

Forget Gunboat Diplomacy, here comes Fishboat Protest

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Background

In January 2022, Irish fishermen prevented the Russian Navy from performing military exercises within their Exclusive Economic Zone [EEZ]. In August of this year, Norwegian fishermen played the same trick on the Russians again.

At the heart of the disputes lies the sui generis character of the EEZ granting rights to both coastal States and maritime user States, rights which spatially often overlap. For a long time, gunboat diplomacy was a staple of great power politics, but fishermen seem to have now decided otherwise.

Is what they did legal and how can these conflicting uses of the oceans be reconciled?

The Law of the Sea Convention

Within the EEZ, art. 56 (1) (a) LOSC awards the coastal state the exclusive sovereign right to explore, exploit, conserve and manage the living natural resources therein.

At the same time, maritime user states profit from the freedom of navigation and other internationally lawful uses of the sea related to it pursuant to arts. Art. 58 (1) iuncto 87 (1) (a) LOSC.

Conversely, the LOSC also contains within art. 56 (2) and art. 58 (3) a reciprocal duty to show due regard for each other's rights, but what does this mean?

“Due Regard”

The duty of due regard is officially meant to balance the rights and interests of States at sea. Unofficially, it was inserted into the LOSC provisions on which States could not reach agreement. In practice, every use of the seas has an effect on another State's use of that area. This does not make that use forbidden, however.

Doctrine has expressed starkly different ideas about the duty, from a mere “consideration” to a combination of procedural obligations. A case-law study has, however, identified several key elements.

Jurisprudence

1974 Fisheries Jurisdiction

- It is foremost an obligation to take full account of each other's rights.
- The duty to show “reasonable regard” is equivalent to the duty to show “due regard”.
- The obligation to negotiate flows is intricately linked to the principle of due regard.

2011 Activities in the Area Advisory Opinion

The duty to show due regard is inherently a variable duty, capable of evolving over time in relation to technology and risk involved.

2012 Bay of Bengal Arbitration

Parties may discharge their due regard duty in several ways, and it is up to them to determine the best possible path forward.

2015 Arctic Sunrise Arbitration

- A coastal State can take measures to prevent interference with its sovereign rights in the EEZ if these are reasonable, necessary and proportional.
- The coastal State should at the same time however, tolerate some level of nuisance.

2015 Chagos Marine Protected Area Case

- The level of due regard to consider will be dependent on the circumstances of the case.
- Elements to consider: the nature and importance of the substantial rights, the anticipated impairment and the availability of alternatives.
- Due regard will almost always involve some form of consultation.

Conclusion: Hope for reconciliation

- What the fishermen are doing in casu is indeed legal under the Law of the Sea, but ...
- Should the coastal State's right to fish always receive precedence over the right to perform military exercises at sea? No, this will depend on the different elements of the due regard principle to balance out the opposing State interests.