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The Superposition of National Legal Regimes in Maritime Disputed Areas

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Abstract

Superposition of national legal regimes in maritime disputed areas is governed by a set of international rules provided for in Articles 74 and 83 of the United Nations Convention on the Law of the Sea (UNCLOS). According to those articles, and as the international jurisprudence confirmed, not all activities are permissible in those areas, and claimant States are bound by a general obligation of restraint that, at the very least, imposes a duty not to permanently harm the marine environment. States are also required to negotiate in good faith provisional arrangements of a practical nature aiming to limit conflicting national legislation and conflicting activities. In the absence of provisional arrangements, the legality of States' activities in an area of overlapping maritime claims is not clear. This paper reviews in the light of the international jurisprudence and State practice the regime devoted to disputed maritime areas. It then highlights the main features of the obligation of self-restraint in a context where each State is trying to assert its sovereignty and maximise the benefits of its claim over a maritime disputed area.

Keywords: maritime disputed area (MDA), UNCLOS, effectivity, delimitation, activities in contested areas.

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1. Introduction

Significant parts of the sea remain undelimited, which raises tensions when several States may be deemed to have jurisdiction and, therefore, be entitled to exercise their powers over the same maritime spaces. This phenomenon appears even more prominent in a context where the interests of States for the "blue economy" are growing, which increases competition for maritime space and the probability of conflicting uses of the sea, and calls for more diplomatic dialogue and cooperation.

'Maritime disputed area' (MDA) are commonly defined as areas where the claims of two or several States over a specific maritime zone (in general the Exclusive Economic Zone (EEZ) or the continental shelf) overlap, and no final delimitation, whether by agreement or judicial award, has been reached.[1] An MDA is, then, an area where two different States (or more) advance a plausible legal entitlement

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1 British Institute of International and Comparative Law, 'Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas', London, 2016 [BIICL Report (2016)] 1; David Anderson, Youri van Logchem, 'Rights and Obligations in Areas of Overlapping Maritime Claims' in Shunmugam Jayakumar, Tommy Koh and Robert Beckman (eds), *The South China Sea Disputes and the Law of the Sea* (Edward Elgar 2014) 192. Various positions exist among scholars on the distinction between the terms "undelimited" and "disputed", see BIICL Report (2016) 29-31; Nicholas Ioannides, 'Rights and Obligations of States in Undelimited Maritime Areas: The Case of the Eastern Mediterranean Sea' in Stefen Minas and Jordan Diamond (eds), *Stress Testing the Law of the Sea: Dispute Resolution, Disasters & Emerging Challenges* (Brill Nijhoff 2018) 312; Tara Davenport, 'The Exploration and Exploitation of Hydrocarbon Resources in Areas of Overlapping Claims' in Robert Beckman, Ian Townsend-Gault, Clive Schofield, Tara Davenport, Leonardo Bernard (eds), *Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources* (Edward Elgar 2013) 106.

and indicate, in their respective views, what the correct delimitation line should be, whether by a formal claim at the international level or by their national practice.[2] In this context, on the one hand, an MDA is the typical area of superposition of national legislations emanating from both States. On the other hand, superposition of national legal regimes is the consequence – as well as the empirical evidence – of an existing MDA.

According to customary international law and specific provisions of the United Nations Convention on the Law of the Sea (UNCLOS),[3] States with opposite or adjacent coasts shall reach agreements for the delimitation of their EEZ (Article 74(1)) or continental shelf (Article 83(1)). There is no such a provision concerning the territorial sea but, according to Article 15, if two States have opposite or adjacent coasts, they shall not extend it beyond a median line, except where they can found their claim on historic title or special circumstances. Besides, even for the delimitation of their territorial sea, States are bound by a general duty to cooperate (UNCLOS Preamble) and to act in good faith (Article 300 UNCLOS).

When studying MDA, scholars focus in general on the EEZ and continental shelf because of the specific provisions of Articles 74 and 83 UNCLOS. Indeed, both articles include a provisional regime in the case where no final agreement has been reached. In such a situation, Articles 74(3) and 83(3) provide that 'the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation'.

The exact meaning and the scope of such a provision remains unclear. Yet, the issues and interests at stake can be tremendous. On the one side, it recognises a *de facto* transitional period during which overlapping claims as well as the national legal regimes of States are supposed to co-exist. The provisional regime provided for in Articles 74(3) and 83(3) UNCLOS may, therefore, limit the probability of conflicting legislation and practice at sea. On the other side, practice shows that the existence of a disputed area and the lack of cooperation between the claimant States can lead to the unilateral enforcement of national law. This can impact navigation, the exploration and exploitation of marine resources, the protection of the marine environment or even lead to the search and seizure of vessels or crew detention.[4]

In such a situation, the co-existence of several national legal regimes creates a presumed balance

2 Sean Murphy, 'Obligations of States in Disputed Areas of the Continental Shelf' in Tomas Heidar (ed), *New Knowledge and Changing Circumstances in the Law of the Sea* (Brill Nijhoff 2020) 185. See also *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (*Judgment*) [2012] ICJ Rep 624, para 159: 'The relevant area comprises that part of the maritime space in which the potential entitlements of the parties overlap'.

