The customary international law nature of the UNCLOS EEZ fisheries regime tomarID

ABSTRACT

The origins of the EEZ may be traced from the pursuit of the establishment of a new maritime zone focused on the conservation and sustainable use of natural resources

LIST OF ACRONYMS

CBD	Convention of Biological Diversity
CCS	Convention on the Continental Shelf
CFCLRHS	Convention on Fishing and Conservation of the Living Resources of the High Seas
CHS	Convention on the High Seas
CTSCZ	Convention on the Territorial Sea and the Contiguous Zone
DICAPI	Directorate General of Captaincies and Coast Guard
EEZ	Exclusive Economic Zone
EU	European Union
IAMSAR	International Aeronautical and Maritime Search and Rescue
IATTC	Inter-American Tropical Tuna Commission
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICNT	Informal Composite Negotiating Text
ILC	International Law Commission
IMO	International Maritime Organization
ISNT	Informal Single Negotiation Text
ITLOS	International Tribunal for the Law of the Sea
LD	Legislative Decree that regulates the strengthening of the Armed Forces in the competencies of the National Maritime Authority – General Directorate of Captaincies and Coast Guard
MDA	Maritime Domain Awareness
OL	Organic Law for the sustainable use of natural resources
PCA	Permanent Court of Arbitration
PRODUCE	Ministry of Production

PSMA	Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing
RFMO	Regional Fisheries Management Organization
RIAA	Reports of International Arbitral Awards
RSNT	Revised Single Negotiating Text
SIMTRAC	Aquatic Traffic Identification and Monitoring System
SPRFMO	South Pacific Regional Fisheries Management Organization
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS I	First United Nations Conference on the Law of the Sea
UNCLOS II	Second United Nations Conference on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNGA	United Nations General Assembly
US	United States

LIST OF TREATIES

1. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2011) 2167 UNTS 3.

2. Agreement on Port State Measures to prevent, deter and eliminate illegal, unreported and unregulated fishing (adopted 22 November 2009, entered into force 5 June 2016) Registration number 54133. No UNTS volume number has yet been determined for this record.

3. Agreement on the Conservation of Albatrosses and Petrels, done 19 June 2001, 2258 UNTS 257 (entered into force 1 February 2004).

4. Agreement related to a Special Maritime Frontier Zone (adopted 4 December 1954).

5. Agreement relating to Measures of Supervision and Control of Maritime Zones of the Signatory Countries (adopted 4 December 1954).

6. Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force 16 November 1994) 1836 UNTS 3.

7. Agreement relating to the issue of permits for the exploitation of the maritime resources of the South Pacific (adopted 4 December 1954).

8. Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945).

9. Complementary Convention to the 1952 Santiago Declaration (adopted 4 December 1954).

10. Convention for the establishment of an Inter-American Tropical Tuna Commission (adopted 31 May 1949, entered into force 3 March 1959) 1951 UNTS 4.

11. Convention for the Strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States of America and the Republic of Costa Rica (adopted 27 June 2002, entered into force 27 August 2010).

12. Convention on Fishing and Conservation of the Living Resources of the High seas (adopted 29 April 1958, entered into force 20 March 1966) 559 UNTS 285.

13. Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (adopted 14 November 2009, entered into force 24 August 2012) 2899 UNTS 211.

14. Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311.

15. Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11.

16. Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205.

17. Declaration on the Maritime Zone (adopted 18 August 1952, entered into force 18 August 1952) 1006 UNTS 326.

18. United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

International Tribunal for the Law of the Sea

1. M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment,

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INTRODUCTION

Fishing is to be considered the oldest human use of the sea.[1] It has traditionally been a source of animal protein and minerals needed for good nutrition of human beings. In addition, it has fostered economic growth while creating numerous jobs and promoting commerce. Fish is used for

on the high seas. In this regard, following UNGA Resolution 1307 (XIII),[7] UNCLOS II was convened in 1960 to address the breadth of the territorial sea and the fishery limits; however, no agreement was reached. Through UNGA Resolution 2750 C (XXV)[8] it was decided to convene UNCLOS III in 1973. This time, as UNGA Resolution 3067 (XXVIII)[9] shows, the mandate of the conference was adopting a treaty dealing with all matters relating to the law of the sea.

UNCLOS III was held between 1973 and 1982. As a result, the United Nations Convention on the Law of the Sea[10] was adopted on 10 December 1982. Among its main achievements, one must highlight the recognition of the Area and its resources as the common heritage of mankind[11] and the conventional establishment of the EEZ, an area beyond and adjacent to the territorial sea up to a maximum of 200 nautical miles measured from the baselines from which the breadth of the territorial sea is measured and where the coastal State enjoys, among others, sovereign rights for the exploration and exploiting, conserving and managing the natural resources, whether living or non-living.

Article 58.1 of UNCLOS prescribes that all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of the treaty, the freedoms referred to in article 87 of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms. In addition, article 58.3 mandates that in exercising these rights and performing their duties under UNCLOS in the EEZ, 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 following the provisions of UNCLOS and other rules of international law in so far as they are not incompatible with Part V (EEZ regime) of the treaty.

The abundant practice of States claiming an EEZ led international tribunals to refer to the custom nature of this institution.[14] Thus, a chamber constituted within the ICJ determined that the UNCLOS provisions on the EEZ are consonant with general international law.[15] In addition, the plenary of the ICJ stated that the institution of the EEZ, with its rule of entitlement because of distance, is shown by the practice of States to have become a part of customary law.[16] The freedom of navigation through the EEZ as a guarantee by the coastal State was also addressed by the ICJ.[17] Noteworthy, even some States which are not a party to UNCLOS have established an EEZ.[18]

Despite the said juridical nature of the EEZ as reflected in UNCLOS, one may note a lack of consensus about the specific rights and obligations which are part of the customary international law that are opposable to all States, even those that are not a party to UNCLOS. In other words, even though there is certainty in the identification of the EEZ institution as part of customary international law, the specific content is debatable. One may argue that the very core of the fisheries regime, namely, the coastal sovereign rights over marine living resources are customary international law. However, the customary nature of the rights and obligations of the whole EEZ fisheries regime requires further assessment. This turns critical when

[14] According to Churchill et al., "although the universal establishment of 200-mile EEZs would embrace no more than about 36 per cent of the total area of the sea, that area contains around 85 per cent of all presently commercially exploitable fish stocks." Churchill et al. (n 1) 254.
[15] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, I.C.J. Reports 1984, p. 246, para. 94.
[16] *Continental Shelf* (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 13, para. 34.
[17] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14, para. 214.
[18] See, for instance, Chapter V of the Organic Law of Aquatic Spaces, approved by Decree N° 1446 of 17 November 2014, in Venezuela; article 574 of the Civil Code (as amended in 2004) in El Salvador; Decree by the Council of Ministers N° 86/11264 of 17 December 1986, in Türkiye; Proclamation N° 5030 of 10 March 1983, in the United States; or the seventh article of Law N° 10 of 4 August 1978, in Colombia.

acknowledging that the coastal State must guarantee certain rights of third States as the ones established by article 58 of UNCLOS. In light of this issue, the case of Peru, a State not a party to UNCLOS, will be assessed.

