
INTERNATIONAL LAW STUDIES

— *Published Since 1895* —

U.S. NAVAL WAR COLLEGE



Intelligence Gathering in the Exclusive Economic Zone

Efthymios Papastavridis

93 INT'L L. STUD. 446 (2017)

Volume 93

2017

Published by the Stockton Center for the Study of International Law

ISSN 2375-2831

Intelligence Gathering in the Exclusive Economic Zone

*Efthymios Papastavridis**

CONTENTS

I. Introduction	447
II. Intelligence Gathering in International Law	449
III. The Legal Nature of the EEZ.....	453
IV. Intelligence Gathering by Coastal States.....	461
A. Maritime Identification Zones.....	461
B. Earth Observation Systems.....	466
V. Intelligence Gathering by Other States in the EEZ.....	470
VI. Conclusion.....	475

* Postdoctoral Research Assistant in International Law of the Sea, Faculty of Law, Oxford University; Oxford Martin Fellow, Oxford University. This paper arose from the Maritime Intelligence Law and Law of the Sea Workshop held in Washington, DC in October 2016, co-sponsored by the Stockton Center for the Study of International Law, U.S. Naval War College and the Center for Oceans Law and Policy, University of Virginia School of Law. I am grateful to the workshop participants for the opportunity to exchange ideas and to the co-sponsors for the opportunity to participate. The research leading to this article received funding from the Oxford Martin Programme for Sustainable Oceans, Oxford Martin School, Oxford University.

The thoughts and opinions expressed are those of the author and not necessarily of the U.S. government, the U.S. Department of the Navy or the U.S. Naval War College.

I. INTRODUCTION

One of the most controversial questions arising from the adoption of the United Nations Convention on the Law of the Sea¹ is whether the coastal State can control the gathering of intelligence by other States within its exclusive economic zone (EEZ). Many scholars have attempted to answer this question.² Currently, the majority position is that “such intelligence-gathering activities by foreign States in the coastal State’s EEZ are exercises of the freedom of navigation and are not subject to [the] coastal State’s jurisdiction.”³ However, in the absence of an authoritative judicial ruling on the matter, and with numerous States, including China,⁴ fervently challenging this position, this issue remains very much contested.

Equally important is the question of whether a coastal State may interfere with the navigational and overflight rights of other States in the EEZ in the course of intelligence gathering for maritime security purposes. As Klein observes, “a critical element to protecting maritime security is ensuring that states have the necessary information at their disposal to take preventative or responsive action.”⁵ Threats to maritime security include a host of activities pertaining not only to national security, but, increasingly, also to transnational organized crime at sea.⁶ In that regard, it is sufficient to note that

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOSC].

2. See, e.g., Mark J. Valencia, *Introduction: Military and Intelligence Gathering Activities in the Exclusive Economic Zones: Consensus and Disagreement II*, 29 MARINE POLICY 97 (2005); Moritaka Hayashi, *Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms*, 29 MARINE POLICY 123 (2005); Stuart Kaye, *Freedom of Navigation, Surveillance and Security: Legal Issues Surrounding the Collection of Intelligence from beyond the Littoral*, 24 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 93 (2005); Jon M. Van Dyke, *Military Ships and Planes Operating in the Exclusive Economic Zone of Another Country*, 28 MARINE POLICY 29 (2004); Desmond Ball, *Intelligence Collection Operations and EEZs: The Implications of New Technology*, 32 MARINE POLICY 67 (2008).

3. Douglas Guilfoyle, *Maritime Security*, in LAW OF THE SEA: UNCLOS AS A LIVING TREATY 329, 356 (Jill Barrett & Richard Barnes eds., 2016).

4. See Ren Xiaofeng & Cheng Xizhong, *A Chinese Perspective*, 29 MARINE POLICY 139, 142 (2005); see also Zhang Haiwen, *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*, 9 CHINESE JOURNAL OF INTERNATIONAL LAW 31, 44–45 (2010).

5. NATALIE KLEIN, MARITIME SECURITY AND THE LAW OF THE SEA 211 (2011).

6. See generally UNITED NATIONS OFFICE ON DRUGS AND CRIMES, COMBATING TRANSNATIONAL ORGANIZED CRIME AT SEA: ISSUE PAPER (2013), http://www.unodc.org/documents/organized-crime/GPTOC/Issue_Paper_-_TOC_at_Sea.pdf.

the UN Secretary-General in his 2008 Report on Oceans and the Law of the Sea identified seven specific “threats to maritime security,” all of which may involve criminal organizations.⁷

Therefore, it comes as no surprise that the need for intelligence gathering beyond the littoral ranks high in the maritime security policy of many coastal States.⁸ For example, one of the main U.S. policy initiatives in relation to intelligence gathering since 9/11 has been the creation of a maritime domain awareness (MDA) system, which seeks to generate and use information concerning vessels, crews and cargos.⁹ According to the U.S. National Plan to Achieve Maritime Domain Awareness, “MDA is the effective understanding of anything associated with the maritime domain that could impact the security, safety, economy, or environment of the US.”¹⁰ To this end, the United States indicates MDA should include the institution of worldwide standards for broadcasts of vessel position and identification and automated tools to discern patterns of suspicious behavior and potential security threats.¹¹

Other States and regional organizations have developed their own strategies in handling information on maritime security. Australia and New Zea-

7. U.N. Secretary-General, *Oceans and the Law of the Sea*, ¶¶ 54, 63, 72, 82, 89, 98, 107–08, U.N. Doc. A/63/63 (Mar. 10, 2008). These seven threats are 1) piracy and armed robbery against ships; 2) terrorist acts against shipping, offshore installations and other maritime interests; 3) illicit trafficking in arms and weapons of mass destruction; 4) illicit trafficking in narcotic drugs and psychotropic substances; 5) smuggling and trafficking of persons by sea; 6) IUU (illegal unreported and unregulated) fishing; and 7) intentional and unlawful damage to the marine environment.

8. See Natalie Klein, *Intelligence Gathering and Information Sharing for Maritime Security Purposes under International Law*, in *MARITIME SECURITY: INTERNATIONAL LAW AND POLICY PERSPECTIVES FROM AUSTRALIA AND NEW ZEALAND* 224, 224 (Natalie Klein, Joanna Mossop & Donald R. Rothwell eds., 2010) [hereinafter *MARITIME SECURITY*]; Petros Liacouras, *Intelligence Gathering on the High Seas*, in *UNRESOLVED ISSUES AND THE NEW CHALLENGES TO THE LAW OF THE SEA* 123, 123 (Anastasia Strati, Maria Gavouneli & Nikolaos Skourtos eds., 2006).

9. On the concept of MDA, see Dana A. Goward, *Maritime Domain Awareness: The Key to Maritime Security*, in *LEGAL CHALLENGES IN MARITIME SECURITY* 513 (Myron H. Nordquist, Rudiger Wolfrum, John Norton Moore & Ronan Long eds., 2008).

10. U.S. DEPARTMENT OF HOMELAND SECURITY, NATIONAL PLAN TO ACHIEVE MARITIME DOMAIN AWARENESS: FOR THE NATIONAL STRATEGY FOR MARITIME SECURITY, at ii (2005), www.dhs.gov/xlibrary/assets/HSPD_MDAPlan.pdf.

11. See U.S. DEPARTMENT OF THE NAVY, NAVY MARITIME DOMAIN AWARENESS CONCEPT 2007 10 (2007), www.navy.mil/navydata/cno/Navy_Maritime_Domain_Awareness_Concept_FINAL_2007.pdf.

land, in light of the large expanses of their EEZs and search and rescue regions, have adopted similar MDA policies.¹² Further, on December 14, 2004, Australian Prime Minister John Howard promulgated the Maritime Identification Zone (MIZ) as part of Australia's effort to strengthen its offshore maritime security.¹³ The creation of this zone, which extended one thousand nautical miles from Australia's coastline, was to enable Australian authorities to identify vessels, including their crew, cargo and journey, seeking to enter Australian ports. The air defense identification zones, maintained by the United States and other nations, serves a similar purpose. In the U.S. example, this zone can extend three hundred miles out to sea in some places and requires both civilian and military aircraft to identify themselves and to follow the directions of U.S. authorities.¹⁴

The purpose of this article is not to address all the legal issues arising from intelligence gathering in the EEZ, which involves serious questions not only of international law, including the law of the sea and international human rights law, but also domestic law, including constitutional law and criminal law. Rather, this article examines whether the law of the sea permits such intelligence gathering, and if so, to what extent. Part II provides a short prelude on intelligence gathering, before the article shifts to the pivotal question of the nature of the EEZ under international law. Part III identifies and explores the rules applicable to the collection of intelligence on the part of the coastal State within its EEZ, while Part IV addresses the converse question of whether other States are permitted to collect intelligence within foreign EEZs. Part V concludes.