3 United Nations Convention on the Law of the Sea [1982] 1833 UNTS 3.

4 Anderson, van Logchem (n 1) 193. Youri van Logchem, 'The Scope for Unilateralism in Disputed Maritime Areas' in Clive Schofield, Seokwoo Lee, Moon-Sang Kwon (eds), *The Limits of Maritime Jurisdiction* (Martinus Nijhoff Publishers 2014) 175.

of power between the claimant States, which are each pursuing effectivity. States will try to maximise the scope of their jurisdiction and powers in the disputed area, and hope for validation of their unilateral practice after an extended period. It is even more the case when the delimitation dispute is linked to a sovereignty dispute.[5]

However, according to the provisional regime established by Articles 74(3) and 83(3) UNCLOS, the claimant States are bound by a general duty of restraint in an MDA, an obligation to make every effort to enter into provisional arrangements of a practical nature, and an obligation not to jeopardise or hamper the reaching of a final agreement. It is therefore important to identify what States can or cannot do in an MDA. The interpretation of those provisions implies the determination of the existence and the substance of an international legal framework limiting the respective powers of the claimant States in an MDA. It also raises the question of the opposability of the unilateral practice of one claimant State to the other, as well as the question of the entitlement of one claimant State to react to the unilateral practice of the other. To that extent, it is interesting to shed some light on the interactions between superposition of national legal regimes and the provisional regime applicable to MDAs.[6]

Section 2 of this article focuses on the effects of superposition of national legal regimes in MDAs from the perspective of the international law of the sea and the provisional regimes provided for in Articles 74(3) and 83(3) UNCLOS. Section 3 presents the various responses of States to the superposition of national legal regimes in MDAs.

2. The Effects of the Superposition of State Legal Regimes in MDAs

The superposition of the national legal regimes of two (or more) States which have plausible entitlements to extend their jurisdiction over a maritime zone can be seen as both a cause and a consequence of the existence of an MDA. Firstly, superposition leads to the identification of a disputed area. Indeed, it contributes to the precise determination of the area covered by States' overlapping claims (subsection 2.1.). Secondly, since a maritime zone appears disputed between two States, which both consider they have jurisdiction, a situation of superposition of national legal regimes ensues (subsection 2.2.). Such a situation logically entails a series of practical problems, and, more broadly, legal uncertainty for various actors at sea, as well as diplomatic tensions between the claimant States. For this reason Articles 74(3) and 83(3) UNCLOS provide for a specific provisional regime. This regime in some respects remains unclear (subsection 2.3.).

5 See the examples below in Part 3.1. (Scattered Islands, Mayotte, South China Sea…).

6 To this end, the great amount of data on State practice gathered by the Observatory of Maritime Disputed Zones and the "ZOMAD/DAMOZ" team (University of Angers – France) appears very useful. See the website of the Observatory of Maritime Disputed Zones (dir. Prof. Alina Miron, University of Angers): < https://zomad.eu > accessed 17 November 2021.

2.1 The Identification of a Dispute

The process of identification of an MDA is based on the comparison of States' claims over a maritime space. An MDA may be identifiable where two or more claims overlap. For this purpose, any State's internationally notified position statement or national legislation, especially legislation defining maritime limits, or practice related to the concerned area can be seen as evidence of a claim and, therefore, of a dispute. A dispute can also be characterised by a State's protestation to legislation adopted by another State or to activities conducted in the relevant area.

Then, superposition of national legislation and practice may help to determine the geographical scope of the disputed area: national legislation of States can be seen as evidence of their claims. In a judicial context, it could also constitute a proof of the crystallisation of the dispute and could be used to establish the admissibility of a request.

In this context, practice reveals two sorts of situations. On the one hand, a State proceeds to the unilateral determination of its maritime zones and notifies its claim internationally by depositing charts, lists of geographical coordinates and sometimes maps with the UN Secretary-General, in accordance with Articles 75(2) and 84(2) UNCLOS. On the other hand, a State may determine its maritime zones by adopting national law, without international notification. In both cases, the degree of precision of the relevant official documents will be essential in the process of comparison of States' claims and, therefore, to the determination of an MDA.[7] Multiple MDAs may be identified this way.[8]

For instance, in the case concerning France and Spain and the delimitation of their respective EEZs in the Gulf of Lion, Spain utilised equidistance as a method of delimitation. France argued that this would result in an inequitable solution considering the concave shape of its Southern coast.[9] In this situation, the superposition of both States' claims led to the identification of a large disputed zone spreading from the mouth of the Gulf of Lion to the latitude of the Balearic Islands.[10]

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7 See for more details Nicholas A Ioannides, 'A Legal Appraisal of the Interplay between the Obligations to Publish/Deposit Charts and Lists of Geographical Coordinates and Unilateral Maritime Claims' [2021] 34 IJMCL 599.

8 See all the studies realized so far by the researchers of the Observatory on Maritime Disputed Areas (all available online < https://zomad.eu >): concerning the Mediterranean Sea (France/Spain; Lebanon/Israel; Algeria/Spain/Italy; France/Italy; Croatia/Slovenia; Spain/Morocco), the Indian Ocean (France/Comoros; France/Mauritius; France/Madagascar), and the Atlantic Ocean (France/Canada).

9 See Ysam Soualhi, 'Le golfe du Lion, France/Espagne', (ZOMAD, un observatoire de la pratique des zones maritimes disputées, May 2020) < https://zomad.eu/fr/med01-france-spain/ > accessed 17 November 2021.

10 Deposit by France of a list of geographical coordinates of points, pursuant to article 75 paragraph 2 of the Convention [2013] M.Z.N.94.2013.LOS; Spain, verbal note transmitted to the UN Secretary-General, 23 March 2013 < https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn94_2013_esp_e.pdf > accessed 14 July 2022; Spain adopted Real Decreto 236/2013 por el que se establece la Zona Económica Exclusiva de España en el Mediterráneo noroccidental [5 April 2013] Boletín Oficial del Estado 92. A list of geographical coordinates resuming the latter decree has been transmitted to the UN Secretary-General, Deposit by Spain of a list of geographical coordinates of points, pursuant to article 75 paragraph 2 of the Convention [2018] M.Z.N.139.2018.LOS.