Peru is located in the central and western parts of South America, with a coastline of more than 3,080 kilometers in length. Historically, the Peruvian State has contributed to the creation of the EEZ by the issuance of the Supreme Decree N° 781 in 1947 and the 1952 Santiago Declaration along with Chile and Ecuador. Peru participated in the UNCLOS III and supported the establishment of the EEZ which was an achievement for the Latin American States that sought a new maritime space for the conservation and sustainable use of natural resources.

According to article 54 of the current Peruvian Constitution, the maritime domain of the State includes the sea adjacent to its coasts, as well as the seabed and subsoil thereof, extending out to a distance of 2-4(f2(e)4(ndi)8l-1(es)-5(o)-4(u)-n8ndi)8l.S2(ma)6(in)2(o)-10(a)4(nd)]TJ -0.004 5ea adjace

PART ONE: THE EXCLUSIVE ECONOMIC ZONE AND ITS CUSTOMARY INTERNATIONAL LAW NATURE

international organization.[38] The latter is important for the assessment of fisheries law since

customary international law.[51] In this regard, the general practice must be assessed to a greater degree in its generality, representativeness, and consistency as explained before.

A last consideration regarding the general practice lies in what practice can be assessed to be considered as an element of customary international law. Concerning the primary position of State practice for this topic, one must note that the conduct of the State may be exercised in its executive, legislative, judicial powers, or other functions on behalf of it.[52] This practice may be in different forms, including physical, verbal, and, in certain circumstances, inaction.[53] This practice must be assessed as a whole[54] and when it varies, the weight given to that particular practice must be reduced.[55]

Now, the bare fact that such things are done does not mean that they have to be done,[56] or said differently, acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.[57] Therefore the sole practice is not tantamount to customary international law, which leads us to address the opinio juris.

1.1.2.2. Opinio Juris

Francois Gény formulated the concept of opinio juris sive necessitatis as an attempt to differentiate legal custom from mere social usage.[58] Thus, opinio juris means that the practice in question must be undertaken with a sense of legal right or obligation.[59] This acceptance of the law must be distinguished from other motives such as comity, political expediency, or convenience.[60] Therefore, the States concerned must feel that they are conforming to what amounts to a legal obligation: the frequency or even habitual character of the acts are not in itself enough.[61]

[51] North Sea Continental Shelf case (n 34) para. 74.
[52] ILC (n 30) 132, Conclusion 5.
[53] Ibid, 133, Conclusion 6.1. In the Asylum case, for instance, the ICJ valued that Peru refrains from ratifying the 1933 and 1939 Montevideo conventions which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum, Colombian-Peruvian asylum case, Judgment of 20th, 1950: I.C.J. Reports 1950, p. 277.
[54] ILC (n 30) 134, Conclusion 7.1.
[55] Ibid, Conclusion 7.2.
[56] Shaw (n 26) 63.
[57] North Sea Continental Shelf case (n 34) para. 76.
[58] F. Gény, Meethode d'Interpretation et Sources en Droit Privé Positif, Paris, 1899, para. 110, in Shaw (n 26) 63.
[59] ILC (n 30) 138, Conclusion 9.1.
[60] Ibid, 139, para. 3; see Asylum case (n 61) 277.
[61] North Sea Continental Shelf case (n 34) para. 77.

Ocean".[67] Thus, its relevance to human life leads to the need for regulation to guarantee its sustainable use; this is the reason for the existence of the international law of the sea.

The international law of the sea may be defined as the body of international rules (and principles)[68] that bind States and other subjects of international law in their marine affairs.[69] Among its main functions, the international law of the sea has established the spatial distribution of jurisdiction of States[70] and the mechanisms through which all subjects of international law must cooperate to achieve common goals. Contemporary challenges such as climate change, sea level rise, or the predation of marine living resources are to be addressed under the law of the sea scope of application. Thus, the ongoing State practice reflects the constant evolution of this body of international rules and principles.[71]

As one of the oldest branches of international law, the international law of the sea can be studied from the theory of the sources of international law. Therefore, the sources of article 38 of the Statute of the ICJ mentioned above are applicable. Although the origins of the international law of the sea reveal its customary nature, today, UNCLOS constitutes the major codification outcome for this law encompassing the main rules and principles to apply to the ocean. The law of the sea is not exhausted by UNCLOS, however, its importance, particularly for the establishment of maritime zones deserves the following lines.

1.2.1. UNCLOS: an overview

Little doubt must generate when ascertaining that UNCLOS is the most important conventional source of the international law of the sea.[72] According to the UNGA Resolution N° 3067 (XXVIII) of 1973, the Third United Nations Conference on the Law of the Sea, which required eleven sessions between 1973 and 1982, had the mandate to adopt a convention dealing with all matters relating to the law of the sea.[73] This was reflected in the third paragraph of the Preamble of UNCLOS asserting that the problems of ocean space are closely interrelated and

[67] This quote is adjudicated to Arthur C. Clarke.
[68] Churchill (n 1) 1.
[69] Tanaka (n 13) 3.
[70] Ibid.
[71] See, for instance, the BBNJ process; Donald R. Rothwell and Tim Stephens, The International Law of the Sea (2nd Edition, Bloomsbury Publishing 2016) 67.
[72] Robin Churchill, 'The 1982 United Nations Convention on the Law of the Sea' in Donald R. Rothwell et al. (eds), The Oxford Handbook of the Law of the Sea (Oxford University Press 2015) 24.
[73] UNGA Resolution (n 9) para 3.

territorial sea, archipelagic waters, contiguous zone, exclusive economic zone, and continental shelf. The second belongs to the high seas and the

innocent passage, among others, for the conservation of living resources of the sea and the prevention of infringement of fisheries laws and regulations.[80]

1.2.2.3. Contiguous zone

According to article 33 of UNCLOS, the contiguous zone is a sea belt adjacent to the territorial sea whose maximum breadth shall not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. The contiguous zone is functional for preventing and punishing customs, fiscal, immigration, or sanitary laws and regulations within the territory or territorial sea of the coastal State. In addition, the contiguous zone is also functional for the protection of underwater cultural heritage.[81]

There is no mention of natural resources in the contiguous zone regime. However, one must know that when a coastal State claims an exclusive economic zone, the contiguous zone overlaps it, making the same sea belt functional for natural resources but under the EEZ regime. If no EEZ is claimed, then the enforcement actions of the contiguous zone would be undertaken on high seas.