II. INTELLIGENCE GATHERING IN INTERNATIONAL LAW

As Jonathan Colby wrote in 1974,

There are no limits to the types and sources of information which may be useful. The processing of intelligence refers to the treatment accorded the raw data which has been collected. It generally includes appraisal of the relevance of the information, as well as editing and cataloguing in forms

12. See, e.g., Donald R. Rothwell & Natalie Klein, *Maritime Security and the Law of the Sea*, in *MARITIME SECURITY*, *supra* note 8, at 22.

13. See Natalie Klein, *Legal Implications of Australia's Maritime Identification System*, 55 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 337 (2006).

14. See Mark Valencia, *Summary of the Bali Dialogue*, 28 *MARINE POLICY* 7, 8 (2004).

useful to decision-makers. These tasks vary enormously in complexity, depending in large measure on the amount and quality of data requested and actually collected.¹⁵

The task of intelligence gathering is particularly challenging in the marine environment, not only due to the vastness of the oceans, but also because of the diverse legal nature of the maritime zones. As for the methods employed, they vary, inevitably following relevant technological advancements. In an earlier era, Roach and Smith noted, “[m]ilitary surveys can include oceanographic, marine geological, geophysical, chemical, biological and acoustic data. Equipment used can include fathometers, swath bottom mappers, side scan sonars, bottom grab and coring systems, current meters and profilers.”¹⁶ Today, they may involve surface vessels and submarines, as well as remotely operated vehicles, autonomous underwater vehicles (AUVs), seabed landers and even satellites and other earth observation systems, such as radars.

With respect to the legal regime governing intelligence gathering, Natalie Klein rightly posits, “Laws relating to the collection and dissemination of information as a matter of international law come from a range of sources and this remains true in the law of the sea more specifically.”¹⁷ Indeed, as Dieter Fleck has written, “intelligence activities as such may not be wrongful under present international law, but the wrongfulness may derive from additional conditions, such as illegal intervention, breach of foreign sovereignty, or common crimes committed in the course of espionage acts.”¹⁸

Under the law of the sea, intelligence gathering may violate coastal State rights over the territorial sea, since it is presumed to be non-innocent passage as set forth in Article 19(2)(c).¹⁹ However, intelligence gathering within the

15. Jonathan E. Colby, *The Developing International Law on Gathering and Sharing Security Intelligence*, 1 YALE STUDIES IN WORLD PUBLIC ORDER 49, 53 (1974).

16. J. ASHLEY ROACH & ROBERT W. SMITH, IDENTIFICATION OF EXCESSIVE MARITIME CLAIMS 248 (1994); *see also* J. Ashley Roach & Robert W. Smith, *Identification of Excessive Maritime Claims*, 66 INTERNATIONAL LAW STUDIES 11, 11–19 (1994).

17. KLEIN, *supra* note 5, at 211.

18. Dieter Fleck, *Individual and State Responsibility for Intelligence Gathering*, 28 MICHIGAN JOURNAL OF INTERNATIONAL LAW 687, 707 (2007).

19. LOSC, *supra* note 1, art 19(2)(c)

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 act aimed at collecting information to the prejudice of the defence or security of the coastal State.

EEZ may qualify as a legal activity under the freedom of the high seas preserved in Article 87.²⁰ The lawfulness of the act will depend on the nature of the intelligence gathering itself and the context in which it takes place. When it comes to where States are permitted to engage in intelligence gathering, the most controversial maritime zone is the EEZ, as demonstrated by the considerable legal literature addressing this topic. Further, many of the international incidents concerning intelligence gathering, such as those involving the *USNS Impeccable*²¹ and a U.S. Navy EP-3 aircraft,²² occurred in the EEZ.²³

It is true that some intelligence gathering activities bear a close resemblance to marine scientific research (MSR), which is largely regulated by the Law of the Sea Convention, even though it does not define MSR. As Sam Bateman notes,

There is a tendency in practice to use the term “marine scientific research” loosely when referring to all kinds of data collection (research) conducted at sea. However, not all data collection conducted at sea necessarily comes within the scope of the marine scientific research regime established by Part XIII of UNCLOS.²⁴

20. *Id.*, art. 87.

21. Chinese vessels interdicted the *Impeccable*, an unarmed U.S. Navy ocean surveillance ship that was collecting data in China’s EEZ on March 8, 2009. See Ann Scott Tyson, *China Draws U.S. Protest over Shadowing of Ships*, WASHINGTON POST, Mar. 10, 2009, at A8.

22. In April 2001, two Chinese fighter jets intercepted a U.S. Navy EP-3 propeller-driven aircraft during a reconnaissance mission over the South China Sea. One of the Chinese aircraft collided with the EP-3. The Chinese jet and pilot were lost at sea, and the U.S. aircraft made an emergency landing on Hainan Island. Chinese forces detained the U.S. crew for more than one week and stripped the aircraft of its advanced electronic equipment. See Erik Eckholm, *Collision with China: The Overview; U.S. Says Spy Crew Wiped Out Secrets in Frantic Landing*, NEW YORK TIMES, Apr. 14, 2001, at A1; see also Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 626, 630 (2001) (discussing the aerial incident occurring off the Chinese coast).

23. For a survey of such incidents, see James Kraska, *Putting Your Head in the Tiger’s Mouth: Submarine Espionage in Territorial Waters*, 54 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 164, 182–84 (2015); see also JAMES KRASKA, MARITIME POWER AND THE LAW OF THE SEA: EXPEDITIONARY OPERATIONS IN WORLD POLITICS 252–53 (2011).

24. Sam Bateman, *Hydrographic Surveying in the EEZ: Differences and Overlaps with Marine Scientific Research*, 29 MARINE POLICY 163, 164 (2005).

Bateman persuasively argues that a distinction should be made between marine scientific research and hydrographic survey²⁵ and military survey activities.²⁶ Major maritime powers, such as the United States²⁷ and Australia,²⁸ adhere to this distinction, while the United Kingdom astutely posits that “[w]hile the means of data collection used in MDG [military data gathering] may sometimes be the same as that used in Marine Scientific Research (MSR), information from such activities, regardless of the security classification, is intended primarily for military use and is not released to the scientific community.”²⁹ Without further dwelling upon this controversial issue, this position, that the distinction between MSR and MDG lies in the application of the data, and not in the process of the data gathering itself, appears to be on a firm legal ground. Moreover, this position aligns with the overall tenor of the Convention not to include military matters within its regulatory scope.

Considering the discussion above, the analysis in this article proceeds without equating intelligence gathering with MSR when the data collected is non-releasable and is for the exclusive use of military forces.

25. The *Hydrographic Dictionary* defines a hydrographic survey as

[a] survey having for its principal purpose the determination of data relating to bodies of water. A hydrographic survey may consist of the determination of one or several of the following classes of data: depth of water, configuration and nature of the bottom; directions and force of currents; heights and times of tides and water stages; and location of topographic features and fixed objects for survey and navigation purposes.

INTERNATIONAL HYDROGRAPHIC ORGANIZATION, *HYDROGRAPHIC DICTIONARY* 237 (5th ed. 1994).

26. Bateman, *supra* note 24, at 165. For a discussion explaining the distinction between marine scientific research and hydrographic survey, see ALFRED SOONS, *MARINE SCIENTIFIC RESEARCH AND THE LAW OF THE SEA* 110 (1982).

27. See ROACH & SMITH *supra* note 16, at 248–49.

28. Australia established Foreign Research Vessel Guidelines as part of its implementation of Part XIII of the Law of the Sea Convention, but these guidelines do not reference hydrographic surveying or other types of surveys. See Montserrat Gorina-Ysern & Martin Tsamenyi, *Defence Aspects of Marine Scientific Research*, 96 *MARITIME STUDIES* 13, 20 (1997).