An MDA between Algeria, Spain and Italy can be identified by superposing their respective claims.[11] On 20 March 2018, Algeria adopted a presidential decree establishing an EEZ in the Mediterranean Sea.[12] The Algerian delimitation extends to 12 nautical miles (NM) determining the territorial sea of Mallorca (Balearic Islands – Spain) and Sardinia (Italy). However, the decree specifies that the limits of the Algerian EEZ can be modified by international agreement.[13] In a letter to the Algerian Ambassador to Spain on 12 July 2018, the Spanish Minister of Foreign Affairs vigorously protested the claim describing it as 'clearly disproportionate with respect to the median line of equidistance'.[14]On 28 August 2018, Spain deposited with the UN Secretary-General the list of geographical coordinates related to the EEZ declared by the royal decree adopted in 2013.[15] For its part, Italy established an Ecological Protection Zone (EPZ) with the adoption of the law n° 61 of 8 February 2006.[16] The law specifies that the limits of the EPZ are established in accordance with an equidistance line between the Italian coast and the coasts of neighbouring States. No list of coordinates has been deposited by Italy with the UN Secretary-General. However, on 28 November 2018, the permanent representation of Italy to the UN transmitted a letter to the Secretary-General stating its disagreement with the limits established by Algeria, whose claim overlaps with the EPZ. In response, Algeria sent two official protestation letters to Spain[17] and Italy[18] oppositng their respective delimitations.

2.2. The Triggering of a Specific Provisional Regime

The existence of an MDA triggers the application of the provisional regime provided for in Articles 74(3) and 83(3) UNCLOS. Overlapping claims as well as conflicting national legislation concerning a given MDA are then supposed to co-exist. Until an agreement on delimitation is reached (Article 74(1) and Article 83(1), the claimant States 'shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement'.

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11 See Pascale Ricard and Wissem Seddik, 'Les chevauchements entre revendications maritimes Algérie/Italie et Algérie/Espagne' (ZOMAD, un observatoire de la pratique des zones maritimes disputées, June 2020) 9 < https://zomad.eu/fr/med05-algeria-spain-italy/ > accessed 17 November 2021.

12 Décret présidentiel 18-96 instituant une zone économique exclusive au large des côtes algériennes [21 March 2018] Journal officiel de la République algérienne 4.

13 Algeria deposited the list of relevant geographical coordinates to the UN Secretary-General, Deposit by Algeria of a list of geographical coordinates of points, pursuant to article 75 paragraph 2 of the Convention [2018] M.Z.N.135.2018.LOS.

14 The letter was transmitted to the UN Secretary General, Letter from Spain to Algeria of 12 July 2018 < https://www.un-.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DZA_2018_noteverbale_en.pdf > accessed 17 November 2021.

15 See n 9.

16 Law 61 on the Establishment of an ecological protection zone beyond the outer limit of the territorial sea [8 February 2006] <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ITA_2006_Law.pdf> accessed 17 November 2021.

17 Algeria, Verbal note n° 18.01056 [25 November 2018] < https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DZA_2018_noteverbale_Fre.pdf > accessed 17 November 2021.

18 Algeria, Verbal note n° 15-423/MAE/DAJ/2019 [20 June 2019] < https://www.un.org/Depts/los/LEGISLATION-ANDTREATIES/PDFFILES/AlgDza20Jun-3.pdf > accessed 17 November 2021.

The exact meaning of paragraph 3 of respective Articles 74 and 83 remains undefined by UNCLOS.[19] A textual analysis, however, leads at least to the following three sets of observations.

The first observations concern the temporal scope of the provisional regime. The expression 'pending agreement as provided for in paragraph 1', logically, must be read in relation to paragraph 1 which provides that delimitation shall be 'effected by agreement'. In this context, it appears that obligations derived from paragraph 3 are not applicable if there is no need for a delimitation between two States, or if States are likely to reach an agreement easily.[20]

The other expression employed in paragraph 3 ('during this transitional period'), which is related to the obligation not to jeopardise or hamper the reach of a final agreement, has been interpreted in the same way by the Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) in the *Ghana/Côte d'Ivoire* case. According to the Special Chamber, 'the transitional period referred to means the period after the maritime delimitation dispute has been established until a final delimitation by agreement or adjudication has been achieved'.[21] Hence, the temporal scope of the obligations under paragraph 3 seems directly related to the superposition of States' claims and national legal r gimes. In such a context, superposition appears particularly relevant and can be seen as practical evidence of States' overlapping claims and, therefore, as one element triggering the provisional regime provided for in UNCLOS. In practice, the need for provisional arrangements of a practical nature is most apparent when unilateral activities in a given MDA, such as fishing or mineral exploration/exploitation, need regulation.[22]

Secondly, the fact that paragraph 3 requires the claimant States to make every effort 'to enter into provisional arrangements of a practical nature'. The overall purpose of such an obligation has been clarified by the Arbitral Tribunal (Tribunal) in the *Guyana v Suriname* case (award of 17 September 2007) in which both parties made claims regarding breaches of Articles 74(3) and 83(3) UNCLOS. According to the Tribunal, 'this obligation constitutes an implicit acknowledgment of the importance of avoiding the suspension of economic development in a disputed maritime area, as long as such activities do not affect the reaching of a final agreement. Such arrangements promote the realisation of one of the objectives of the Convention, the equitable and efficient utilization of the resources of the seas and oceans'.[23] Then, the goal of the obligation provided for in paragraph 3 is to promote interim measures that could strengthen relations between claimant States and, thus, pave the way to the eventual adoption of a final agreement on delimitation.[24]

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19 The wording of paragraph 3 is the result of a compromise between conflicting views of States on several but intertwined issues of discussion that emerged during the Third United Nations Conference on the law of the Sea (a criterion on delimitation, rules on the settlement of disputes, and interim measures pending a final agreement on delimitation), Anderson, van Logchem (n 1) 199-205.