1.2.2.4. Exclusive economic zone

According to article 55 of UNCLOS, the exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regimen established in Part V of UNCLOS. The EEZ shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Article 56 of UNCLOS prescribes that in the EEZ, the coastal has 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. The said article also prescribes that the State has jurisdiction with regard to the establishment use of artificial islands, installations, and structures; marine scientific research; and, the protection and preservation of the marine environment.

[80] Article 21.1.d-e of UNCLOS.
[81] Article 303.2 of UNCLOS.

The EEZ must be claimed, otherwise, it can be consid

1.2.2.6. High seas

High seas are the parts of the sea that are not included in the exclusive economic zone, in the territorial sea or the internal waters of a State or the archipelagic waters of an archipelagic State.[85] No State has jurisdiction over the high seas, nor sovereign rights. However, the flag State enjoys exclusive jurisdiction over the ship that is entitled to fly its flag, save in exceptional cases.[86]

Although the relevance of high seas fisheries has decreased due to the establishment of the EEZ where most stocks are harvested,[87] all States enjoy the freedom of fishing, which is tied to certain conservation and management duties as prescribed in articles 116 to 120 of UNCLOS. In addition, articles 63 and 64 of UNCLOS are relevant to the high seas since it includes straddling and highly migratory stocks whose habitat may be in the EEZ as well as on the high seas. For this, UNCLOS mandates the duty to cooperate.

In the following chapter, the EEZ will be addressed to study the customary nature of the rights and obligations that compounds its fisheries regime.

[85] Article 86 of UNCLOS.
[86] Article 92.1 of UNCLOS.
[87] Matz-Lück and Fuchs (n 75) 498.

Chapter 2: Exclusive Economic Zone

2.1. Historical background

2.1.1. Before UNCLOS

The post-Second World War time brought a long-range worldwide need for new resources. Thus, this period witnessed the beginning of unilateral declarations of coastal States extending their jurisdiction towards the sea, challenging the traditional dichotomy of the territorial sea and the high seas with an overlapping contiguous zone. In 1945, President Truman of the United States issued a proclamation by which the State reserves the natural resources of the subsoil and seabed of the continental shelf beneath the high seas under its jurisdiction and control for their conservation and prudence utilization.[88] For fisheries, another proclamation was issued by the United States to establish conservation zones on the high seas subject to its control and regulation.[89]

Following Truman's proclamations, some Latin American States claimed sovereignty over the continental shelf and the waters above.[90] This is the case, for instance, of Mexico[91] in 1945, Argentina[92] in 1946, and Chile[93] and Peru[94] in 1947. It must be noted that each declaration had its views regarding the motivation and terminology[95] for such claims. For example, both coastal States from the Pacific Ocean realized they had no extended continental shelves and lacked opportunities to exploit mineral resources, which is why they needed compensation.[96] Peru

[88] Proclamation N° 2667 of 28 September 1945.
[89] Proclamation N° 2668 of 28 September 1945. According to professor Attard, this proclamation was never applied. David Attard, The Exclusive Economic Zone in International Law (Claredon Press Oxford 1987) 2; see Treves (n 3) 11.
[90] Attard (n 89) 3.
[91] Presidential Declaration of 29 October 1945. The text of the declaration is in the newspaper "El Universal", Ciudad de México, from 30 October 1945. See Bernardo Sepúlveda Amor, 'La Política Exterior de México: Realidad y Perspectivas ‖ Derecho del Mar: Apuntes sobre el sistema legal mexicano (13 Foro Internacional 1972) 268-269; F. V. García Amador, América Latina y el derecho del mar (Editorial Universitaria 1976) 14.
[92] Presidential Decree N° 14708 of 11 October 1946.
[93] Presidential Declaration Concerning Continental Shelf, June 23, 1947. United Nations Legislative Series, Laws and Regulations on the Regime of the High Seas, UN Doc. ST/LEG/Ser.B/1, at 6 (1951). The declaration was issued by President Gabriel González Videla.
[94] Supreme Decree N° 781 of 1 August 1947.
[95] See for instance the use of the concept of "Mar Epicontinental" used in article 1 of the said Argentinian Presidential Decree N° 14708 of 11 October 1946.
[96] Treves (n 3) 11.

asserted socio-economical needs[97], while Chile expressed its purpose to protect whaling and deep-sea fisheries.[98]

In addition, in 1952, Chile, Ecuador, and Peru adopted the “Declaration on the Maritime Zone” (commonly known as the “Santiago Declaration”) in which they proclaim as a norm of their international maritime policy that they each possess exclusive sovereignty and jurisdiction over the sea along the coasts of their respective countries to a minimum distance of 200 nautical miles from these coasts. The Declaration was based on the need to conserve and safeguard for their people the natural resources of the maritime zones adjacent to their coasts. While some States protested the Santiago Declaration, other States started to seek the establishment of a similar maritime space focusing on natural resources.

In the fulfillment of its mandate for making recommendations to encourage the progressive development of international law and its codification,[99] the ILC started in 1956 to prepare the base for the UNCLOS I which took place in 1958. The result included four treaties: CTSCZ,[100] CCS,[101] CHS,[102] and CFCLRHS.[103] Although substantive progress on the codification of thvehve0.3 0 Tdti

define the breadth of the territorial sea and create a fisheries zone. The formula that could not be approved contemplated a 6 nautical miles territorial sea and a 6 nautical miles fisheries zone.

From this last conference, State practice started to turn to several claims of a specific maritime zone targeting natural resources. This is the case of the "patrimonial sea" mentioned in the Santo Domingo Declaration in 1972, the "economic zone" stated as a result of the 1972 Yaoundé Regional Seminar, or the very "exclusive economic zone" proposed by Kenya to the UN Seabed Committee in the same year. Therefore, one more conference on the law of the sea had to be convened.