29. Bateman, *supra* note 24, at 173.

III. THE LEGAL NATURE OF THE EEZ

Intelligence gathering is particularly challenging in the EEZ due to the hybrid or *sui generis* character of the zone,³⁰ which requires balancing freedoms of the high seas, including freedom of navigation, and the sovereign rights and jurisdiction of the coastal State.³¹ The relevant Law of the Sea Convention provisions determine the legal nature of the EEZ. Article 56 defines the EEZ as an area located beyond and adjacent to the territorial sea that cannot extend beyond two hundred nautical miles from the baselines from which the territorial sea is measured.³² Article 55 specifies that the EEZ is subject to a “special legal regime” established in Part V of the Convention, which governs the rights and jurisdiction of the coastal State and the rights and freedoms of other States in the EEZ.³³ Thus, the rules governing the EEZ no longer allow the use of the traditional principles of sovereignty and freedom of the high seas in identifying the coastal State’s sovereign sphere and the freedoms of other States.³⁴ As one commentator notes:

[I]n terms of territory, the EEZ is a no man’s land (and thus high seas), whereas in terms of function (i.e., usage and protection rights) the EEZ is a *sui generis* zone subject to a ‘specific legal regime’ (Article 55 of LOSC), located *quasi* ‘between’ the maritime territory of a coastal state and the high seas.³⁵

In essence, the coastal State does not enjoy territorial sovereignty, but only sovereign rights over economic resources within the EEZ. Under Article 56, these sovereign rights concern the conservation, management, and

30. As far as can be determined, the term “*sui generis* zone” was first used by the Chairman of the Second Committee during the UNCLOS III negotiations. *See* 5 OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 153 (2008). Leading textbooks have adopted this terminology. *See, e.g.*, R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 166 (3d ed. 1999).

31. *See generally* DAVID JOSEPH ATTARD, *THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW* (1987); BARBARA KWIATKOWSKA, *THE 200 MILE EXCLUSIVE ECONOMIC ZONE IN THE LAW OF THE SEA* (1989).

32. LOSC, *supra* note 1, art. 56.

33. *Id.*, art. 55.

34. *See* Umberto Leanza & Maria Cristina Caracciolo, *Exclusive Economic Zone*, in 1 *THE IMLI MANUAL ON INTERNATIONAL MARITIME LAW: THE LAW OF THE SEA* 178, 185 (Malgosia Fitzmaurice & Norman A. Martínez Gutiérrez eds., 2014).

35. Alexander Proelss, *The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited*, 26 *OCEAN YEARBOOK* 87, 89 (2012).

exploitation of natural resources, both biological and non-biological, and other activities aimed at the exploration and exploitation of the area for economic purposes, such as the production of energy from water, currents and winds.³⁶ Still, under Article 58, other States enjoy “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 . . . compatible with the other provisions of this Convention.”³⁷ This list is exhaustive, even if the reference to other lawful uses makes it somewhat flexible.³⁸ According to the Virginia Commentary, “[t]he ‘other internationally lawful uses’ include, *inter alia*, ‘those associated with the operation of ships, aircraft and submarine cables and pipelines.’ This does not include fishing, which is governed by Articles 61 to 73.”³⁹

However, as underscored above, these freedoms are subject to the “special legal regime” of the EEZ and should not be taken as freedoms of the high seas per se. Equally, the coastal States’ sovereign rights are not absolute, but qualified by specific provisions of the Law of the Sea Convention, as well as by the general requirements of the principle of good faith and the prohibition of abuse of right.⁴⁰ Indeed, Articles 56 and 58 impose mutual obligations on the coastal State to take into account the rights and duties of other States and on other States to take due regard of the rights and duties of the coastal State.⁴¹ This due regard requirement is key to the harmonious reading and application of the Convention and is pivotal to our inquiry.

The Law of the Sea Convention also provides the so-called “residual rule,” which applies to cases where the Convention confers no rights on either the coastal State or other States. According to Article 59,

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and

36. LOSC, *supra* note 1, art. 56.

37. *Id.*, art. 58.

38. Leanza & Caracciolo, *supra* note 34, at 193.

39. See 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 564 (Satya N. Nandan & Shabtai Rosenne eds., 1993) [hereinafter 2 VIRGINIA COMMENTARY].

40. LOSC, *supra* note 1, art. 300 (“States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.”).

41. *Id.*, arts. 56, 58.

in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

The residual rule balances the coastal State's position and the position of other States in situations where the activity in question is neither an exercise of a sovereign right of the coastal State, nor an exercise of a freedom of communication of the other State. However, as noted in the most recent Law of the Sea Commentary, "Art[icle] 59 does not provide precise answers, but rather requires that conflicts ought to be resolved on a case-by-case basis, depending on the individual circumstances and based on a balancing of the interests involved, with the aim to achieve an equitable solution."⁴² Indeed, it is a very context-specific provision, which should not be taken as a panacea to any conflict that may arise. Further, it is important to note that many disputes concerning the uses of the EEZ could be resolved by the proper application of the due regard principle enshrined in Articles 56(2) and 58(3).⁴³

Two recent judgments of international tribunals demonstrate how the application of the due regard principle can resolve such disputes. The first was the arbitration between Mauritius and the United Kingdom in which Mauritius claimed that the establishment of a marine protected area (MPA) in the Chagos Archipelago extinguished its traditional fishing rights in the territorial sea and the EEZ surrounding the archipelago.⁴⁴ The arbitral tribunal upheld Mauritius' claim that the United Kingdom had violated Article 56(2), finding that Mauritius is entitled to fishing rights in the territorial sea and the EEZ pursuant to the United Kingdom's unilateral actions.⁴⁵

42. See THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 459 (Alexander Proelss ed., 2017).

43. LOSC, *supra* note 1, art. 56(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.") (emphasis added); *id.*, art. 58(3)

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.

(emphasis added).

44. See Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), Case No. 2011-03, Award, ¶ 414 (Perm. Ct. Arb. 2015), <https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf>.

45. These unilateral actions are known as the Lancaster House Undertakings (1965).

In scrutinizing Article 56(2), the tribunal reasoned as follows:

[T]he ordinary meaning of “due regard” calls for the United Kingdom [the coastal State] to have such regard for the rights of Mauritius [the other State] as *is called for by the circumstances and by the nature of those rights*. The Tribunal declines to find in this formulation any universal rule of conduct. The Convention does not impose a uniform obligation to avoid any impairment of Mauritius’ rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights. Rather, 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 State.⁴⁶

Here, the tribunal held that the approach of the United Kingdom to consultations with other States provided a practical example of due regard and a yardstick against which the communications with Mauritius can be measured. For example, it found that “the United States was consulted in a timely manner and provided with information, and that the United Kingdom was internally concerned with balancing the MPA with U.S. rights and interests.”⁴⁷ Such consultations never took place between the United Kingdom and Mauritius, which, among other reasons, substantiated a violation of Article 56(2) by the United Kingdom.⁴⁸

This ruling is reminiscent of the International Court of Justice (ICJ) *Fisheries Jurisdiction* judgment in 1974.⁴⁹ In examining the nature of preferential fishing rights of the coastal State, the ICJ stated, “[i]t is implicit in the concept of preferential rights that negotiations are required in order to define or delimit the extent of those rights”⁵⁰ According to the Court, the duty to negotiate in good faith meant that it would be the task of the States concerned to act with reasonable regard. Thus, the Court found that:

46. Chagos Marine Protected Area Arbitration, *supra* note 44, ¶ 519 (emphasis added).

47. *Id.*, ¶ 528.

48. *Id.*, ¶ 536.

49. Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. Rep. 3 (July 25).

