



MILITARY EXERCISES INVOLVING LIVE FIRING IN THE EEZ AND THE “DUE REGARD” OBLIGATION IN 1982 UNCLOS

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PART 1

Exclusive Economic Zone as a Specific Legal Regime

Nature of EEZ Regime

- EEZ is a maritime zone beyond and adjacent to the territorial sea, extending out to 200 nautical miles from the baselines from which the territorial sea is measured
- EEZ is **not** part of the high seas
- EEZ is **not** subject to the sovereignty of coastal State
- EEZ is a specific legal regime in which the **rights and jurisdiction of coastal States and the rights and freedoms of other States** are set out in UNCLOS
- EEZ is subject to selected sovereign rights and powers of the coastal State which co-exist with some freedoms of the high seas of other States.

Overview of EEZ Regime

Article 55 – Specific Legal Regime

Article 56 – Rights, Jurisdiction & Duties of Coastal States

Article 58 - Rights and Duties of Other States

Article 59 – Basis for resolution of conflicts regarding the Attribution of Rights and Jurisdiction in the EEZ

Art. 56(1)– Rights of Coastal State

In the EEZ, the coastal State has:

- (a) **sovereign rights** for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
- (c) **other rights and duties** provided for in this Convention.

Art. 56(2) – Jurisdiction of Coastal State

In the EEZ, the coastal State has:

(b) **jurisdiction** as provided for in the relevant provisions of this Convention with regard to:

- (i) the establishment and use of artificial islands, installations and structures; [Part VI]
- (ii) marine scientific research; [Part XII]
- (iii) the protection and preservation of the marine environment; [Part XII]

Art 56(3) – Due Regard Obligation

2. In exercising its rights and performing its duties under this Convention in the Exclusive Economic Zone,
- the coastal State shall have **due regard** to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

Article 58 – Rights and Duties of Other States in the EEZ

1. In the EEZ, **all States, . . . enjoy,** subject to the relevant provisions of this Convention, the **freedoms** referred to in article 87 of **navigation and overflight** and of the laying of submarine cables and pipelines, and **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, and compatible with the other provisions of this Convention.

Note: Phrase in bold was proposed by the United States with the intention of preserving the right to conduct naval activities in the EEZ / could not reach agreement on other language

Article 56. – Jurisdiction of Coastal State

In the EEZ, the coastal State has:

(b) **jurisdiction** as provided for in the relevant provisions of this Convention

with regard to:

- (i) the establishment and use of artificial islands, installations and structures; [Part VI]
- (ii) marine scientific research; [Part XII]
- (iii) the protection and preservation of the marine environment; [Part XII]

Note: Article 73 authorizes coastal States to enforce their laws and regulations with respect to living resources in its EEZ

Art. 58 – High Seas rules apply in EEZ

- **Articles 88 to 115 and other pertinent rules of international law apply to the EEZ** in so far as they are not incompatible with this Part.
- Note: Articles 88-115 include the rules on jurisdiction over ships on the high seas, including:
 - Exclusive jurisdiction of the flag state (Art 92)
 - Duties of flag States (Art 94)
 - Immunity of warships (Art 95)
 - Piracy regime (Arts 101-107)
 - Right of Visit (Art 110)
 - Hot Pursuit (Art 111)

Reciprocal “Due Regard” Obligations

Article 56(2) Rights, Jurisdiction & Duties of Coastal State in EEZ

In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the **coastal State** shall have **due regard** to the **rights and duties of other States** and shall act in a manner compatible with the provisions of this Convention.

Article 58(3) Rights and Duties of Other States in EEZ

In exercising their rights and performing their duties under this Convention in the exclusive economic zone, **States** shall have **due regard** to the **rights and duties of the coastal State** and shall **comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law** in so far as they are not incompatible with this Part.

Rights & Jurisdiction in the EEZ

- **Coastal States** do not have sovereignty in the EEZ – they have rights and jurisdiction over economic activities, marine scientific research and protection of the marine environment [Art 56]
- Other States have **high seas freedoms** and “**other lawful uses of the sea related to those freedoms**” [Art 58(1)]
- If coastal State is not given jurisdiction in Part V, the high seas rules on jurisdiction apply [Art 58(2)]
- In exercising their rights and performing their duties, both States must have **due regard** to the **rights** and **duties** of the other
 - **Note: Must give due regard to “rights and duties”, not to “interests”**

PART 2

Military Activities

**involving live firing of weapons
and the “due regard” obligation**

Unilateral Declarations of Coastal States

- Declarations of India, Malaysia and other States when signing or ratifying UNCLOS. For example, India's declaration:
 - The Government of India understands that the provisions of the Convention do not authorize other States to carry out in the exclusive economic zone and on the continental shelf **military exercises or manoeuvres, in particular those involving the use of weapons or explosives** without the **consent of the coastal State**.

US State Dept on “Due Regard” Obligation

- Under article 58(1), all States have the right to conduct **military activities** within the EEZ, but may only do so consistently with the obligation to have due regard to the rights and duties of the Coastal State
- User State must only comply with the laws and regulations adopted by the coastal State in accordance with UNCLOS and other rules of international law
- **US Position:** It is the duty of the flag State, not the right of the coastal State, to enforce this "due regard" obligation.

US Commander's Handbook on Law of Naval Operations, 2022

Paragraph 2.6.2:

- Since all ships and aircraft, including warships and military aircraft, enjoy the high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms—in and over those waters—the **existence of an EEZ in an area of naval operations need not, of itself, be of operational concern to the naval commander.**

PART 3

Proposed Compromise: Prior Consultation

Possible “Compromise” on Military Exercises in the EEZ involving live firing

- User State should **CONSULT** the coastal State with regard to the timing, nature and location of the exercise
 - **Not** a request for **consent or authorization** of coastal State
 - **Not** conducting exercise without **notice** to coastal State
- Coastal State can **request consultation** if it learns of planned exercise in its EEZ involving live firing of weapons
- **Purpose of consultation** is to ensure that exercise will not interfere with existing or planned activities of coastal State in the same area

Chagos Marine Protected Area Arbitration (Mauritius v. UK2015)

- UK unilaterally declared a **marine protected area** around disputed territory i.e. Chagos Archipelago
- Annex VII Arbitral Tribunal had to consider whether UK's action was a breach of its '**due regard**' obligation in Article 56(2)
- Tribunal found that the **due regard obligation** requires a balancing act between competing rights based upon an evaluation of
 - the extent of the interference,
 - the availability of alternatives and
 - the importance of the rights and policies at issue
- Ordinary meaning of 'due regard' calls for the UK to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights

Chagos Marine Protected Area Arbitration (Mauritius v. UK, 2015)

- The **extent of 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 State

“Consultation” Provision in Article 9 of 1967 Outer Space Treaty

- If a State Party to the Treaty has reason to believe that an activity or experiment planned **by it or its nationals** in outer space. . . , would cause potentially harmful interference with activities of other States Parties . . . **it shall undertake appropriate international consultations** before proceeding with any such activity or experiment.
- A State Party to the Treaty which has reason to believe that an activity or experiment planned **by another State Party** in outer space, including the moon and other celestial bodies . . . , would cause potentially harmful interference with activities in the peaceful exploration and use of outer space. . . **may request consultation** concerning the activity or experiment.

USA should take the lead

- The USA should adopt a policy of prior consultation before engaging in military exercises involving the live firing of weapons in the EEZ of other States
- This would enhance its prestige and alleviate the concerns of coastal States in Asia
- It would also enhance the reputation of the US as a promoter of the Rules Based Legal Order set out in UNCLOS.

Thanks for your attention!

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