2.1.2. UNCLOS' negotiations

Through the UNGA Resolution 2750 C (XXV) of 1970, it was decided to convene in 1973 a conference on the law of the sea which would deal with:

> the establishment of an equitable international regime -including international machinery- for the area and the resources of the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, a precise definition of the area, and a broad range of related issues including those concerning the regimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and the contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal States), the preservation of the marine environment (including, inter alia, the prevention of pollution) and scientific research.[107]

Further, by UNGA Resolution 3067 (XXVIII) of 1973, it was decided that the mandate of the said conference shall be to adopt a convention dealing with all matters relating to the law of the sea (including the topics mentioned in the previous paragraph), bearing in mind that the problems of ocean space are closely interrelated and need to be considered as a whole.[108] This approach was known as the "package deal" approach which implies a deal that embraces

[107] UNGA Resolution (n 8) para. 2.
[108] UNGA Resolution (n 9) para. 3.

several matters and has to be accepted as a whole, the less favorable items along with the favorable ones.[109]

UNCLOS III (1973-1982) was a milestone in international law negotiations, not only for the

the main purpose the targeting of natural resources.[114] The negotiation texts of UNCLOS III were the base for several claims of EEZ around the world during the 70s and 80s.[115] This gave stability to the drafting articles.

Votation was required to approve

UNCLOS fisheries regime in the EEZ may be understood as the group of rights and obligations that are prescribed in the treaty for the coastal State and other States regarding fishing-related activities.[121] This fisheries regime is mainly contained in Part V but includes other provisions of the treaty. Therefore, an assessment of the relevant UNCLOS provisions will be addressed as contained in selected articles. It must be noted that this information will aid to identify which rights and obligations are part of customary international law.

2.2.1.1. Coastal States' rights

The EEZ fisheries regime turns into the axis of the sovereign rights over the natural resources of the coastal State. According to article 56.1.a) of UNCLOS, in the EEZ, the coastal State has 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. The concept of sovereign rights is not tantamount to sovereignty, a

Concerning the scope of the sovereign rights, ITLOS has asserted in the M/V “ Virginia G” case the following:

> The term “sovereign rights” in the view of the Tribunal encompasses all rights necessary for and connected with the exploration, exploitation, conservation, and management of the natural resources, including the right to take necessary enforcement measures.[125]

The reference to “all rights” includes jurisdiction, whether prescriptive, enforcement, or judicial. In this regard, one may consider the jurisdiction prescribed in article 56.1.b) iii) of UNCLOS contains a right of the coastal State concerning fisheries since the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.[126] n, ed i0 T.J72 07 Td (a)Tj25.69 0 Td [()4(r)3(t)-12(i1)-2(e)462-0t.-2(i)-2(o-6hf)def

absolute.[131] This obligation has its counterpart in the rights of other States in the EEZ as prescribed in article 58.1 of UNCLOS. It must be noted also that article 58.3 of UNCLOS poses the same due regard obligation to other States when exercising its rights and performing its duties in a foreign EEZ.

2.2.1.3. Other States' rights

In the EEZ, all the States enjoy, subject to the relevant provisions of UNCLOS, the freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms (article 58.1). In addition, UNCLOS prescribes that articles 88 and 115 and other pertinent rules of international law apply to the EEZ in so far as they are not incompatible with the EEZ regime (article 58.2).

Therefore, within the fisheries regime of the EEZ, foreign-flagged fishing vessels are entitled to exercise the right of freedom of navigation. However, the coastal State has the right to observe that these vessels do not undermine its fisheries management measures.[132] This raises the challenge of whether a coastal State may be impeding the freedom of navigation if strict measures are taken. Certainly, this must be addressed on a case-by-case basis and taking into account the due regard rule applicable to the coastal State and other States; as well as other applicable international law rules as may be IMO regulations.

Following the mentioned coastal State obligation in article 62.2, UNCLOS prescribes that other States, having particular2(e)4(nt)-Span <</M59,h4(d)]TJ 0 [(Tc 0.004 nl)-2(y, t)-2(hi)--6(62.2,)-6(t)-6c

If a foreign State has been granted access to the surplus of the total allowable catch, their nationals fishing in that EEZ shall comply with the conservation measures and other terms and

means for the determination of rules of law as prescribed by article 38.1.d) of the statute of the ICJ.

During the first years of the second half of the twentieth century and despite the valuable efforts of developing States to establish an *ad hoc* maritime zone focused on natural resources, the concept of an exclusive economic zone in international law was still some long years away.[134] Substantial progress was the establishment of fishery zones, though. Indeed, in its *Fisheries Jurisdiction* case[135] (1974), the ICJ ruled that "the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea"[136] has crystallized as customary law.

Although the ICJ stated in 1974 that the extension of that fishery zone was up to 12 nautical miles from the baselines,[137] the abundant State practice evolved into considering the 200 nautical maximum lengths and therefore a part of customary international law.[138] It must be noted that in this fishery zone the coastal State was entitled to explore, exploit, conserve and manage offshore fisheries.

The importance of this assertion lies in that, as pointed out in the *La Bretagne* arbitration, the EEZ and fishery zone "are regarded as equivalent with respect to the rights exercised therein by a coastal State over the living resources of the sea".[139] Therefore it can be argued that in so far as the coastal State rights, the fishery zone is to be "included in the exclusive economic

concept of the exclusive economic zone may be regarded as part of modern international law".[142] Indeed, over 60 States claimed 200 nautical miles EEZs or exclusive fishery zones before 1982.[143] Thus, the adoption of UNCLOS in 1982 and therefore the conventional establishment of the institution of the EEZ codified an already existing norm of customary international law due to the general acceptance in the international community as reflected in widespread national practice, which was deemed as permitted (or required) by law.

Even though UNCLOS entered into force in 1994, certain jurisprudence had already ascertained the EEZ's customary nature.[144] Thus, in the Delimitation of the Maritime Boundary in the Gulf of Maine Area case[145] (1984), a special chamber of the ICJ stated that the not entry into force of UNCLOS does not detracts from the consensus reached during the conference in several provisions of the treaty such as the one concerning the continental shelf and the exclusive economic zone, which were adopted without objections.[146] In this regard, the chamber expressed that those institutions may be regarded as consonant at present with general international law.[147]

The plenary of the ICJ took the same view in the Continental Shelf case[148] (1986) where it stated the following:

> It is in the Court's view incontestable that […] the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law […].[149]

In this case,

shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf".[151]

In the author's view, this confirms that the coastal State has the customary international law right to proclaim an EEZ up to a maximum of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured as reflected in article 57 of UNCLOS. This is a right that the coastal State can decide not to exercise. In this case, in principle, the water column will remain high seas. The question remains whether other institutions such as the exclusive fishery zones or even the Peruvian maritime domain are not to be considered as high seas. State practice[152] and jurisprudence[153] (particularly for delimitation controversies) show that the treatment can be tantamount to an EEZ. Then, it can be affirmed that any claim concerning the sovereign rights for the purpose of exploration, exploitation, conservation, and management of natural resources within the 200 nautical miles limit is in conformity with customary international law and therefore the water column would not be considered high seas.