50. *Id.*, ¶ 74.

to conduct their negotiations on the basis that each must in *good faith* pay reasonable regard to the legal rights of the other in the waters around Iceland outside the 12-mile limit, thus bringing about an *equitable apportionment* of the fishing resources based on the facts of the particular situation and having regard to the interests of other states which have established fishing rights in the area.⁵¹

The second recent judgment is the extensively discussed award of the tribunal in the South China Sea dispute between the Philippines and China.⁵² Here, the Philippines claimed that China interfered with its fishing rights in violation of Article 58(3).⁵³ The tribunal agreed with the interpretation of due regard found in the *Chagos Marine Protected Area* arbitration, as well as the finding of the International Tribunal for the Law of the Sea in its *Fisheries* advisory opinion.⁵⁴ The latter interpreted due regard by reading it in conjunction with the obligations directly imposed upon nationals by Article 62(4), which extends a duty on the flag State “to take the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in IUU [illegal, unreported and unregulated] fishing activities.”⁵⁵ After stating its agreement with that interpretation, the tribunal in the South China Sea arbitration continued, again stressing the importance of due regard:

Given the importance of fisheries to the entire concept of the exclusive economic zone, the degree to which the Convention subordinates fishing within the exclusive economic zone to the control of the coastal State . . . the Tribunal considers that anything less than due diligence by a State in preventing its nationals from unlawfully fishing in the exclusive economic zone of another would fall short of the regard due pursuant to Article 58(3) of the Convention.⁵⁶

51. *Id.*, ¶ 78 (emphasis added).

52. South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award (Perm. Ct. Arb. 2016), <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>.

53. *See id.*, ¶¶ 744, 753, 757.

54. *Id.*, ¶ 744; *see also* Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Case No. 21, Advisory Opinion of Apr. 2, 2015, ¶ 124, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion/C21_AdvOp_02.04.pdf [hereinafter *Fisheries Advisory Opinion*].

55. Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), *supra* note 54, ¶ 124.

56. South China Sea Arbitration, *supra* note 52, ¶ 744.

It is true that these cases pertained mainly to fisheries, and thus, are not directly relevant to intelligence gathering. However, it is possible to use these cases to draw some conclusions for how due regard should be construed towards intelligence gathering in the EEZ. First, it is certainly a matter of an ad hoc balancing exercise that should take into account a host of parameters, including “the nature of the rights held by the third State, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the coastal State and the availability of alternative approaches.”⁵⁷

Second, it readily appears that this due regard obligation on the part of the coastal State is an “obligation of conduct,” not an “obligation of result.”⁵⁸ The coastal State has a “due diligence obligation”⁵⁹ to have regard for the potential interference with the other States’ rights and to attempt to mitigate such interference. In some instances, consultations in good faith between the coastal State and the affected State may suffice, as it did in the *Fisheries Jurisdiction* advisory opinion and the *Chagos Marine Protected Area* arbitration.

A third, but more uncertain conclusion concerns the question of whether there is an absolute equilibrium between the rights of coastal States and the freedoms of other States. According to some commentators, “on a more careful reading, the imbalance between the position of the coastal State and that of the other States is clearly evident.”⁶⁰ Regardless of whether such an imbalance is evident, one may argue that there is a rebuttable presumption in favor of the coastal State in respect of all uses that pertain to resources or, more broadly, have an economic value. Indeed, the Virginia Commentary suggests a shift of emphasis in favor of the coastal State even in situations covered by Article 59: “Given the functional nature of the exclusive economic zone, where economic interests are the principal concern this formula would normally favor the coastal State.”⁶¹

57. See *Chagos Marine Protected Area Arbitration*, *supra* note 44, ¶ 719.

58. On this distinction, see *Fisheries Jurisdiction*, *supra* note 49, ¶ 129; see also Rüdiger Wolfrum, *Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations*, in *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* 363 (Mahnoush H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane & Siegfried Wiessner eds., 2011).

59. For a review of the due diligence obligation, see *Fisheries Jurisdiction*, *supra* note 49, ¶¶ 130–73.

60. See Leanza & Caracciolo, *supra* note 34, at 192.

61. See 2 VIRGINIA COMMENTARY, *supra* note 39, at 569.

The presumption applies when a conflict between the rights of the coastal State and other States arise. Importantly, the other State receives priority over the coastal State only in exceptional circumstances, such as when the coastal State's action constitutes an abuse of right. Still, as Proelss notes, this presumption is not "general and irrefutable," but, a "rebuttable . . . presumption" whose "effects are directly assigned to the sphere of procedural law."⁶² David Attard agrees, stating,

with respect to activities related to the development of the zone's resources, the assumption is that the coastal State has the competence 'equivalent to that it enjoys in the territorial sea', thereby shifting the onus of proof to the opponent. Thus, if another State's activity clashes with this competence, and no priority is specified by the [Law of the Sea Convention], the onus of proof lies with the [other] State.⁶³

One could argue,⁶⁴ however, that there is equally a rebuttable presumption in favor of other States with respect to the use of the sea to safeguard the freedom of communications.⁶⁵ A careful reading of the freedoms enjoyed by other States in the EEZ reveals that they all pertain to the *jus communicationis*: freedoms of navigation, overflight, laying of submarine cables and pipelines and other associated uses.⁶⁶ Indeed, as the Virginia Commentary acknowledges, "where conflicts arise on issues not involving the exploration

62. See Proelss, *supra* note 35, at 98–99 (noting that "it is generally recognized that invoking a rebuttable presumption established by rules of substantive law before a court shifts the burden of proof from one party of the dispute to the opposing party").

63. ATTARD, *supra* note 31, at 75.

64. It is noteworthy that authors such as Proelss speak only about a rebuttable presumption in favor of the coastal State. In his words, "accepting that the shift of emphasis in favor of the coastal state is embodied in a rebuttable presumption gives consideration to the nature of the coastal state's rights as constituting an extract of the comprehensive concept of sovereignty . . ." Proelss, *supra* note 35, at 99.

65. As Proelss notes, the ICJ used the term "freedom of communications" in the Nicaragua case. *Id.* at 91 n.21; see also *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶¶ 214, 253 (June 27).

66. The *jus communicationis*, namely the right to communicate, and, *a fortiori*, the right to trade freely with other nations using high seas routes has been at the center of nearly all debates concerning the theoretical underpinnings of the freedom of the seas. See, e.g., Efthymios Papastavridis, *The Right of Visit on the High Seas in a Theoretical Perspective: Mare Liberum versus Mare Clausum Revisited*, 24 LEIDEN JOURNAL OF INTERNATIONAL LAW 45, 62 (2011).

for and exploitation of resources, the formula would tend to favor the interests of other States or of the international community as a whole.”⁶⁷ It is telling that in a recent dispute between Croatia and Slovenia, the arbitral tribunal found that Slovenia’s enjoyment of the freedom of communication in the “Junction Area,” housed in the Croatian territorial sea encompassed the same freedoms as found in Article 58(1).⁶⁸

That said, it must be reiterated that the rights incorporated in Article 58(1) do not reflect the rights within the regime of the high seas.⁶⁹ This is evident from Article 58(2), which declares Articles 88 to 115 applicable in the EEZ only “in so far as they are not incompatible with this Part.”⁷⁰

In sum, these two presumptions significantly assist in addressing those conflicts to which they apply, but they do not obviate the need for a careful assessment of each conflict on a case-by-case basis. For conflicts to which neither presumption applies, including many of those concerning intelligence gathering, there should be recourse to Article 59, as well as to other applicable provisions within the Convention. Such provisions include the principle of good faith and the prohibition of the abuse of rights,⁷¹ the obligation of all States to refrain from the use or the threat of use of force,⁷² the reservation of the EEZ for peaceful purposes,⁷³ and other pertinent rules of international law.⁷⁴

Based on the discussion above, the following Part scrutinizes some of the intelligence gathering activities in which coastal States or other States are engaged, although an exhaustive treatment of all such activities is outside the scope of this article.

67. 2 VIRGINIA COMMENTARY, *supra* note 39, at 569.

68. Croatia v. Slovenia, Case No. 2012-04, Final Award, ¶ 1123 (Perm. Ct. Arb. 2017), <https://www.pcacases.com/web/sendAttach/2172>.

69. *See* MARIA GAVOUNELI, FUNCTIONAL JURISDICTION IN THE LAW OF THE SEA 65–66 (2007).

70. *See also* Tullio Treves, *Military Installations, Structures, and Devices on the Seabed*, 74 AMERICAN JOURNAL OF INTERNATIONAL LAW 808, 843 (1980).

71. LOSC, *supra* note 1, art. 300.

72. *Id.*, art. 301.

73. *Id.*, art. 58(2) (referencing art. 88, which states: “The high seas shall be reserved for peaceful purposes.”).