20 BIICL Report (2016) (n 1) 17.

21 *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (*Judgment*) [2017], ITLOS Rep 2017 [630].

22 Anderson, van Logchem (n 1) 209.

23 *In the Matter of an Arbitration between Guyana and Suriname* (*Award of the Arbitral Tribunal*) [2007] PCA Rep [460].

24 In its footnote 532, the Tribunal cites Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary,* vol. II (Martinus Nijhoff 1993) 815, and Rainer Lagoni, 'Interim Measures Pending Delimitation Agreements' [1984] 78 AJIL 354. See also Anderson, van Logchem (n 1) 212-215 and Nicholas A. Ioannides, 'The legal framework governing hydrocarbon activities in undelimited maritime areas' [2019] 68 ICLQ 346.

However the use of the expression 'to make every effort' suggests that paragraph 3 imposes an obligation of conduct, not of result, related to a more general – and customary – obligation to negotiate in good faith.[25]

As to the nature and characteristics of 'provisional arrangements of a practical nature', States are free to conclude any kind of agreement in both form and substance. UNCLOS gives no definition. In practice, a wide variety of arrangements have been adopted by States.[26]

The term 'arrangement' appears flexible. It does not have to be a formal binding treaty and could be limited to simple informal cooperation. It does not have to explicitly refer to Articles 74(3) and 83(3) UNCLOS. It could also remain in force without any limit of duration as soon as it does not appear as a means of jeopardising or hampering the reaching of a definitive delimitation agreement. Regarding their content, arrangements of a practical nature are meant to avoid conflicting legislation or conflicting activities in the disputed area. Then, any kind of arrangement dedicated to the joint exploration or exploitation of marine resources or to the regulation/management of any other activity in the area can be regarded as falling under paragraph 3 (see examples presented in Section 3, considering that the adoption of provisional arrangements appears as a reaction to the superposition of national legislation in an MDA). Lastly, paragraph 3 specifies that provisional arrangements are without prejudice to final delimitation. Such provisional arrangements can then be modified or abandoned if needed, which for the claimant States reduces the potential risks in reaching a compromise.

Thirdly, according to paragraph 3 of Articles 74 and 83, States are required to make every effort not to jeopardise or hamper the reaching of a final agreement (often referred to as the 'obligation of self-restraint'). UNCLOS does not define this. Preparatory works reveal that while States had general concerns over the conduct of unilateral activities in MDAs they did not intend to exclude them completely, in order not to mitigate the economic development of the coastal State.[27] The use of the expression 'to make every effort', applicable to both the obligation to enter into provisional arrangements and not to jeopardise or hamper, indicates that it is again an obligation of conduct and not one of result. As to the rest of the paragraph, the wording is drafted in a particularly broad and imprecise manner, in order to leave room for interpretation. According to Anderson and van Logchem, the obligation 'limits both the scope for unilateral activities by States in areas of overlapping maritime claims, and in addition curtails the ways in which States can respond to unilaterally conducted activities there'.[28] They consider it difficult to establish an abstract standard for such an obligation of restraint seems difficult. Prohibited unilateral actions related to the disputed area are to be concrete and 'somehow alter the *status quo ante* or prejudge the outcome of boundary negotiations or involve taking (or attempting to take) resources, especially non-renewable resources, from the area of overlaps'.[29] However, there is a consensus that the obligation of self-restraint does not prohibit all activities in an MDA.[30]

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25 *In the Matter of an Arbitration between Guyana and Suriname* (n 24) [461].

26 See, among others, BIICL Report (2016) (n 1) 14-16; Anderson, van Logchem (n 1) 212-215.

27 van Logchem (n 4) 179-181; Lagoni (n 25) 349-354.

28 Anderson, van Logchem (n 1) 216.

29 ibid.

30 Alexander Pröelss, Amber Rose Maggio, Eike Blitza, Oliver Daum (eds), *United Nations Convention on the Law of the Sea: A Commentary* (Beck-Hart-Nomos 2017) 578–579, 663; Kentaro Nashimoto, 'The Obligation of Self-Restraint in Undelimited Maritime Areas' [2019] 3 Jap Rev 29; BIICL Report (2016) (n 1) 24.

A textual analysis of paragraph 3 of Articles 74 and 83 does not reveal which activities conducted by the claimant States in MDAs fall under the obligation not to jeopardise or hamper. Yet, practical issues can be significant, considering the large number of MDAs and the growing interest of States in exploiting marine resources.