To the author's understanding, the identification of the institution of the EEZ as part of customary international law, namely the customary right to proclaim an EEZ and the sovereign rights over natural resources, still does not exhaust the analysis of which rights and obligations within the UNCLOS fisheries regime have become customary international law. During this research, no evidence has been found regarding the whole rights and obligations of the fisheries regime to be considered as part of customary international law. Therefore, some comments willc-4( )]TJ 0 Tc

States, including parties and non-parties to UNCLOS, have adopted national law declaring an EEZ.[156] While one must be aware that a law's title or even jurisdictional assertion can be indicia of the establishment of an EEZ, the historical background of this institution indicates that the core, the fishery regime, is what is referred to in these norms.

Therefore, the ICJ in the mentioned case ascertained that:

> Customary rules on the rights and duties in the exclusive economic zone of coastal States and other States are reflected in several articles of UNCLOS, including Articles 56, 58, 61, 62, and 73 […].[157]

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After this, the ICJ went into developing all the mentioned articles as pre4(rj.ar)-1(t)-4(I)13(C)13(C).v2(th)2(e8

to be clarified when applied. In this regard, ITLOS in the M/V "Virginia G" case stated that confiscation is a compatible measure in terms of article 73.1 of UNCLOS.[162]

To the knowledge of the author, there is no evidence to determine whether the coastal rights prescribed in articles 65 and 71 are part of customary international law. One must note that some marine mammals are also included in highly migratory species. However, article 65 may be considered as *lex specialis* for these stocks. In addition, the conservation and sustainable utilization of some of them are within the framework of certain international organizations, which require membership. Therefore, one may question the generality and consistency of the practice, as well as the *opinio juris*. As far as the right to avoid access to the surplus of the allowable catch as prescribed by article 71, almost inexistence practice has been evidenced to determine objectively an overwhelming economic dependence on the exploitation of living resources.[163]

Turning to the coastal State obligations, although it has been stated that it is difficult to ascertain whether, and if so to what extent, the detailed duties acquired a customary nature,[164] it is secure now to consider the conservation and utilization of the living resources in the EEZ as duties under customary international law as prescribed by UNCLOS (articles 61 and 62).

The ICJ also recalled that when exercising its sovereign rights and jurisdiction in the EEZ, the coastal State has the customary obligation to have due regard to the rights and duties of other States and shall observe its other obligations under the law of the sea (article 56.2).[165] Finally, the ICJ also stressed that "it is not contested between the Parties that all States have the obligation under customary international law to protect and preserve the marine environment". Thus, article 192 of UNCLOS reflects a customary international law duty of the coastal State.

As seen above, articles 63 and 64 imply the duty of cooperation. While UNCLOS prescribes the obligation to "seek to agree" in article 63 regarding shared and straddling stocks, it heightens the obligation to "shall cooperate" in article 64 concerning highly migratory stocks. These obligations may be understood as due diligence obligations,[166] therefore, the need to

[162] M/V "Virginia G" (n 121) para. 257.
[163] Professor Tanaka suggests that Iceland can be an example of this obscure provision. Tanaka (n 13) 487 and 489.
[164] Andreone (n 131) 162.
[165] Alleged Violations (n 153) para. 60.
[166] See for instance Request for an Advisory Opinion (n 3) para. 210.

reach an agreement is not required. States must negotiate in good faith as reflected in article 300 of UNCLOS. In addition, due to several State practices (including the practice of international organizations)

In addition, the ICJ stated that "the customary rules as reflected in Articles 88 to 115 of UNCLOS, and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with the regime of that zone".[173] This incompatible uses of the EEZ are related to the sovereign rights and jurisdiction of the coastal State. Finally, although it appears obvious, to exercise the customary rights contained in article 58, the exclusive economic zone must have been claimed, as the M/V "Norstar" case[174] shows.

Following ICJ's findings, article 62.2 of UNCLOS forms part of customary international law. Therefore, other States are to be given access to the surplus of the allowable catch when the coastal State does not have the capacity to harvest it, solely if agreements or other arrangements have been convened. This customary right also entails a particular regard for landlocked and geographically disadvantaged States to exploit the living resources of other States' EEZ

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Following the position given about the coastal States' obligations under articles 63 and 64, they represent a customary international law obligation also for other States. To the knowledge of the author, there is not enough evidence for considering articles 65 to 67 and 72 contain customary international law norms.[179] The reasons for this are explained in the paragraph above when addressing the coastal States' customary rights and obligations.

[179] For article 65, see footnote 170.

PART TWO: THE PERUVIAN "MARITIME DOMAIN" AND THE UNCLOS' FISHERIES REGIME IN THE EEZ

Chapter 3: The doctrine of the "maritime domain"

3.1. Origins of the "maritime domain"

3.1.1. At a national level

3.1.1.1. The Supreme Dawreme Da8.76 Tm0<</M(t)-D 4.WT 7 d

The last paragraph of the Preamble of the Supreme Decree N° 781 stated the following:

> That, in the exercise of sovereignty and to safeguard the national economic interests, the State must set unmistakably the maritime domain of the nation, within which the protection, conservation, and vigilance of the natural wealth are to be exercised[181] (emphasis added)

This is the first time that the "maritime domain" concept is mentioned in Peruvian national law. At first glance, one must note that the maritime domain is a geographical space (due to the words "within which") where the Peruvian State exercises sovereignty and jurisdiction to reserve, protect, maintain and utilize natural resources. However, to understand this institution, further assessment of the reasons behind the seaward extension of 200 nautical miles (geographical scope) and the legal aspects of the said decree are required.

3.1.1.2. Rationale for the 200 nautical miles breadth

Despite it has been said that the seaward limit of 200 nautical miles relies only on historical and political reasons,[182] the Peruvian thesis for the said distance is explained by geographical, physical, and biological characteristics that make the sea adjacent and its coast into a unique and indivisible ecosystem containing great natural wealth.[183]

The Peruvian coast which should be warm, rainy, and with exuberant vegetation due to its geographical location, is temperate, with almost no rainfall and mostly desert.[184] This is because of the presence of the Andes Mountains that go across Peru occupying ( )Tj EMC(P)gat(i)-2(ny)]3s

In addition, that anchovy is the natural food of guano birds, whose deposit is an important fertilizer,[194]

time of the issuance of the decree, a previous supreme decree issued in November 1934 and the 1940 Regulations of National Captaincy had already acknowledged that Peru had a 3 nautical mile territorial sea.

sovereignty and jurisdiction “are exercised” on the water column. The extension must be understood as a physical prolongation, while the exercise is a conceptual amplification (not a physical prolongation). In other words, the latter refers to the necessary competencies to fulfill the purpose of reserving, protecting, maintaining, and utilizing the natural resources and wealth of that water column.[206] This is confirmed by the last words of the quoted last paragraph of the Preamble of the decree (“to be exercised”).