74. *Id.*

IV. INTELLIGENCE GATHERING BY COASTAL STATES

The importance of intelligence gathering is evident in both law enforcement efforts and military operations, and recent developments to enhancing maritime security is replete with mechanisms of information gathering and sharing. Maritime domain awareness policies, the designation of maritime or aerial identification zones and the use of satellite systems to track and monitor vessels share the same purpose—to increase awareness of the marine environment and any activity therein that may amount to a threat to the security of the coastal State. This is especially true for coastal States operating in their EEZs given the economic considerations and contiguity with the territorial sea. As such, this Part examines unilateral and multilateral efforts to improve the collection of information in relation to the movement of ships. In particular, it focuses on maritime identification zones, such as the Australian Maritime Identification System, and various satellite-based tracking systems.

A. Maritime Identification Zones

As stated above, several States have promulgated maritime or aerial identification zones to improve intelligence gathering concerning the movement of vessels or aircraft for maritime security purposes. Examples include the Air Identification Zone (ADIZ) of the United States established in 1950, the Japanese ADIZ promulgated in 1969 and of course, the East China Sea Air Defense Identification Zone established by China in 2013.⁷⁵ However, the most infamous and the identification zone that will serve as the focus of our analysis is the Australian Maritime Identification Zone (MIZ) promulgated on December 14, 2004 by Prime Minister John Howard, as part of Australia's effort to strengthen its offshore maritime security.⁷⁶ The MIZ, extending one thousand nautical miles from Australia's coastline, was established to identify vessels, including their crew, cargo and journey, seeking to enter Australian ports. The provision of this information was viewed as a means of enhancing the effectiveness of civil and military maritime surveillance, particularly in protecting offshore oil and gas facilities in the Australian EEZ. In the MIZ, information would not only be sought from port-bound vessels entering this zone, but would also aim "to identify all vessels, other than day recreational

75. See Roncevert Almond, *Clearing the Air above the East China Sea: The Primary Elements of Aircraft Defense Identification Zones*, 7 HARVARD NATIONAL SECURITY JOURNAL 126, 129, 132, 191 (2016).

76. See Klein, *supra* note 13, at 337–40.

boats” entering the EEZ.⁷⁷ As initially envisaged, vessels not complying with the request to provide information would be subject to interdiction.⁷⁸

It was no surprise that Australia’s claim to such interdiction authority raised serious concerns as to the legality of the MIZ under international law.⁷⁹ Eventually, Australia reformulated the MIZ into the Australian Maritime Identification System (AMIS). Under the AMIS, ships would be requested to provide information on a voluntary basis and the new system would be based on cooperative international arrangements, particularly with neighboring States.⁸⁰ It must be noted, however, that Australian maritime control initiatives did not stop with AMIS, but revived in 2013 with Operation Sovereign Borders, which targets the influx of migrants by sea through various measures, including interdiction operations based, apparently at least in part, on intelligence.⁸¹

As far as the legality of these measures in the EEZ is concerned, there is no reference in the Law of the Sea Convention to maritime identification zones. Under the Convention, coastal States may establish a contiguous zone extending up to twenty-four nautical miles from its baselines in which they may exercise the control of vessels necessary to prevent violations of certain laws and regulations.⁸²

In the EEZ, arguably, any identification process by the coastal State should be linked with the exercise of its sovereign rights and jurisdiction over

77. See Media Release, Prime Minister John Howard, Strengthening Offshore Maritime Security (Dec. 14, 2004), <http://pmtranscripts.pmc.gov.au/release/transcript-21554>; see also KLEIN, *supra* note 5, at 225.

78. See Media Release, *supra* note 77.

79. See Klein, in MARITIME SECURITY, *supra* note 8, at 227.

80. See *id.*; see generally Cameron Moore, *Turning King Canute into Lord Neptune: Australia’s New Offshore Protection Measures*, 3 UNIVERSITY OF NEW ENGLAND LAW JOURNAL 57 (2006).

81. The Australian government began Operation Sovereign Borders (OSB) in September 2013. Under this policy, Australian officials prioritized preventing vessels carrying irregular migrants from reaching Australian territory. See AUSTRALIAN GOVERNMENT, DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION, OPERATION SOVEREIGN BORDERS, <http://www.osb.border.gov.au/en/operation-sovereign-borders> (last visited Nov. 2, 2017). See Natalie Klein, *Assessing Australia’s Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interception Operations*, 15 MELBOURNE JOURNAL OF INTERNATIONAL LAW 413 (2014).

82. On the contiguous zone, see LOSC, *supra* note 1, art. 33; see also A.V. Lowe, *The Development of the Concept of the Contiguous Zone*, 52 BRITISH YEARBOOK OF INTERNATIONAL LAW 109 (1981).

the conservation of living resources,⁸³ the protection of offshore platforms⁸⁴ and the marine environment.⁸⁵ Interestingly, in relation to the protection of the marine environment, Article 220(3) provides that

[w]here there are clear grounds for believing that a vessel navigating in the exclusive economic zone . . . has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards, that *State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.*⁸⁶

Thus, it specifies the information that may be requested, and in Article 220(4), requires States to adopt laws and regulations and take other measures so vessels flying their flag comply with requests for this information.

While this provision is limited in its application to conduct impacting the marine environment, any request of information that is linked with the exercise of sovereign rights and jurisdiction of the coastal State over its natural resources in the EEZ would be consistent with the rebuttable presumption in favor of the coastal State discussed above, and would meet the due regard obligation set forth in Article 56(2).

Moreover, in examining the legality of such intelligence activities in the EEZ, recourse may be had to other applicable rules of international law.⁸⁷ First, the coastal State, in this case Australia, is entitled to request information from vessels seeking to enter its ports under customary international law and under the authority of the 2004 amendments to the International Convention for the Safety of Life at Sea (SOLAS)⁸⁸ and the International

83. *See, e.g.*, LOSC, *supra* note 1, art. 73.

84. *See, e.g., id.* art. 60; *see also* Efthymios Papastavridis, *Protecting Offshore Energy Installations under International Law of the Sea*, in NATURAL RESOURCES AND THE LAW OF THE SEA: EXPLORATION, ALLOCATION, EXPLOITATION OF NATURAL RESOURCES IN AREAS UNDER NATIONAL JURISDICTION AND BEYOND 197, 197 (Lawrence Martin, Constantinos Salonidis & Christina Hioareas eds., 2017).

85. *See* LOSC, *supra* note 1, art. 60(1)(b)(iii).

86. *Id.*, art. 220(3) (emphasis added).

87. *Id.*, art. 58(2) (“Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.”).

88. International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 278 [hereinafter SOLAS]. A 2004 amendment to SOLAS incorporated Chapter XI-2 into the treaty. *See* Chapter XI-2: Special Measures to Enhance Maritime Security,

Security and Port Security Code (ISPS Code).⁸⁹ Second, information could also be requested for vessels in the EEZ under the customary “right of approach.” Since “other pertinent rules of international law” apply to the EEZ pursuant to Article 58(2), it is arguable that the customary right of all States to enquire about the identity of foreign-flagged vessels on the high seas equally applies thereto and may be exercised not only by Australian warships, but also by those of other States.

Indeed, even though the international law of the sea does not permit interference with the navigation of foreign-flagged vessels on the high seas except in exceptional circumstances, the same does not hold true for other monitoring measures. For example, according to *Oppenheim’s International Law*, “it is a universally recognized customary rule of international law that warships of all nations, in order to maintain the safety of the high seas, have the power to require suspicious private vessels on the high seas to show their flag.”⁹⁰ This right of approach, or *reconnaissance*, is limited to verifying the ship’s right to fly its flag.⁹¹ This, an approaching warship may request an encountered vessel to show its colors, which are prima facie evidence of its nationality.⁹² It is submitted here that the customary right of approach in principle, has remained intact in the twenty-first century, albeit its implementation has been significantly modified due to technological changes. As one commentator describes:

in its exercise of the customary “right of approach,” a warship may intercept a vessel, inspect it from a safe distance to determine its name, flag, and home port, receive and review any data the vessel may be emitting from its automatic identification system (AIS) or long range identification and

<https://www.classnk.or.jp/hp/pdf/activities/statutory/isps/SOLAS-XI-2-e.pdf> [hereinafter Chapter XI-2]. Chapter XI-2 introduced far-reaching measures to improve the security of ships and port facilities. For a discussion of IMO activities in furtherance of its mandate to make travel at sea as safe as possible, see Hartmut G. Hesse, *Maritime Security in a Multilateral Context: IMO Activities to Enhance Maritime Security*, 18 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 327 (2003).