2.3. The Difficult Distinction between Lawful and Unlawful Activities in MDAs

Determining what unilateral activities breach the obligation of self-restraint can be complex. The first answers come from the limited international case law. The decisions of international courts and tribunals concern only activities conducted on the continental shelf, and not the EEZ. In *Guyana v Suriname*, Guyana had granted licenses for oil exploration in the disputed area to several private companies. During exploratory drilling, the Surinamese navy ordered the Canadian company CGX Resources Inc. to leave the disputed area and justified its acts by claiming that Guyana had breached the obligation of self-restraint (Articles 74(3) and 83(3) UNCLOS). The Tribunal first noted that the obligation was not intended to prohibit all activities in an MDA.[31] Then, it made a distinction between activities which do not cause a physical change to the marine environment, which would 'generally' not breach the obligation of restraint, and acts that do cause a physical change, and which may jeopardise or hamper the reaching of a final agreement on delimitation.[32] To that extent, the Tribunal stressed the need not to 'stifle the parties' ability to pursue economic development in a disputed area' in relation to the fact that unilateral activities should not 'affect the other party's rights in a permanent manner'.[33] Therefore, it erected the criteria of the absence of 'permanent physical impact' on the marine environment[34] as the threshold to evaluate the possibility to carry out activities in the disputed area, in coherence with the 'no harm' or prevention customary principle of international environmental law.[35] Based on this consideration, the Tribunal concluded that exploratory drilling constituted a breach of Guyana's obligation of restraint. However, it declared that allowing seismic exploration did not violate such an obligation 'in the circumstances at hand', that is, considering that both parties had issued licenses for exploration and no objections were expressed from the other. This fact-specific decision from the Tribunal means that this approach could vary in future cases, depending on context.[36]

In the more recent *Ghana/Côte d'Ivoire* case, Ghana had authorised oil exploration and exploitation activities in the disputed area. Côte d'Ivoire argued that the activities undertaken by Ghana constituted a violation of the obligation of self-restraint as provided for in Article 83(3) of UNCLOS. The proceedings before the Special Chamber of the International Tribunal for the Law of the Sea followed two phases. Firstly, Côte d'Ivoire presented a request for provisional measures that required Ghana to suspend all ongoing activities and to abstain from granting any new licenses. The Special

31 *In the Matter of an Arbitration between Guyana and Suriname* (n 24) [465].

32 ibid [467].

33 ibid para [470].

34 ibid.

35 Consecrated for instance by the ICJ in the *Pulp Mill on the River Uruguay (Argentina v. Uruguay)* (*Judgement*) [2010] ICJ Rep 14 [14]. On the "no harm" principle, see also, BIICL Report (2016) (n 1) 19-21.

36 *In the Matter of an Arbitration between Guyana and Suriname* (n 24) [481].

Chamber, however, refused to order provisional measures. It recognised that exploration and exploitation activities could entail a physical change of the disputed area or that the acquisition and the use of information gathered on mineral resources could generate a risk of irreversible prejudice to the plausible rights of Côte d'Ivoire in the disputed area. It asked Ghana to 'take all necessary steps to ensure that no new drilling either by Ghana or under its control takes place in the disputed area'. Nevertheless, the Special Chamber found that suspending all ongoing activities undertaken by Ghana could entail a risk of considerable financial loss and harm the marine environment.[37] Thus, Ghana could continue its activities in the MDA even though these activities could have a permanent physical impact on the continental shelf. This approach reflects the nature of the proceedings concerning provisional measures. The threshold for ordering such provisional measures is considerably higher than the one for establishing a breach of paragraph 3 of Articles 73(3) and 84(3) UNCLOS. Finally, in the phase concerning the merits, the Special Chamber considered that Ghana's exploration and exploitation activities did not constitute a breach of the obligation not to jeopardise or hamper. However, it is not certain that the Special Chamber took a different approach to the Tribunal in the *Guyana v Suriname* case. Côte d'Ivoire claimed a violation of its rights in the "Ivorian maritime area",[38] but activities were conducted in a maritime area that was ultimately determined to be Ghanaian. In this context, by adopting a strict interpretation of Côte d'Ivoire's claim, the Special Chamber refused to make any comment or take any decision concerning the potential violation of the obligation of self-restraint in the rest of the disputed area that was assessed to be Ivorian.

In the International Court of Justice (ICJ) case concerning *Maritime delimitation in the Indian Ocean (Somalia v Kenya)*, Somalia claimed that exploration and drilling activities in the disputed area were conducted by Kenya in violation of its obligation of restraint under Articles 74(3) and 83(3) UNCLOS. Concerning exploration activities, the ICJ decided these were 'not of the kind that could lead to a permanent physical change in the marine environment', founding its consideration on the standard established in the *Guyana v Suriname* case.[39] As to drilling activities, 'which are of the kind that could lead to permanent physical change in the marine environment', the ICJ considered it did not have sufficient certainty that they took place after 2009 which was the critical date of dispute.[40] The reasoning of the ICJ, which is rather short, is entirely based on the standard established by the Tribunal in the *Guyana v Suriname* case, without adding further clarification.

The contribution of these international court and tribunal decisions does not entirely satisfactorily determine the substantive scope of the obligation not to jeopardise or hamper the reaching of a final agreement. International case law offers only one standard (the 'permanent physical impact' on the marine environment) and this raises several issues. First, it seems mostly applicable to activities that take place on the continental shelf, which is more likely to suffer from a 'permanent' and 'physical' impact. Second, if such a standard is recognised as providing guidance for the interpretation of the obligation of restraint, it remains unclear. Besides, it is largely acknowledged that establishing an

37 *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (Provisional Measures) [2015] [88-102].

38 *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* (n 22) [632-633].

39 *Maritime delimitation in the Indian Ocean (Somalia v. Kenya)* (judgement) [2021] ICJ Rep 2021 [207].

