ed.], p. 396.

59 contains rights other than resource rights,[49] as does Art. 56 (1) (c) — which contains "other rights" besides sovereignty and jurisdiction rights —, Yee argues that the security interests of the coastal State are within the scope of Art. 59.[50] He then points out that:

> «If the fight since the beginning of the drafting process between the maritime powers and the group of developing States regarding the security interest of the coastal State did not result in any specific express language on the point, the framework as interpreted above seems to contain the wherewithal to deal with such an interest and militate in favor of the coastal State, because of the importance of security interest in the light of the proximity of the zone of activities to the coastal State.
>
> Indeed, if the security interest of the coastal State cannot be guaranteed, so that the life of that State cannot be maintained, what is the point of having all the rights to the resources in the EEZ anyway? Accordingly, the security interest of the coastal State is an issue of inherent, primal importance and must be given paramount consideration.»[51]

So, how important is it for the third State to conduct MEMs, especially those making use of weapons and explosives without the consent and, not infrequently, against the will of the coastal State? US-Americans present the right to defend oneself, to create the means for defense. Their interests are strategic.[52] However, military exercises and maneuvers often aim to intimidate the coastal State, even against the prohibition on the threat of the use of force. At other times, since the maritime powers have ships and aircraft in various parts of the globe, it is logistically and strategically convenient to conduct MEMs in foreign EEZs.

The right of defense does not grant the third State, having its EEZ and the

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49 During the Third Conference, the Singapore delegation proposed to delete Art. 59, since the coastal State would only have rights over marine resources. The maintenance of Art. 59 demonstrates that there may indeed be other rights not directly related to marine resources. NORDQUIST; ROSENNE; SOHN, *cit*., p. 568.

50 In this sense: S. YEE, «Sketching the Debate on Military Activities in the EEZ: An Editorial Comment», *Chinese Journal of International Law*, 9 (2010), p. 3; S. NANDAN, «The Exclusive Economic Zone: A historical perspective», in UN Food and Agricultural Organization (ed.), *The Law of the Sea:* Essays in Memory of Jean Carroz, Rome, FAO, 1987, p. 186; J. CASTAÑEDA, «Negotiations on the Exclusive Economic Zone at the Third United Nations Conference on the Law of the Sea», in J. MAKARCZYK, *Essays on International Law in Honour of Judge Manfred Lachs*, Leiden, Nijhoff, 1984, p. 620; Tanaka, *cit*., p. 396.

51 YEE, *ibid*., p. 3-4.

52 KRASKA, *cit*., pp. 258-260.

entire high seas available, the freedom to conduct military exercises and maneuvers in the EEZ of another State. Possible strategic interests connected with such exercises do not seem to outweigh the overriding security interests of the coastal State. What is the international community's interest in this right of defense? Certainly, "international community" does not mean a handful of maritime powers conducting exercises and maneuvers either to intimidate a coastal State or to prevent its own EEZ from being affected by the adverse effects of such activities. On the contrary, this alleged right of defense becomes a growing source of conflict, contrary to the real interests of the community.

On the side of the security interests of the coastal State, Yee is emphatic. Considering the typical reality of MEMs in a foreign EEZ, the security interests of the coastal State should always prevail. Hence, the right to regulate these activities in the EEZ is attributed to the coastal State, including absolute discretion over consent for the practice of these activities.

4. The material and procedural limits on the freedom to conduct military exercises or maneuvers in a foreign EEZ

Should the freedom to conduct MEMs be in Art. 58 (1) or Art. 59, it is to be exercised according to Art. 58 (3): States shall have due regard to the rights and duties of the coastal State and comply with the internationally lawful laws and regulations adopted by it.

This section will analyze, first, the obligation of due regard. This is a procedural obligation. It represents a procedure with which freedoms must be exercised and consists of being aware of the rights and duties of the coastal State and weighing them against one's own, to determine what will be done.[53] Of course, that does not mean the awareness and balancing is done solely by the third State. This understanding's consequences would be absurd, since the coastal State's only option would be to seek a remedy to a violation if the obligation of due regard has not been complied with. Indeed, it would be as if the obligation of due regard did not exist.[54]

53 Prezas, *cit*., p. 99.

54 Prezas, *cit*., p. 106.

More recently, an Arbitral Tribunal clarified the concept of due regard. In the Chagos Marine Protected Area Arbitration between Mauritius and the United Kingdom, it held that:

> «The extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches. In the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding states.»[55]