89. The ISPS Code was incorporated in SOLAS by Chapter XI-2. *See supra* note 88.

90. 1 OPPENHEIM’S INTERNATIONAL LAW 737 (Robert Jennings & Arthur Watts eds., 9th ed. 2008).

91. The U.S. Supreme Court held: “In respect to ships of war . . . there is no reason why they may not approach any vessels described at sea for the purpose of ascertaining their real characters. Such a right seems indispensable for the fair and discreet exercise of their authority . . .” *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 43 (1826).

92. *See Yves van der Mensbrughe, Le Pouvoir de Police des Etats en Haute Mer*, 11 REVUE BELGE DE DROIT INTERNATIONAL 56, 61 (1975).

tracking (LRIT) equipment, perhaps scan other electromagnetic emissions if so equipped, and finally hail it on the radio.⁹³

It follows from the foregoing that the mere request of information by Australia or any other State establishing similar identification zones would not be in dissonance with international law. On the contrary, it may be founded on more than one legal basis. What would clearly be in dissonance is any interdiction operation based solely on the denial of the requested vessel to provide the relevant information. As Natalie Klein rightly observes, “there is no exception to flag State authority on the high seas that would permit the right of visit to enforce a coastal State requirement to provide information in pursuit of that State’s maritime security policies.”⁹⁴ The sole exception to this rule appears to be if the vessel has failed to provide information concerning marine pollution in the EEZ, as found in Article 220(5).⁹⁵ Of course, if there are other suspicions regarding the vessel, for example, that it may be engaging in illegal fishing activities or that it is without nationality, the coastal State may use other legal bases to intercept the vessel.⁹⁶

In sum, even though maritime identification zones are not provided for in the Law of the Sea Convention, the coastal State may request information from foreign vessels in its EEZ under certain circumstances and in relation to certain activities. Such information would be confined to the identity of the vessel, its next port of call and its activities that may be related to the suspicious conduct in question. Any further enforcement measures must be specifically warranted by the Convention, since the mere refusal to provide this information does not trigger these measures.

93. CRAIG H. ALLEN, MARITIME COUNTERPROLIFERATION OPERATIONS AND THE RULE OF LAW 82–83 (2007).

94. Klein, *in* MARITIME SECURITY, *supra* note 8, at 226; *see also* Klein, *supra* note 13, at 345–50, 352–57.

95. Article 220(5) provides:

Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a substantial discharge causing or threatening significant pollution of the marine environment, that State may undertake physical inspection of the vessel for matters relating to the violation *if the vessel has refused to give information* or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.

LOSC, *supra* note 1, art. 220(5) (emphasis added).

96. *Id.*, art. 73 (enforcing the laws and regulations of the coastal State) and *id.*, art. 110(1)(d) (noting that a ship suspected of being without nationality provides a reasonable ground for boarding).

B. Earth Observation Systems

It is an increasingly common practice of coastal States to employ earth observation systems, including satellites, radars or drones, to monitor vessels and their activities in an effort to prevent threats to maritime security. Such monitoring and surveillance measures are a key part of intelligence gathering in the EEZ. Examples include the automatic identification system (AIS) and the long-range identification and tracking (LRIT) system established by the International Maritime Organization (IMO) and the European Border Surveillance System (EUROSUR) established by the European Union (EU).

The IMO adopted AIS in 2000 as part of a revised Chapter V of SOLAS. It requires ships to carry an AIS capable of providing information about the vessel, such as identity, location, course and speed, to other vessels and coastal authorities. The regulation requires AIS to be fitted aboard all ships of three hundred gross tonnage and upwards engaged on international voyages, cargo ships of five hundred gross tonnage and upwards not engaged on international voyages and all passenger ships, irrespective of size.⁹⁷

The IMO further revised SOLAS to increase the tools available to States to learn about vessels in the surrounding waters by adopting Regulation 19-1 in 2006. Regulation 19-1, which entered into force in July 2009, requires ships to transmit information automatically, through a satellite-based system, disclosing the identity of the ship, its position and the date and time of the

97. IMO Res. MSC.117(74), IMO Doc. MSC 74/24/Add.1, Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as Amended (June 6, 2001), https://www.navcen.uscg.gov/pdf/marcomms/imo/msc_resolutions/MS74-24a2.pdf. The requirement became effective for all ships on December 31, 2004. For more information, see *AIS Transponders*, INTERNATIONAL MARITIME ORGANIZATION, www.imo.org/OurWork/Safety/Navigation/Pages/AIS.aspx (last visited Nov. 2, 2017).

position.⁹⁸ This information is to be received for “security and other purposes as agreed” by the IMO,⁹⁹ such as marine environment protection.¹⁰⁰ Similar to AIS, it applies to vessels engaged on international voyages and encompasses passenger ships, cargo ships of three hundred gross tonnage and upwards and mobile offshore drilling units.¹⁰¹

In addition to AIS and the LRIT system, there are vessel monitoring systems (VMS) that have been developed and installed by some States and shipping companies. These systems are used in marine accident investigations, search and rescue, safety of navigation and pollution prevention.¹⁰² The type of information collected may include the course of the vessel, its speed, draft, and estimated time of arrival and departure from various positions. The use of VMS has also become an important means of deriving information about the location of fishing vessels, to which LRIT regulations do not usually apply because of their smaller size. Accordingly, many regional fisheries management organisations have introduced VMS as a means of enhancing surveillance and enforcement.¹⁰³

In 2013, the European Council adopted a regulation establishing EUROSUR.¹⁰⁴ Its aim is to reinforce control of the external borders of the EU States. In particular, EUROSUR establishes a mechanism for member States’

98. IMO Res. MSC.202(81), IMO Doc. MSC 81/25/Add.1, Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as Amended (May 19, 2006), [http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/MaritimeSafety-Committee-\(MSC\)/Documents/MSC.202\(81\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/MaritimeSafety-Committee-(MSC)/Documents/MSC.202(81).pdf) [hereinafter 2006 Amendment to SOLAS]. For further information on the LRIT system, see *Long-Range Identification and Tracking (LRIT)*, INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/en/OurWork/Safety/Navigation/Pages/LRIT.aspx> (last visited Nov. 2, 2017).

99. 2006 Amendment to SOLAS, *supra* note 98, ¶ 8.1.

100. See IMO Res. MSC.242(83), IMO Doc. MSC 83/28/Add 2, Annex 6, Use of the Long-Range Identification and Tracking Information for Maritime Safety and Marine Environment Protection Purposes (Oct. 12, 2007), http://www.crs.hr/Portals/0/docs/eng/imo_iacs_eu/imo/msc_reports/MSC_83_28-Add-2.pdf?ver=2010-11-03-135332-000.

101. See 2006 Amendment to SOLAS, *supra* note 98, Reg. 19-1, ¶ 2.1.

102. See Klein, *in* MARITIME SECURITY, *supra* note 8, at 227–28.

103. See, e.g., “Volga” Case (Russ. v Austl.), Case No 11, Judgment of Dec. 23, 2002, 2002 ITLOS Rep. 10, 28, 34 https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_11/11_judgment_231202_en.pdf; see also ROSEMARY GAIL RAYFUSE, NON-FLAG STATE ENFORCEMENT IN HIGH SEAS FISHERIES 269 (2004).

104. Regulation 1052/2013, of the European Parliament and of the Council of 22 October 2013 Establishing the European Border Surveillance System (Eurosir), 2013 O.J. (L 295/11). For additional information, see Press Release, Council of the European Union, Council Adopts Regulation Establishing the EUROSUR System (Oct. 22, 2013), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/139099.pdf.

authorities carrying out border surveillance activities to share operational information and to cooperate with each other and with other EU agencies, such as the European Border and Coast Guard Agency (formerly known as FRONTEX). Its objectives are reduction of the number of irregular migrants entering the EU undetected and enhanced internal security by preventing cross-border crime, such as trafficking in human beings and narcotics smuggling. Clearly, the surveillance of maritime borders is facilitated by the use of modern technologies such as satellites.