40 ibid [209].

absolute and abstract standard based on the nature of the activities conducted in an MDA might be difficult and unnecessary.[41] For instance, according to Judge Paik in a separate opinion to the judgment rendered in the *Ghana/Côte d'Ivoire* case, the obligation of self-restraint should be perceived as a result-oriented notion related to the effect of endangering or impeding the reaching of a final agreement. Accordingly, the analysis carried out by international courts and tribunals should consider the whole context in which activities are conducted, including the diplomatic relations between the claimant States.[42] In the *Somalia v Kenya* case, the ICJ did not mention such a debate, despite the argument being raised by Somalia during the proceedings.[43]

International case law does not clarify the application of the obligation of self-restraint to activities conducted in the EEZ. Questions can be raised but answers remain scarce. For instance, under UNCLOS, States are bound by provisions concerning the management of living resources of the sea. In particular, Article 61(2) provides that States must ensure that living resources of their EEZ are not endangered by over-exploitation. Further, States shall cooperate for the management of their shared stocks. To that extent, there is a 'delicate balance'[44] to be found between activities that permit economic development of the coastal States and those which could have a permanent impact on the marine environment. In this context, fishing in a disputed EEZ does not appear, in itself, to be a breach of the obligation not to jeopardise or hamper (considering the renewable character of fish stocks), but over-exploitation could be qualified as a breach. Therefore, claimant States should exchange information and cooperate to make sure that their fishing activities in a disputed area are sustainable.[45] The question becomes even more complicated if one claimant State decides to control or arrest vessels of the other claimant State fishing in the disputed area. It could be seen as a provocation, but it could also constitute the only means for one claimant State to force the other to abide by the obligation of restraint (see below Section 3). In such a situation, the qualification of a violation of the obligation not to jeopardise or hamper should take into consideration all the relevant circumstances.[46]

3. States' Responses to the Superposition of their Legal Regimes in MDAs

The implementation by each State of its national legislation and its projects (such as seismic or other research, creation of marine protected areas) illustrates a search for effectivity ("effectivités" in French), as States are looking for confirmation of their claims. Indeed, the effective occupation of a territory is traditionally a legal means of acquiring sovereignty in international law.[47] As Anderson and van Logchem recall, the respective Articles 74 and 83 paragraph 3 UNCLOS are confined to the question of the maritime boundary and do 'not apply to the sovereign issue as such, with the result that each

41 Nashimoto (n 31) 32; BIICL Report (2016) (n 1) 24.

42 *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* (n 21) Separate Opinion of Judge Paik [6].

43 *Maritime delimitation in the Indian Ocean (Somalia v. Kenya)* (Reply of Somalia) [2018] [4.20-4.24].

44 *In the Matter of an Arbitration between Guyana and Suriname* (n 24) [470].

45 In that sense, see BIICL Report (2016) (n 1) 28.

46 ibid.

47 ibid 34-35.

side remains entitled, in principle, to seek by lawful means to strengthen its claim to sovereignty'.[48] This search for effective occupation at sea must, however, be consistent with the provisions of UNCLOS and specifically of Articles 74 and 83 when the sovereign dispute entails maritime delimitation.

Seeking to achieve effective occupation and administration in MDAs usually takes the form of a strategy of long-term validation by practice, which could lead to the abandonment of contrary claims by the other party. This unilateral reaction and the corresponding practice taking place in areas of superposition of national legal regimes is not prohibited by UNCLOS, neither is it prohibited by general international law, to a certain extent (section 3.1). However, as regards the superposition of national legal regimes resulting from disputes over maritime boundaries, obligations of cooperation and negotiation in good faith do apply in order to set a transitional legal regime for activities in the area, conducting to non-unilateral or collective reactions to the *de facto* superposition of national legal regimes, mainly through bilateral cooperation (section 3.2).

3.1. Unilateral Reactions to the Superposition of State Legal Regimes

In the period when an area of overlapping maritime claims is not covered by any provisional arrangements, the fundamental question is not only what activities may or may not be carried out unilaterally, in the disputed area (see sections 2.2. and 2.3.), but also how these activities and the legislative frameworks of the claimant States may be implemented, and how the other State can respond. Efforts toward an effective occupation through the unilateral implementation of national law by the claimant States may lead to different situations and strategies. The outcome is dependent upon several factors, such as the sovereign nature of the dispute, the relationship between the two States, their historical reaction to the dispute or their cooperation in other fields. In areas characterised by the superposition of the legal regimes of claimant States, various scenarios can be observed: either a balance between the exercise of their rights by the conflicting States, through an implementation of their obligation of restraint (section 3.1.1.); or, which is usually the case when the dispute involves issues of sovereignty, one of the two States can clearly take or try to take the upper hand over the other, through a historic and dominant *de facto* enforcement of its laws and regulations (section 3.1.2.) or through a 'robust' enforcement of its legal regime, through the mobilisation of the police at sea (section 3.1.3.). The compatibility of those reactions to UNCLOS and general public international law appears more doubtful and the latter State has consequently several means to respond.

3.1.1. The difficulty to Assess the Reasonable Exercise of their Unilateral Rights and Obligation of Self-restraint

Reading the respective Articles 74 and 83 paragraph 3 of UNCLOS – and in the light of what have been developed in sections 2.2. and 2.3. of this article – it appears that the drafters of UNCLOS found themselves facing a dilemma: on the one hand, they clearly wanted to prevent unilateral exploitation of natural resources in undelimited areas; on the other, it was not their intention to

48 See Anderson, van Logchem (n 1) 222. A distinction must therefore be made between maritime boundary questions and related sovereignty disputes to determine what activities are covered by Articles 74 and 83.

freeze all activity.[49] The balance to be struck between unilateralism and self-restraint is not easy. Indeed, does self-restraint equal complete abstention from activity? Does the absence of unilateral acts and activities in a disputed area necessarily traduce a self-limitation by a State, in the absence of an express declaration? Or is it simply the result of a lack of means, technology, or willingness to carry out activities in an area, for example because it is located too far offshore? How can we distinguish between these situations? State practice in this area is interesting but not very enlightening as to whether or not there is a deliberate and stated desire of States to restrain themselves.