As noted, the Court determined the weighing of the importance of the activities undertaken, but also pointed to the availability of alternatives. Including the EEZ of the third State and the high seas, are there no alternatives to conducting MEMs in foreign EEZs? As said, most of these MEMs serve to intimidate the coastal State, to keep such activities' adverse effects away from its own EEZ, or to advance strategic interests. Given the likelihood that alternatives are available, it seems reasonable, therefore, for the coastal State simply to raise any legitimate activity related to its sovereignty rights or jurisdiction compromised by military activities.[56] In this sense, Prezas affirms:

> «a regulation requiring prior notice or even authorization to conduct some mainly ‹material› military activities, such as naval exercises or weapons tests in the EEZ, would not be unlawful, if it finds its true justification in the protection of the economic rights of the coastal state.»[57]

This justification would not take the form of requiring consent only for activities affecting these rights. This would be impractical, because there must be a judgment on whether the MEM affects the coastal State's rights. But, in this form, the judgment is for the third State to do, by seeking the consent of the coastal State for those activities the third State deems to affect its rights and duties. The ideal form seems to be for the coastal State to require consent for any MEM, but to only be allowed to deny it when the military activity affects its rights. This is the way consent to conduct marine scientific research in the EEZ works. It

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55 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Judgment, Merits, PCA Reports 2015, para. 519.

56 In any case, if there is a conflict of rights and as far as the economic rights of the coastal State are concerned, they should, a priori, prevail. Proelss, *cit*., p. 97. Supporting this view: Xiaofeng and Xizhong, *cit*., p. 145.

57 Prezas, *cit*., p. 112.

requires the coastal State's consent, which must be given, except in four specific instances related to sovereign rights over resources and coastal State jurisdiction. Therefore, if a coastal State establishes in law the general requirement of consent, but determines the cases in which it may deny it by relating them to compromised rights and duties, there is no excess by the coastal State. In fact, that would be an internationally lawful regulation, the compliance with which is an obligation of all States, under Art. 58 (3).

The Arbitral Tribunal also noted that, in the majority of cases, there is an obligation to at least consult with the rights-holding State, so there is an assessment of the respective importance of the rights, the possible harms, and the availability of alternatives. For the risks imposed by a military activity of a more material dimension, MEMs certainly fall under "the majority of cases."[58] Thus, the absence of consultation should be seen as a violation of the due regard obligation. This understanding is particularly relevant for States that do not have internationally lawful laws regulating the matter.

After the consultation and an eventual objection from the coastal State, if the third State still conducts MEMs,[59] the former may see hostility. In effect, the third State has acted unilaterally to the detriment of peaceful means of dispute settlement, in violation of Articles 279, UNCLOS, 2 (3), of the UN Charter, and possibly 2 (4), also of the Charter.[60]

5. The use of force in the EEZ and military exercises or maneuvers

The prohibition on the use of force is the last barrier to foreign MEMs in the EEZ, given its status as a peremptory norm.[61] It applies autonomously to MEMs, under Art. 301, UNCLOS, and 2 (4), UN Charter, but also integrates the EEZ regime. According to Art. 58 (2), Arts. 88-115 apply to the EEZ insofar as they are

58 Prezas, *cit*., p. 109.

59 In this case, a dispute would be characterized. A dispute is "disagreement on a point of law or fact, a conflict of legal views or of interests." *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.

60 Art. 279 and 2(4) contain the obligation to seek to resolve disputes peacefully and Art. 2 (4) the prohibition on the use of force. They are discussed further in Section 5.

61 A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford, Oxford University Press, 2006, pp. 50-51.

not incompatible with Part V. Art. 88 reserves the high seas (and, by Art. 58 (2), also the EEZ) for peaceful purposes. The vast majority doctrine interprets "peaceful purposes" using Art. 301 on peaceful uses of the sea, which prohibits the use of force.[62] Moreover, as contained in Art. 58 (1), the freedoms of internationally lawful uses of the sea must not only relate to communicational freedoms but also be compatible with the other provisions of the Convention, including Art. 301.

This put, and before looking specifically at the use of force in the EEZ, it is convenient to transcribe the content of Art. 301, for the sake of clarity:

> «In exercising their rights and performing their duties under this Convention, states Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.»

In this provision, the present section must examine two expressions: "territorial integrity" and "principles of international law embodied in the Charter" of the UN." Having satisfied these inquiries, it will be possible to assess the application of this prohibition to foreign MEMs in the EEZ.