These developments were echoed in some very interesting findings made by the arbitral tribunal in the *Arctic Sunrise* award in 2015.¹⁰⁵ In discussing whether the Russian authorities fulfilled the requirement of sending “a visual or auditory signal to stop” to the Greenpeace vessel, *Arctic Sunrise*, as dictated by the right of hot pursuit under Article 111, the tribunal stated,

Given the large areas that now must be policed by coastal States and the availability of more reliable advanced technology (sea-bed sensors, satellite surveillance, over-the-horizon radar, unmanned aerial vehicles), it would not make sense to limit valid orders to stop to those given by an enforcement craft within the proximity required for an audio or visual signal that makes no use of radio communication.¹⁰⁶

Such an evolutionary interpretation of the Convention’s hot pursuit provisions is certainly welcome, as it takes into account contemporary technological advancements and the practice of States. However, no broader conclusions can be drawn from this finding. The tribunal alluded to satellites, along with other devices, such as radars and UAVs, solely to substantiate its argument that in the twenty-first century, law enforcement agencies may also lawfully use radio communication in lieu of “a visual or auditory signal” under Article 111. Can this argument also be interpreted as allowing the coastal State to use these specific means to give signals to stop? Possibly yes, in the view of the author, if there are secure channels of communication providing safeguards to ensure the signal comes from competent authorities of the coastal State and that the vessel is aware of the existence of these channels.

The question in the context of our inquiry, however, is broader than the use of such systems in the course of hot pursuit and concerns the legality of

105. The Arctic Sunrise Arbitration (Neth. v. Russ.), Case No. 2014-02, Award on the Merits (Perm. Ct. Arb. 2015), <https://www.pccases.com/web/sendAttach/1438>. For a discussion of this award, see James Harrison, *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, 31 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 145 (2016).

106. The Arctic Sunrise Arbitration, ¶ 260.

such methods for intelligence gathering in the EEZ. Evidently, to the extent that these measures are incorporated in treaties like SOLAS, there is no doubt that they are part of the “pertinent rules of international law” that apply to the EEZ under Article 58(2). But even besides the authority provided by SOLAS, it stands to reason that the use of earth observation systems, including radars, satellites and drones, by the coastal State in its EEZ would comply with the international law of the sea, either pursuant to Articles 56 and 59 or under the customary right of approach.

Specifically, as long as coastal States police their EEZ to safeguard their exercise of sovereign rights therein or to protect the marine environment, these acts would clearly accord with the rebuttable presumption in favor of the coastal State. Even if we have recourse to the abstract formula of Article 59, it is submitted that “equity” and the “importance of the interests involved to the parties” would considerably favor the coastal State.

On the other hand, as permitted under the customary right of approach, every State, including the coastal State, may request some basic information regarding the vessels exercising the freedom of navigation. States can do this by sending their warships and other duly authorized vessels to approach the vessel concerned or through observation systems, like AIS and vessel monitoring systems (VMS).¹⁰⁷ As stated above, the intention of the right of approach has traditionally been to inquire the identity of vessels on the high seas. In modern times, there is no need to approach the vessel physically to complete this act, as States can achieve the same result by using earth observation systems. The rationale, however, remains the same.

That said, it is one thing to request information on the flag, the name or the course of the vessel concerned and another to interfere with its navigation, board and search it. For the latter actions, there must be another legal basis found in the provisions of the Convention concerning the EEZ or the high seas by reference to Article 58(2), as well as the default rule of the consent of the flag State.

A further, extremely relevant question concerns the level of information that coastal States may request in the exercise of the right of approach, either in its traditional form or in its contemporary manifestations. Certainly, earth observation systems have limits on what they can actually see and discern. Nonetheless, it is the present author’s view that the intelligence that may be collected or requested is confined to that information needed for the “*police*

107. See, e.g., ALLEN, *supra* note 93, at 82–83.

générale” of the EEZ. This data may include the vessel’s nationality and documentation number, its current position and its course, as well as the next port of call, especially if they are fishing vessels and are bound to a port of the coastal State.¹⁰⁸ However, any further information concerning the internal matters of the vessel, including information relating to its crew and cargo, falls within the remit of flag-State jurisdiction and may not be requested solely under the right of approach.¹⁰⁹ Such a request would undermine the freedom of navigation safeguarded in Article 58, as well as shift the presumption from favoring the coastal State to favoring other States and their *jus communicationis*, as discussed in Part III.¹¹⁰

To conclude, the use of earth observation systems, with their advantages and inherent limitations, will increase and will inevitably challenge the traditional contours of policing of the seas, including the EEZ. It rests upon State practice and future judicial opinions to discern how to accommodate such advancements with the legal regime of the EEZ and the freedom of navigation of other States.

V. INTELLIGENCE GATHERING BY OTHER STATES IN THE EEZ

It is a truism that most scholarly writings have been devoted not to whether the coastal State may engage in intelligence gathering in the EEZ, but the inverse question: whether other States may engage in intelligence gathering in a foreign EEZ. Several recent incidents in various EEZs,¹¹¹ political tension in contested areas such as Southeast Asia and the importance that naval powers ascribe to military intelligence gathering¹¹² have all fueled this debate.

108. Under EU legislation, “third country fishing vessels . . . shall notify the competent authorities of the Member State whose designated port or landing facilities they wish to use at least three working days before the estimated time of arrival at the port” and provide certain required information, including the fishing authorization, dates of the trip and the quantities of each species retained on board. *See* Council Regulation (EC) 1005/2008, of 29 September 2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, art. 6, 2008 O.J. (L 286/1).

109. For vessels bound to coastal State ports, additional information may be requested (and required) pursuant to the ISPS Code and other regulations under SOLAS.

110. *See supra* text accompanying notes 64–74.

111. *See supra* text accompanying notes 21–23.

112. Valencia has described why this issue remains problematic:

Military and intelligence gathering activities by foreign nations in or over others EEZs are becoming more frequent due to the accelerating pace of globalization; the tremendous increase in world trade; the rise in the size and quality of the navies of many nations; and technological advances that allow navies to better utilize oceanic areas.

In particular, questions arise as to the contours of the rights of coastal States and the freedom of navigation enjoyed by other States. As Natalie Klein observes, “the lack of legal clarity has become especially problematic as technological advances have not only improved the range and accuracy of both weaponry and intelligence collection, but also changed the very art of both warfare and intelligence gathering.”¹¹³ In this regard, Hayashi describes potential intelligence activities as follows:

Other [signals intelligence] activities intercept naval radar and emitters, thus enabling the location, identification and tracking of surface ships as well as the planning and preparation of electronic or missile attacks against them. These activities appear to involve far greater interference with the communication and defense systems of the targeted coastal State than any traditional passive intelligence gathering activities conducted from outside national territory.¹¹⁴

The law of the sea does not provide a straightforward answer concerning the permissibility of intelligence gathering activities in the EEZ. While Article 19(2)(c) defines intelligence gathering in the territorial sea as non-innocent passage, there is no corresponding provision in the Convention that addresses intelligence gathering in the EEZ.¹¹⁵ Hence, *a contrario*, one can presume that since this activity is not prohibited, it is permitted.¹¹⁶ Indeed, the preponderant view is that intelligence gathering is one of the “other internationally lawful uses of the sea” related to the freedoms set forth in Article 58.¹¹⁷ For example, Hayashi notes, “[t]raditionally, intelligence gathering

Valencia, *supra* note 2, at 98.

113. Klein, *in* MARITIME SECURITY, *supra* note 8, at 215.

114. *See* Hayashi, *supra* note 2, at 126; *see also* Valencia, *supra* note 2, at 98.

115. Those involved in the negotiations of the Law of the Sea Convention maintain that the general understanding was that such activities could be conducted, even though some States argued against such a position at the time. *See* Klein, *in* MARITIME SECURITY, *supra* note 8, at 219.

116. This would be consistent with the old, yet in some respects persistent, *Lotus* principle. *See* S.S. *Lotus* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7). For a more contemporary version of this principle, see *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶ 79 (July 22). *See also* the very poignant critique of Judge Simma in his Declaration, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. Rep. 478, ¶ 8 (July 22) (declaration by Simma, J.).