Finally, the supreme decree unmistakably states that it does not impede freedom of navigation as recognized by international law. As known by those years,[207] the innocent passage identified the territorial sea. Therefore, the supreme decree itself does not refer to a territorial sea. This, however, must be contrasted to the “Declaration on the Maritime Zone”,[208] better known as the “Santiago Declaration”, which used the term “innocent and inoffensive passage”, as will be seen later.

The Supreme Decree N° 781 was protested by some States like Germany, the United Kingdom, and the United States.[209] In its protest note, the United States underscored that the principles of the initiatives presented by Peru and Chile differ considerably from the principles underlying the United States proclamations and thus appear to depart from the generally adopted principles ke G

The Preamble of the Santiago Declaration states the following:

1. Governments have the obligation to ensure for their people the necessary conditions of subsistence and to provide them with the resources for their economic development
2. Consequently, they are responsible for the conservation and protection of their natural resources in order to secure the best possible advantages for their respective countries
3. Thus, it is also their duty to prevent any exploitation of these resources beyond the scope of their jurisdiction, which endangers the existence, integrity, and conservation of these resources to the detriment of the peoples who, because of their geographical situation, possess irreplaceable means of subsistence and vital economic resources in their seas. (emphasis added)

Next, the substantive part of the declaration prescribes the following:

I. The geological and biological factors which determine the existence, conservation, and development of marine fauna and flora in the waters along the coasts of the countries making the Declaration are such that the former extension of the territorial sea and the contiguous are inadequate for the purposes of the conservation, development and exploitation of these resources which the coastal countries are entitled.
II. In the light of these circumstances, the Governments of Chile, Ecuador and PhgTJ 0.02 f20 >

Taking into account the highlighted part of the declaration, the rationale and the navigational issue must be addressed.

3.1.2.2. Rationale for the Declaration

It was the first time that three States collectively proclaimed sovereignty and jurisdiction over a maritime zone to a minimum distance of 200 nautical miles from their coasts. From the legal point of view, although, it has been argued that this declaration challenged the international law of the sea of that time. One may consider that the purpose was to start a process that, in the wishes of Chile, Ecuador and Peru, would eventually lead to the formation of new customary international law.[214] Moreover, from a political point of view, the declaration may be taken as a counterweight from these Latin American States against the major maritime powers.[215] Above all, one must highlight that the main purpose of the declaration was targeting the natural resources of the adjacent sea.

In the context of the said conference, the three States also made a joint declaration on the problems of fisheries in the South Pacific[216] stressing their concern for the lack of conservation measures against the threads to the natural resources within the maritime zone under their jurisdiction and recommending, among others, the coordination of scientific research and the issuance of fishing permits only when the fishing activities are not in detriment of the targeted species.

The Preamble of the Santiago Declaration and the joint declaration assimilate the motivations supporting the issuance of the Supreme Decree N° 781; these are the socioeconomic needs and the consequential obligation of the State to conserve and protect natural resources. The declaration also recognizes that there are geological and biological factors that challenge the traditional extension of the well-established territorial sea and the contiguous zone to conserve and protect natural resources. As seen above, in sustaining its unilateral declarations, each State presented the specific issue that led it to claim the extension of jurisdiction toward the sea.

[214] Treves (n 3) 12.
[215] Jorge A. Vargas, Mexico and the Law of the Sea: Contributions and promises (Martinus Nijhoff Publishers 2011) 139.
[216] Declaración Conjunta Relativa a los problemas de la pesquería en el Pacífico Sur (Santiago, 18 de agosto de 1952). Available on: http://cpps.dyndns.info/consulta/documentos/legal/declaraciones/declarac_conjunta_pesq_pacif_sur_1952.pdf Accessed on 6 September 2022.

Therefore, the geographical, physical, and biological reasons exposed by Peru fits with this reasoning of the declaration.

On commenting upon the argument of natural compensation as reflected in the declaration, the Peruvian Government stressed that many countries have a broad submarine zone as a result of prehistoric geological upheavals and others have none.[217] Therefore, considering the natural resources that can be found in broad continental shelves, the impact on the economic progress[218] of States without these broad shelves would be critical. Then, even though this idea is not the sole basis for the Santiago Declaration, it is one of the most solid bases vis-à-vis other States and one that cannot be ignored.[219]

Notably, from the very title of the declaration, the States called it a “maritime zone”, comprising the water column, seabed, and subsoil where they exercise exclusive jurisdiction and sovereignty. Thus, although there was no mention of the concept of the maritime domain, the purpose and the competencies (jurisdiction and sovereignty) of the declaration were the same as those established and pursued by the Supreme Decree N° 781, save for the inclusion of the word “exclusive”. This supports

above, the institution of the innocent passage describes the existence of the territorial sea, therefore, some States interpreted the maritime zone as amounting to an extension of the territorial sea to 200 nautical miles.[221] The terms "exclusive sovereignty and jurisdiction" also supported this statement.

Then, one must weigh the arguments supporting the specific purposes of this new maritime zone against the navigations rights of third States to clarify the existence of an extended territorial sea. In the author's view, the emphasis allocated to the conservation and protection of natural resources and the background of the said declaration are critical factors to decant for the establishment of an *ad hoc* maritime zone. Furthermore, South Pacific State practice reveals that their supreme purpose in the application of the declaration was targeted to the natural resources on the sea adjacent to their coasts, as is reflected in the 1954 Agreements,[222] namely:

- Agreement relating to the issue of permits for the exploitation of the maritime resources of the South Pacific.
- The Complementary Convention to the 1952 Santiago Declaration.
- The Agreement relating to Measures of Supervision and Control of Maritime Zones of the Signatory Countries.
- The Agreement related to a Special Maritime Frontier Zone.

Following the above assessment, the 1947 unilateral declarations guided the motivations and substantive content of the Santiago Declaration. That said, one must highlight the relevance of the doctrine of the maritime domain as established by the Supreme Decree N° 781 in giving solid ground to the proclamation of a maritime zone devoted to the conservation and utilization of natural resources. This is, in the author's view, the internationalization of the maritime domain concept as a maritime zone for specific purposes and distant from a territorial sea claim. The following lines will address the maritime domain concept in the Peruvian constitutions and relevant national law, as well as further developments in the understanding of the said concept.