On the first expression, the golden question is: should the EEZ have its integrity safeguarded by the prohibition of Art. 301, which protects the offended State's territorial integrity?[63] The answer could be simply "no" because the coastal State does not enjoy territorial sovereignty over the 200 nautical miles. Accordingly, the application of Article 301 in the EEZ would not differ from that on the high seas. However, to better answer the golden question, one must understand the nature of the sovereign rights and jurisdiction the coastal State enjoys in the EEZ.

It is true that the coastal State does not have full sovereignty over the EEZ, but only some sovereign rights and a materially limited jurisdiction. Notwithstanding, this does not mean that the *jus imperii of* the coastal State is lesser than in the territorial sea. Indeed, the difference between both regimes is of material scope.

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62 R. WOLFRUM, «Restricting the Use of the Sea to Peaceful Purposes: Demilitarization in Being», *German Yearbook of International Law*, 24 (1981), p. 203; OXMAN, 1984… *cit*., p. 832; FRANCIONI, *cit*., p. 223; BOCZEK, 1988… *cit*., p. 457; M. NORDQUIST; N. GRANDY; S. NANDAN; S. ROSENNE, *United Nations Convention on the Law of the Sea, 1982:* a Commentary, Volume II. Leiden, Brill Nijhoff, 1993. p. 155; CHURCHILL and LOWE, 1999… *cit*., p. 411; HAYASHI, *cit*., p. 125; KRASKA, *cit*., p. 257.

63 FRANCIONI, *cit*., p. 213.

The powers of the coastal State in the EEZ regarding economic resources are exactly the same as those it has in the territorial sea concerning the same matter.[64] It would not be absurd, therefore, to affirm that the coastal State enjoys a materially limited sovereignty in the EEZ.

Supporting this perspective, in the Aegean Sea Continental Shelf Case between Turkey and Greece, the International Court of Justice (ICJ) held that:

> «In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal state. It follows that the territorial régime — the territorial status — of a coastal state comprises, ipso jure, the rights of exploration and exploitation over the continental shelf to which it is entitled under international law.»[65]

Here, the Court would only have jurisdiction over the dispute if the matter concerned the Greek "territorial status." Faced with this *quaestio juris*, as cited above, it held that the territorial regime of the coastal State includes the rights of exploration and exploitation of the continental shelf. *Mutatis mutandi*, the sovereign rights and jurisdiction of the coastal State in the EEZ are also part of its territorial regime.

This understanding is a consequence of the principle according to which the land dominates the sea, a fundamental basis of the law of the sea, held from Grotius to celebrated cases in international jurisprudence.[66] In 2009, in the maritime delimitation between Romania and Ukraine, the ICJ was explicit in also mentioning the EEZ as a consequence of this principle.[67] It is undoubted that the sovereign rights and jurisdiction of the coastal State in the EEZ are protected by the prohibition on the use of force through the principle of territorial integrity.[68]

The ensuing questions are: when will a third party activity offend the EEZ as

64 M. gavouneli, *Functional Jurisdiction in the Law of the Sea*, Leiden, Martinus Nijhoff Publishers, 2008, p. 265. Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Dissenting Opinion of Judge Oda, ICJ Reports 1982, p. 230.

65 Aegean Sea Continental Shelf (Greece v. Turkey), Jurisdiction, Judgment of 19 December 1978, ICJ Reports 1978, para. 86.

66 B. B. jia, «The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges» *German Yearbook of International Law* 57 (2014).

67 Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, ICJ Reports 2009, para. 77.

68 D. attard *cit.*, p. 69.

territorial integrity? What is the procedure to frame such an offense? To answer these questions, one must have the EEZ legal regime in perspective. The first one is simple: a third party act offends the EEZ as territorial integrity when it attacks the sovereign rights, jurisdiction or other rights of the coastal State in the EEZ.

As to the second, one should turn to the obligations of due regard and to comply with internationally lawful laws and regulations of the coastal State. As seen (Section 4), the duty of due regard prevents third States from unilaterally verifying whether their intended activity affects the rights and jurisdiction of the coastal State, especially when it concerns material military activities. There is a duty to consult with the coastal State. Ignoring it and conducting MEM may be considered hostile by the coastal State, even more so because, increasingly, the EEZ has been viewed through a quasi-territorial lens.[69]