117. For a contrary view, *see*, for example, Xiaofeng & Xizhong, *supra* note 4; *see also* Haiwen, *supra* note 4.

activities have been regarded as part of the exercise of freedom of the high seas and therefore, through Article 58(1), [is] lawful in the EEZ as well.”¹¹⁸ Similarly, Rauch has argued that the freedom of navigation associated with the “operation of ships” allows for a range of internationally lawful military activities, including intelligence gathering and surveillance.¹¹⁹

Assuming that intelligence gathering is associated with the freedom of navigation enjoyed by other States in foreign EEZs, the rebuttable presumption would favor its permissibility. However, as discussed in the previous Part, this is just a rebuttable presumption, which is subject to the legal regime of the EEZ, the Convention, and other pertinent rules of international law. In turn, this point raises the question of when the presumption may be rebutted or qualified.

It is obvious that the gathering and sharing of intelligence would be unlawful if it interfered with the exercise of the coastal State’s sovereign rights and jurisdiction. This outcome would be evident where information gathering undermined the existing sovereign rights of coastal States. More broadly, it could be argued that any intelligence gathering, having as its purpose the economic benefit of other States would violate the due regard requirement in Article 58(3), at least as that requirement has been construed in the *Chagos Marine Protected Area* and the *South China Sea* arbitrations.

An example of such intelligence gathering would be the incidental—and perhaps intentional—collection of information related to the natural resources of the EEZ, such as a survey involving the acquisition of seismic data that could be used to locate oil and gas exploratory wells. Such an acquisition could occur in the course of a marine scientific research project that had already received the requisite consent by the coastal State under Article 246(2).¹²⁰ Here, the collection of such information would amount to an unjustifiable interference with the sovereign rights of the coastal State under Article 77, as preserved under Article 246(7),¹²¹ as well as under Article 56 in conjunction with Article 58(3).

118. See Hayashi, *supra* note 2, at 130.

119. See Elmar Rauch, *Military Uses of the Oceans*, 28 GERMAN YEARBOOK OF INTERNATIONAL LAW 229, 252 (1985); see also Walter F. Doran, *An Operational Commander’s Perspective on the 1982 LOS Convention*, 10 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 335 (1995).

120. LOSC, *supra* note 1, art. 246(2) (“Marine scientific research in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State.”).

121. *Id.*, art. 246(7) (“The provisions of paragraph 6 are without prejudice to the rights of coastal States over the continental shelf as established in article 77.”).

A second example in which military intelligence gathering by third States in the EEZ would not be permitted is when such activities constituted unlawful conduct¹²² as “the threat or use of force” contrary to Article 2(4) of the UN Charter,¹²³ and, more particularly, to Article 301 of the Law of the Sea Convention. As Article 301 states:

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.¹²⁴

This provision echoes, but is not identical to Article 2(4) of the UN Charter. Nonetheless, Article 2(4) may serve as the interpretative yardstick for incidents falling within the scope of Article 301.

It is true that international courts and tribunals have been very reluctant to find a “threat or use of force.” An arbitration tribunal did make such a finding in a 2007 award arising from a dispute between Guyana and Suriname. Here, sailors on two Surinamese gunboats asked the operators of a Guyanese-licensed drilling rig in a contested maritime area to leave the rig within twelve hours.¹²⁵ The tribunal concluded these activities amounted to an illegal threat of the use of force, rather than a law enforcement activity.¹²⁶

In general, to constitute a threat of the use of force, the act in question must involve a considerable degree of coercion against the coastal State. Thus, the act of intelligence gathering, without any further activities, would fall short of reaching the threshold of either Article 301 or Article 2(4). The act would need to be accompanied by other coercive measures to substantiate impermissible intelligence gathering. As an example, Bateman suggests

122. In the EEZ, Article 58(1) permits other States the freedoms “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” *Id.*, art. 58(1).

123. U.N. Charter art. 2(4) (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

124. LOSC, *supra* note 1, art. 301.

125. *Guyana v. Suriname*, Case No. 2014-2, Award, ¶ 445 (Perm. Ct. Arb. 2007), <https://pcacases.com/web/sendAttach/902>. For a discussion of this case, see Patricia Jimenez Kwast, *Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award*, 13 JOURNAL OF CONFLICT AND SECURITY LAW 49 (2008).

126. *Guyana v. Suriname*, ¶ 445.

that “[t]ypically this would be the case if the research or data collection were being undertaken to support contingency plans for military operations against the coastal State.”¹²⁷ In the author’s view, such data collection would not amount to a threat of the use of force, unless it is accompanied by other coercive measures and explicit threats of aggressive action by the State concerned. As such, it is evident that the threshold for establishing such a violation is particularly high.

Another instance in which intelligence gathering by other States within the EEZ would violate the law of the sea is when that State’s activities amount to an abuse of right, in this case the right of navigation and the associated right to collect information in a foreign EEZ. Article 300 of the Convention addresses good faith and abuse of right, stating: “States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.”¹²⁸ According to the Virginia Commentary, “it would appear that the parameters of the notion as enunciated in Article 300—and applicable to the whole Convention— . . . concern the unnecessary or arbitrary exercise of rights, jurisdiction and freedoms or the misuse of powers by such a State Party.”¹²⁹ Having assumed that intelligence gathering is a freedom reserved under Article 58(1), it may still result in abusive conduct, such as when it is conducted arbitrarily or unaligned with a purpose associated with the *jus communicationis*. That said, abuse of right has proven a very elusive concept, scarcely referred to in international case law,¹³⁰ and very difficult to substantiate in practice.

127. Bateman, *supra* note 24, at 172.

128. LOSC, *supra* note 1, art. 300. Further, The Virginia Commentary describes an abuse of rights as

[t]he exercise by a State of a right in such a manner or in such circumstances as indicated that it was for that State an indirect means of avoiding an international obligation imposed upon that State, or was carried out with a purpose not corresponding to the purpose for which that right was recognized in favor of that State.

5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 152 (Myron H. Nordquist, Shabtai Rosenne & Louis B. Sohn eds., 1989) (citing JULES BASDEVANT, *DICTIONNAIRE DE LA TERMINOLOGIE DU DROIT INTERNATIONAL* (1960)) [hereinafter 5 VIRGINIA COMMENTARY].

129. 5 VIRGINIA COMMENTARY, *supra* note 128, at 152.

130. The Permanent Court of International Justice considered the abuse of rights in several cases. *See, e.g.*, *Certain German Interests in Polish Upper Silesia* (Ger. v. Pol.), Judgment, 1926 P.C.I.J. (ser. A) No. 7, at 30 (May 25); *Free Zones of Upper Savoy and the District of Gex* (Fr. v. Switz.), Judgment, 1932 P.C.I.J. (ser. A/B) No. 46, at 167 (June 7).

In sum, notwithstanding that some scholars disagree,¹³¹ intelligence gathering in foreign EEZs is a lawful use of the seas associated with the freedoms reserved for other States in coastal State EEZs. While this presumption is rebuttable, few examples arise that do not favor this presumption, and for those that do, it is often the underlying conduct, rather than the intelligence gathering itself that violates the law of the sea and international law generally.

VI. CONCLUSION

This article has explored the contours of intelligence gathering in the EEZ under the international law of the sea. Intelligence gathering in the maritime domain is significant for military and law enforcement purposes and for both coastal States and other States. Intelligence gathering attains even more prominence in the EEZ due to the sensitive location and importance of resources to the coastal State. Crucially, the law of the sea, as reflected in the Law of the Sea Convention, neither explicitly prohibits nor permits the collection of information by other States in the EEZ. Equally, it is silent on the extent of the intelligence gathering on the part of the coastal State.

While acknowledging the complexity of legal issues pertaining to the EEZ, this article concludes that intelligence gathering within the EEZ would fall under a presumption of unlawfulness favoring the coastal State when the intelligence pertains to its economic interests. In contrast, the presumption would favor other States, rather than the coastal State, when the gathering of intelligence is a sheer expression of the *jus communicationis* of the other State. Moreover, the pertinent rules of international law, ranging from the prohibition of the threat of the use of force and the abuse of right to the customary right of approach may find application when deciding whether the intelligence gathering activity violated the rights of the coastal State or other States. As demonstrated above, determining the lawfulness of intelligence gathering in the EEZ is certainly not easy nor straightforward legal question. Nonetheless, it is a question that the international law of the sea can answer.

131. See, e.g., Xiaofeng & Xizhong, *supra* note 4; see also Haiwen, *supra* note 4.