[221] Nordquist (n 98) 494.
[222] All of them were adopted on 4 December 1954 and are integral part of the agreements reached at the Conference on the exploitation and conservation of the marine resources of the South Pacific in 1952

3.2. The debate and development of the doctrine of “maritime domain”

3.2.1. The Peruvian constitutions and other relevant national legislation

As international law of the sea was being developed,[223] there was an evident need to establish further maritime zones besides the classic territorial sea and high seas, including their maximum length. This was the case, for instance, of the contiguous zone in Article 24.2 of the CTSCZ (1958), as a result of UNCLOS I, or the almost achieved territorial sea and fisheries zone, of 6 nautical miles each, in UNCLOS II (1960). Thus, the establishment of a sui generis

The Constituent Assembly will function regularly in the Legislative Palace and, if the Plenary agrees, it may meet anywhere in the territory of the Republic, which includes the 200 miles of its territorial sea (emphasis added).[225] [226] [227] [228] [229] [230]

subsoil up to a distance of 200 nautical miles.[232] Notably, when referring to sovereignty and jurisdiction, the quoted provision used the term “exercises”, omitting the term “extends” as prescribed in the supreme decree. Furthermore, it reiterated the respect for freedom of navigation, pursuant to the law and the treaties ratified by the Republic.

The President of the 1978-1979 Constituent Assembly's Principal Commission declared that the “State Constitution has adopted, with great prudence and realism, a flexible formula on our marine space”.[233] Indeed, the last part of the provision must be understood as leaving a clear path for Peru to ratify UNCLOS since then, the said sovereignty and jurisdiction would be applied according to a ratified treaty.

Peru voted in favor of the final text of UNCLOS and signed the final act of UNCLOS III. These actions were criticized by a certain part of the population. Even though the 1979 Constitution had a clear provision regarding its flexibility towards the end of UNCLOS III,[234] the conflict between territorialists and zonists prevented the Government to ratify UNCLOS, arguing that there was a need for further assessment of the treaty. Notwithstanding the territorialists opposition to an EEZ as an ad hocmaritime zone, it must be noted that by this time, many coastal States have already claimed an EEZ.

3.2.1.2. Amendments Post UNCLOS

The current 1993 Peruvian Constitution took the same draft and included it without major changes in Article 54. However, this time drafters decided to include an overall provision concerning the geographically territorial unity and its competencies within the air space:

> Article 54.- The territory of the Republic is inalienable and inviolable. It includes the soil, the subsoil, the maritime domain, and the superjacent airspace.

> The maritime domain of the State comprises the sea adjacent to its coasts, as well as its sea bed and subsoil up to a distance of two hundred nautical miles measured from the baselines established by law.
>
> In its maritime domain, the State exercisessovereignty and jurisdiction, without prejudice to the freedom of international communications, pursuant to the law and the treaties ratified by the State.
>
> The State exercises sovereignty and jurisdiction over the airspace above its territory and adjacent sea up to the limit of two hundred nautical miles, without prejudice to the freedom of international communications, pursuant to the law and the treaties ratified by the State. (emphasis added)

One must agree that this drafting -at least its first paragraph- does not aid in the purpose of sustaining that the maritime domain is not equivalent to a territorial sea. Still, the overall view of the national law issued as a result of the 1993 Constitution, using the term "jurisdictional waters" as an equivalent of the maritime domain, and the further developments of this constitutional provision, clarify the juridical nature of the maritime domain. Indeed, there was no national law issued mentioning that the maritime domain is tantamount to a territorial sea.[235] In this respect, one can see, for instance, the 2005 Peruvian Maritime Domain Baselines Law[236] or the 2012 Legislative Decree that regulates the strengthening of the Armed Forces in the competencies of the National Maritime Authority - General Directorate of Captaincies and Coastguards.[237]

On commenting on the mentioned article 54 of the Constitution, an author has stated that the maritime domain is not a geographical space but a juridical relationship that refers to the State's capacity to exercise its sovereignty and jurisdiction. In addition, this author has affirmed that the Constitution does not specify a unique space.[238] To the understanding of the author of this

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work, the geographical space in article 54 is evidenced by the words “comprises” and “in its” in the second and third paragraphs, respectively. Furthermore, in its 2009 memorial presented to the ICJ within the context of the Maritime Dispute case, Peru stated that the maritime domain is in line with the geographical extension of the EEZ.[239] This assertion must lead us to conclude also that this geographical space does not consider the internal waters as recognized by international law. Regarding the juridical relationship,

In its 1998 report on oceans and the law of the sea, the UN Secretary-General made a summary of national claims to maritime zones stating the following:

> One Latin American State, a non-party to the Convention, claims a single 200-nautical-mile area called "maritime domain" expressly recognizing freedoms of navigation and overflight beyond 12 miles. For this reason, the maritime area of that State is listed in a separate category under "others" instead of being classified as a territorial sea extending beyond 12 nautical miles.[242]

As evidence, the report emphasizes that the maritime domain concept is not comparable to the territorial sea due to its respect for the freedom of international communications,[243] beyond the 12 nautical miles.

Convinced by the flexibility of the concept of the maritime domain, in 2001 the Executive Power through his Excellency Ministry of Foreign Affairs, Ambassador Javier Pérez de Cuéllar, submitted for consideration of the Congress of the Republic the approval of UNCLOS and the Part XI Agreement.[244] Within the Peruvian Congress, in 2004 the Foreign Affairs Commission approved the request and recommended that for adherence to the treaty there must be a national referendum due to its alleged incompatibility with the Constitution.[245]

Indeed, according to some views inside the Congress, the fact that article 54 of the 1993 Constitution falls into Chapter I "State, nation and territory" of Title II "State and nation" means that the maritime domain is the territory of the State and it is not compatible with the EEZ regime. To the author's understanding, this is a methodology matter in which the drafting technique used reflects the unity of the Peruvian geographical space. This is why the maritime domain and the superjacent airspace in the same article 54 are subject to the freedom of international communications, pursuant to the law and the treaties ratified by the State, including the customary international law.

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[242] United Nations General Assembly, 53rd Session, Oceans and the Law of the Sea, Report of the Secretary-General, UN Doc A/53/456 (5 October 1998) para. 99.
[243] Reply of the Government of Peru in the context of the Maritime Dispute case (Vol. I, 9 November 2010) p. 11, para. 22.
[244] Document OF RE (TRA) N° 3-0/74 2001 received by the Congress on 31 May 2001.
[245] Dictamen recaído en el Proyecto de Resolución Legislativa N° 813/2001-CR, que propone aprobar la adhesión del Perú a la Convención de las Naciones Unidas sobre el Derecho del Mar y el Acuerdo Relativo a la Aplicación de la Parte XI de dicha Convención.