If consultation is made, the coastal State objects, and the third State does not agree, there is a dispute. According to Art. 279 of UNCLOS, "States Parties shall settle any dispute between them concerning the interpretation or application of the present Convention by peaceful means in accordance with article 2, paragraph 3, of the Charter of the United Nations." Here is the second expression to be analyzed in this section: the principles of international law embodied in the UN Charter, protected by the prohibition in Art. 301. Art. 2 (3) is one of these. Therefore, if there is an objection, even if ill-founded, there is an unlawful use of force just by not seeking to resolve the dispute peacefully.[70]

Hence, the third State should consult with the coastal State and, if it objects, try to resolve the dispute peacefully. If the solution shows that the activity does not violate the sovereignty, jurisdiction, and other rights of the coastal State, it may proceed with the activity. If it does not reach a solution, but has tried in good faith to settle the dispute and the coastal State has not offered a plausible justification, it may also conduct MEMs in this case.

Regarding the obligation to comply with internationally lawful laws and regulations of the coastal State, refusal to comply with them — not seeking consent,

69 B. OXMAN, «The Territorial Temptation: a Siren Song at Sea», *American Journal of International Law*, 100 (2006), p. 839.

70 Guyana v. Suriname. Judgment of 17 September 2007, PCA Reports 2007, para. 423. S. D. MURPHY, «Obligations of States in Disputed Áreas of the Continental Shelf» in Heidar, T (Ed.). *New Knowledge and Changing Circumstances in the Law of the Sea*, Leiden, Brill, 2019, p. 19

Subi Reef, Spratly Islands, South China Sea, in May 2015, seen from southwest. The source claims it is Mischief Reef, which is clearly wrong when compared with other photos of both reef. Photo U. S. Navy (Public domain)

for example — and conducting MEMs should be seen as a threat or use of force against the territorial integrity of the coastal State.

Finally, there is a type of MEMs that requires a special attention: *Freedom of Navigation Operations* (FONOPs) and similar operations. Through these military operations, the United States claims to be actively resisting "excessive maritime claims" by enforcing supposed freedom of navigation.[71] The actions are demonstrations of force intended to dissuade other countries from pursuing their maritime claims. In practice, it fits the concept of gunboat diplomacy, particularly the kind that uses "purposeful force,", which uses/display/threats force aiming at a particular purpose unrelated to the direct consequences of the action.[72]

71 E. freund, "Freedom of Navigation in the South China Sea: A Practical Guide," (Belfer Center for School of International Affairs, Havard Kennedy School, 2017) 19.

72 J. cable, Gunboat Diplomacy: 1919-1991, London, Macmillan, 1994 [3rd Ed.], p. 33.

The ICJ, in the Corfu Channel Case, held that the conduct of minesweeping in the Albanian territorial sea by the UK was a violation of the latter's sovereingty, but not a "demonstration of force for the purpose of exercising political pressure on Albania."[73] Previously, in that case, the UK had attempted to assert the right of innocent passage through the Corfu Channel by exercising it with two cruisers and two destroyers, overriding Albanian previous objections, which required its consent for the passage of foreign vessels. On 22nd October 1946, British destroyers Saumarez and Volage provoked the explosion of freshly laid mines, resulting in 44 deaths, 42 personal injuries, and material damages. In November, the UK carried out Operation Retail, to remove the mines in Albanian territorial sea.

Albania claimed that Operation Retail had made use of an unnecessary display of force, out of proportion to the requirements of the sweep. The Court ruled that it was not "for the purpose of exercising political pressure on Albania," but rather justifiable, since, in few months, British "ships had been the object of serious outrages." Still, the Court considered it did violate Albanian sovereigny. The UK's main line of defense relied on the theory of intervention, by means of which the State intervening would secure possession of evidence in the territory of another State, in order to submit it to an international tribunal and thus facilitate its task. The Court's declinal of this line was vehement:

> «The Court cannot regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses [...] Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.»[74]

It should be highlighted that the Court did not have jurisdiction to rule on the prohibition on the use of force, only on the sovereignty of Albania, as per the *compromis* submitted by the parties. So, to the understanding of the ICJ, Operation Retail was indeed a violation of Albanian sovereignty, but without the specific purpose of exercising political pressure on it.

An interpretation *a contrario* would allow one to say that FONOPs are unlawful threats of force because they are a demonstration of force for the purpose of exercising political pressure on the coastal State that has "excessive maritime

73 Corfu Channel Case (United Kingdom v. Albania). Judgment of 9 April, ICJ Reports, 1949 35.
74 *Ibid*.

claims." Whereas the UK used an illegal operation to collect evidence, FONOPs have this explicit purpose.