Sometimes, the duty of restraint is explicitly referred to by the State themselves. For example, in a letter addressed by the Algerian Minister of Foreign Affairs to Spain on 20 June 2019, noting the overlap between the newly created EEZ of that State[50] and the Spanish EEZ,[51] Algeria expressly recalls that 'international law and State practice require that Algeria and Spain refrain, as an interim measure, from engaging in activities in this area related to their discovery rights, in particular the exploration and exploitation, conservation and management of natural, biological or non-biological resources, as provided for in Article 56 of the United Nations Convention on the Law of the Sea'. This precision, that could be interpreted as a unilateral engagement, is particularly broad as it refers not only to activities concerning mineral resources and drilling, which are usually problematic, but also to fisheries and conservation activities, which are less likely to cause irreparable damage.

When the obligation of self-restraint is not expressly referred to, implicit respect can be deduced from unilateral state practice. For instance, in the disputed area between France and Spain, both States are conducting unilateral activities reasonably, in a peaceful manner: both have issued offshore research permits in or near this area but did not authorise the renewal of those permits nor the exploitation phase. They are cooperating in the fields of fisheries and surveillance of maritime spaces, as well as designated protected areas overlapping the disputed area, but no incidents have been reported.[52]

These examples show that in the absence of provisional agreements of a practical nature, communication and cooperation in the conducting of activities in or near a disputed area is the most appropriate, moderate and the easiest reaction for States not to jeopardise the reaching of a final delimitation agreement, without surrendering their claims.

However, such an equilibrium appears possible only in areas where the geopolitical stakes are low and where relations between States are otherwise good and not subject to a sovereignty dispute. When the unilateral behaviour of one of the claiming States is considered as unbalanced and unlawful by the other, the latter can counter it and respond by several means. The obligation of self-

49 See the statement by the Chairman of Negotiating Group 7, NG 7/26, 26 March 1979, cited by Nicholas A. Ioannides, 'The China-Japan and Venezuela-Guyana Maritime Disputes: how the law on undelimited maritime areas addresses unilateral hydrocarbon activities' (2019) EJIL: Talk!, < https://www.ejiltalk.org/the-china-japan-and-venezuela-guyana-maritime-disputes-how-the-law-on-undelimited-maritime-areas-addresses-unilateral-hydrocarbon-activities/ > accessed 17 November 2021.

50 Presidential Decree n 1896 instituant une zone économique exclusive au large des côtes algériennes [20 March 2018] Journal official de la Republique Algerienne 18.

51 Algeria, Verbal Note n 15-422/MAE/DAJ/2019 [20 June 2019] < https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/AlgSpain.pdf > accessed 14 July 2022. See Ricard, Seddik (n 11).

52 See Soualhi (n 9).

restraint limits somewhat the ways in which a State can meaningfully respond to a unilateral activity undertaken in an undelimited area. De Herdt explores several answers to the question of what responses are permissible and meaningful under international law to bring about a halt of unilateral acts conducted in disputed areas.[53] First, the most usual and useful means to respond to a situation considered as illegal is protestation;[54] it can be combined with a claim to an international body (for instance, the UN Security Council, as occurred in the 1976 continental shelf dispute between Greece and Turkey). Then, States can seek an adjudication through compulsory dispute resolution under Article 283 and 298 UNCLOS, as well as request the prescription of provisional measures under Article 290 UNCLOS. As we will see below in sections 3.1.2. and 3.1.3., maritime law enforcement is usually preferred by States to address unilateral conduct, potentially accompanied or justified as a countermeasure. However practically, 'the fact remains that to delineate the legal line separating maritime law enforcement from the use of force seems to be a far from clear-cut exercise',[55] as well as its compatibility with Articles 74(3) and 83(3) UNCLOS, as it may exacerbate the dispute.

3.1.2. The Exclusive and Prevailing De Facto Enforcement and Effectiveness of the Regime of one State over the Other

The co-existence of unilateral States' rights and legal regimes in disputed areas may not be as balanced as has been seen elsewhere, especially when maritime claims are combined with sovereignty claims. In this context, the situation of the islands claimed by France and other States in the Indian ocean is relevant, especially regarding the Scattered Islands and the island of Mayotte, which are a 'legacy' of the French colonisation in this area.

Indeed, in the Scattered Islands, only France is actually exercising its *de facto* sovereignty[56]. While a cooperation for the management of the islands was once envisaged, it is clear that both French and Malagasy's authorities would interpret such cooperation as a renouncement of their sovereignty, which encourages unilateral action. The Scattered Islands are fully integrated in the French legal framework.[57] France, for instance, created a national natural park around the Glorieuses archipelago and expressed its intention to extend it to its whole EEZ.[58] Two permits for the exploration of petroleum were granted

53 Sandrine De Herdt, 'Meaningful Responses to Unilateralism in Undelimited Maritime Areas' [2019] 6 JMS 5.

54 Christophe Eick, 'Protest', *Max Planck Encyclopedia of Public International Law* (2006).

55 ibid 17.

56 See for a historical perspective Ricard, Robin 'Tensions dans le canal du Mozanbique et autour des îles Éparses (France / Madagascar)', *in* Miron, Robin, *Atlas des espaces maritimes de la France* (2022) 223. See also the website of the TAAF, Antarctic and Austral French Territories Authority: < https://taaf.fr/collectivites/presentation-des-territoires/les-iles-eparses/ > accessed 17 November 2021.