In 2006, while commenting on the concept of freedom of international communications in article 54 of the 1993 Constitution, the Constitutional Tribunal, supreme interpreter of the constitution, stated that the *ius communicationis* constitutes a principle of public International Law,[246] as affirmed by the International Court of Justice in the *Corfu Channel Case* (United Kingdom v. Albania).[247] In this regard, the Constitutional Tribunal argued that the principle of freedom of international communications is manifested in the innocent passage through the territorial sea,[248] the freedom of navigation, overflight, and laying of submarine cables in the exclusive economic zone,[249] and in the very principle of freedom of the high seas.[250]

One may note, however, that the innocent passage is not tantamount to freedom of navigation. Although the Constitutional Tribunal suggested that both institutions are subsumed in the principle of international communications, they are exercised in different maritime zones, namely, territorial sea (or internal waters by article 8.2 of UNCLOS) for innocent passage, and EEZ and high seas for freedom of navigation. The challenge, in this case, is that Peru claims a single maritime space. Therefore, further clarification on this issue is needed, mainly, if Peru has implemented the institution of the innocent passage, which constitutes customary international law.[251]

Some years later in 2009, within the context of the delimitation process with Chile in the ICJ, the Peruvian memorial included in its allegations that, with respect to the water column:

> Peru has consistently claimed an exclusive maritime domain extending to a distance of 200 nautical miles from its baselines, which is in line with the geographical extension and the purpose of the institution of the EEZ as set forth in Article 56 of the 1982 Convention on the Law of the Sea.[252]

This indicates that the maritime domain is indeed a maritime zone with a geographical perspective.

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[246] Judgment of the Constitutional Tribunal of Peru of 20 January 2006. Exp. N° 2689-2004-AA/TC (Asunto EMERGIA S.A.), para. 3.
[247] *Corfu Channel Case* (n 207) 22.
[248] Constitutional Tribunal (n 246) para. 4.
[249] Ibid, para. 5.
[250] Ibid, para. 6.
[251] *Military and Paramilitary Activities in and against Nicaragua* (n 17) para. 214.
[252] Memorial of the Government of Peru in the context of the *Maritime Dispute* case (Vol. I, 20 March 2009) p. 64, para. 3.10.

Peru corroborated its position in its instrument of ratification to the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean:[257]

> […] Equally, given that

priority objective N° 1 of the National Maritime Policy is to “strengthen the influence of Peru in international maritime affairs”.

As one moves forward to today’s State practice, it must be noted that the maritime domain concept is not an unused or strange term anymore, though, far from what it means to Peru. Indeed, within the framework of the IMO, the IAMSAR Manual introduced the term ‘maritime domain awareness’ (MDA) meaning “the effective understanding of any activity associated with the maritime environment that could impact upon the security, safety, economy, or environment”.[261]

The goal of MDA is to develop a shared understanding of developments and threats at sea.[262] In this context, States such as the United States[263] or the United Kingdom[264] have defined the “maritime domain” as the following:

> All areas and things of, on, under, relating to, adjacent to, or bordering on a sea, ocean, or other navigable waterways, including all maritime-related activities, infrastructure, people, cargo, vessels, and other conveyances.

The term maritime domain is now used as a security-related concept that goes beyond a t 55w wcu -0 3.42

As seen above, in its “maritime domain” Peru is committed to applying the provisions of UNCLOS that have passed the threshold of customary international law and general principles of law. This is overwhelming proof that it is not possible anymore to support the idea that Peru claims a 200 nautical miles territorial sea. In addition, today’s State practice within the framework of IMO has developed the concept of the maritime domain related to security matters, which does not have the same meaning given by Peru. Therefore, this urges Peru to take action to clarify its position in today’s State practice within the international community.

Today, due to political reasons, the Government has been

The Convention on Biological Diversity[266] (CBD) was adopted on 5 June 1992 and entered into force on 29 December 1993. Peru approved the CBD by Legislative Resolution N° 26181 of 11 May 1993. The treaty entered into force for Peru on 29 December 1993. According to the CBD, the contracting parties shall implement the treaty concerning the marine environment consistently with the rights and obligations of States under the law of the sea.[267] Therefore, it can be argued that it refers to the law as reflected in UNCLOS.

Article 1 of the CBD states that the objectives of the treaty are the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.

Among the terms used by the CBD, one must highlight the concept of "biological resources" and "ecosystem". For the first one, article 2 states that it "includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity". In the case of the second, the same article prescribes that it means a "dynamic complex of plant, animal, and micro-organism communities, and their non-living environment interacting as a functional unit".

Further, recalling the UN Charter and the principles of international law, article 3 of the CBD dictates that State have:

> the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. (emphasis added)

As pointed out by the FAO, fish is a major component of global biodiversity, being the aquatic environment the place where 70 percent of the biomass of animals live in.[268] Therefore, there is an intrinsic relationship between CBD and the goal of achieving sustainable fisheries through

[266] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.
[267] Article 22.1 of the CBD.
[268] Committee on Fisheries. Thirty-fourth Session. 1-5 February 2021. Biodiversity mainstreaming across fisheries and aquaculture. COFI/2021/9.1.

conserving and sustainably using marine living resources, as well as its associated species and their habitat. This is also true when referring to areas beyond national jurisdiction, since article 5 of the CBD calls for cooperation between contracting parties, directly or, where appropriate, through competent international organizations. This allows to broach UNCLOS provisions on the conservation and utilization of living resources, along with the one on straddling and highly migratory species.

Next, the Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas[269] (Compliance Agreement), approved on 1 November 1993, has the objective to enhance the role of flag States and ensure that a State strengthens its control over its vessels to ensure compliance with international conservation and management measures.

The treaty entered into force on 24 April 2003. The Peruvian instrument of acceptance was deposited on 23 February 2001, therefore, the treaty also entered into force for Peru on 24 April 2003. The second paragraph of the Preamble of the Compliance Agreement recognizes that under international law as reflected in UNCLOS, States have to cooperate for the conservation of living resources on the high seas.

Thus, article 1.a) of the Compliance Agreement prescribes that "international conservation and management measures" means:

> measures to conserve and manage one or more species of living marine resources that are adopted and applied in accordance with the relevant rules of international law as reflected in the 1982 United Nations Convention on the Law of the Sea. Such measures may be adopted either by global, regional, or subregional fisheries organizations, subject to the rights and obligations of their members or by treaties or other international agreements.

In addition, for the Compliance Agreement, "fishing vessel" means any vessel used or intended for use for the commercial exploitation of living marine resources, including mother ships and

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