By doing so, the United States distances itself from peaceful means of disputes settlement, and even if it is right about allegedly excessive maritime claims, it appears to adopt an illegal strategy. Actually, assuming the targeted maritime claims' illegality, the threat or use of force would still be unlawful as MEMs, because the illegality of the claims is not an armed attack that would authorize self-defense under Art. 51 of the UN Charter. In such cases, not only is the principle in Art. 2 (3) attacked, but also the political independence of the coastal State, protected by Arts. 301 and 2 (4). Here, the question of territorial integrity is not yet under consideration. Eventually, a FONOP could indeed be an illegal use of force against the territorial integrity and political independence of another State, as well as incompatible with the Art. 2 (3) principle.

Therefore, the application of the prohibition on the use of force to foreign MEMs in the EEZ depends on the legal regime of the latter. The view according to which the application of the prohibition in the EEZ is identical to its application on the high seas is erroneous. The considerations made here become more pertinent if one considers the hypothesis in which third States are directly or residually free to conduct MEMs, i.e., the scenario most favorable to them. Assuming that jurisdiction over foreign MEMs is residually assigned to the coastal State, any unauthorized MEM may threat the territorial integrity of the coastal State.

Conclusions

Throughout the article, the present author has developed preliminary conclusions that lead to a general conclusion: the coastal State *may* require its consent for third parties to conduct MEMs in its EEZ. However, its discretion in exercising this power varies depending on the adopted interpretation of Part V.

Primarily, this discretion is absolute, since, in the absence of direct attribution of jurisdiction to the coastal State or of freedom to all States, the residual attribution, by Art. 59, should confer the jurisdiction over foreign MEMs to the coastal State. This is justified by the prevalence of the coastal State's security interests over the strategic interests of others. By integrating the territorial status of the coastal State, the violation of this residually attributed right, depending on the hostility, may also evidence a violation of the prohibition on the use of force.

Even considering that the freedom to conduct MEMs is attributed directly or residually to all States, the coastal State can still require its consent. However, the discretion in exercising this power would be limited, comprising only the sovereign rights and jurisdiction of the coastal State affected by the third party activity. This put, a conservative and better legally shielded approach for coastal States was proposed here:[75] to require consent for any MEM, but to only be able to deny it when such military activities affect its rights. Because it is an internationally lawful law, third States are obliged to comply with it.

The paper also answered the question of how these limitations happen in practice through the obligation of due regard, important especially for countries that do not regulate MEMs in their EEZ. As exposed, it is a procedural duty, i.e., it stipulates the manner in which a substantial right must be exercised. Following international jurisprudence, especially the Chagos Marine Protected Area Arbitration, one can affirm that military activities of material dimension such as MEMs will always require prior consultation with the coastal State. In this consultation, the rights in dispute are weighed and the alternatives are analyzed.

If the coastal State objects and the third State disagrees, a dispute arises. By Art. 279, UNCLOS, and 2 (3), UN Charter, the third State must seek to resolve the dispute peacefully. Ignoring the third State's objection results in a violation of such provisions and, by the forcible nature of MEMs, in a threat or use of force incompatible with the principles embodied in the Charter, and possibly to the detriment of the territorial integrity of the coastal State. Thus, the peaceful vocation of the prohibition on the use of force also functions as a procedural duty to be observed by the third State.

Finally, the article also gave attention to the FONOPs' issue. Following the ICJ in the Corfu Channel Case, these operations with purposes of exercising political pressure on coastal States to dissuade them from their allegedly excessive maritime claims constitute a threat of use of force against the political independence of the coastal State — beyond the considerations applied to MEMs in general.

All things considered, it is fair to conclude that the US diplomatic and academic efforts towards constructive ambiguity are illogical for one reason only:

75 As for our main position, inevitably, there is some level of idiosyncrasy in asserting that one interest prevails over another. In this second approach, the idiosyncratic margin is much smaller and therefore harder to be objected.

the very regime of the EEZ, *sui generis*, *tertium genus*, distinct from that of the high seas, makes it impossible to there be an almost absolute freedom to conduct MEMs in the EEZ, as there was in spaces that were once parts of the high seas. As Yee said, "Indeed, if the security interest of the coastal State cannot be guaranteed, so that the life of that State cannot be maintained, what is the point of having all the rights to the resources in the EEZ anyway?" The profound change brought about by the 1982 Convention, to make the legal order of the oceans more just and equitable, in fact and in law, could not undermine the *sovereignty* of the rights of sovereignty and jurisdiction that the coastal State enjoys in the EEZ.

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