57 Law attaching the Scattered islands to the Antarctic and Austral French Territories (TAAF) [21 February 2007], Arrêté n°2007-18 bis creating the "Scattered District" [23 February 2007].

58 Décret no 2021-734 portant création de la réserve naturelle nationale de l'archipel des Glorieuses (Terres australes et antarctiques françaises) [8 June 2021] Journal Officiel de la République Française 0133.

in 2008.[59] France ensures the permanent presence of French military on the islands; fisheries activities are regulated by French law and scientific research activities are frequently authorised by the island's prefect. The Malagasy legal framework does not ignore the islands, but it does not either explicitly apply to their maritime areas and no control activity or effective occupation is to be mentioned.

In the archipelago of Mayotte, the situation is different but the stakes are similar. The effective application of French national legislation did not stop with the declaration of independence of the Federal Islamic Republic of the Comoros[60] and only France is exercising its jurisdiction in the maritime areas around Mayotte, without having, however, conducted activities susceptible to have permanent detrimental impacts (such as offshore drilling). Nonetheless, the Republic of the Comoros has maintained a claim of sovereignty over Mayotte, with the full support of the United Nations General Assembly (UNGA).[61] Article 6 of the Comoros' Constitution includes Mayotte in the territory of the Union of the Comoros and its preamble states that it seeks to 'make the return of the island of Mayotte in its natural whole, a national priority'. Article 122 specifies that 'The Institutions of Maoré will be established as soon as the occupation of the Island ends'.

In those cases, neither France nor Madagascar or Comoros set precise coordinates for their claimed EEZ around the islands, nor date have they claimed any extended continental shelf – probably because of the absence of the criteria to make such a claim to the Commission on the Limits of the Continental Shelf –, which can be interpreted, to a certain extent, as a consideration of the claims of the other State and potentially as a 'soft' application of the obligation of restraint, according to Articles 74(3) and 83(3) UNCLOS.

These examples of an unbalanced superposition of national legal regimes in MDAs illustrate the situation in which one of the States takes precedence over the other in terms of effectivity, due to the historical context. However, this does not mean that the other State renounces its claims, so far as it keeps protesting the exercise of unilateral acts by the former. Protest and adjudication are the main means available for the other claiming State to respond. As long as the prevailing State is exercising its unilateral rights peacefully and do not cause irreversible and permanent damage to the marine environment, this behaviour may be seen as compatible not only with UNCLOS obligations but also with wider public international law.

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59 The first permit has been extended until 2018 but stopped after the declaration by the French government of the end of offshore drilling in France according to the Loi no 2017-1839 mettant fin à la recherche ainsi qu'à l'exploitation des hydrocarbures et portant diverses dispositions relatives à l'énergie et à l'environnement [30 December 2017] Journal Officiel de la République Française 0305. See Léna Kim, 'The End of Offshore Drilling in France' (ZOMAD, Un observatoire de la pratique des zones maritimes disputes, 2 September 2020) < https://zomad.eu/fr/2020/09/02/the-end-of-offshore-drilling-in-france/ > accessed 17 November 2021.

60 See Loi no 76-1212 relative à l'organisation de Mayotte [24 December 1976] Journal Officiel de la République Française 112; and Loi organique no 2010-1486 relative au Département de Mayotte [7 december 2010] Journal Officiel de la République Française 0284, article LO6111-1.

61 Which condemns the presence of France in the island of Mayotte and invite it to renounce to its project to separate this island to the rest of the Comoros archipelagos See UNGA Res 3385 (XXX) (12 November 1975) A/RES/3385(XXX) on the admission of the Comoros to membership in the United Nations, or 'Question of the Comorian Island of Mayotte', UNGA Res 31/4 (21 October 1976) A/RES/31/4.

3.1.3 The 'Robust' Enforcement of its Legal Regime by One of the Claimant States over the other through police action at sea: the limits of unilateral reactions

In their efforts to secure effectivity, some States use all the means at their disposal to assert – or impose – their sovereignty or jurisdiction over a land and/or maritime area, including through forcible action. Police activities are used as a means of strengthening the effectiveness of the regime. According to Jimenez Kwast, 'While incidents involving unilateral action against vessels of the other party quite commonly occur, they tend to cause further contention and intensify the conflict'.[62] The distinction between law enforcement (including forcible actions authorised under the law of the sea) and use of force (in application to the Article 2.4 UN Charter) is particularly blurred.[63] The examples of China in the South China Sea, and Lebanon and Israel in the Mediterranean Sea illustrate this phenomenon and this difficult distinction.

China currently claims the entire South China Sea, and, more precisely, since the mid twentieth century, all waters within the 'nine-dashed line' which overlaps with waters claimed by almost every other regional State. The diverse claims became more assertive and widespread from the 1970s onwards, due to the evolution of the law of the sea and the discovery of hydrocarbon deposits. Several States of the region began occupying the different islets to demonstrate their rights. This occupation and long-term strategy of control of the islets have since taken a decidedly robustly military turn, illustrated by the construction by China of military bases in the claimed islands.[64] China transformed the natural state of several islets, initially unsuitable for permanent habitation, into artificial islands capable of hosting naval aviation activity – but also effected transformation by the continuous occurrence of altercations. Vietnam began military occupation of islands, but was forcibly removed from the Paracels in 1974; in 1988, 64 Vietnamese military personnel were killed in a Chinese intervention on Johnson Reef in the Spratly islands; on 12 March 2011, two Chinese patrol vessels approached a Philippine vessel conducting a seismic survey near Reed Bank, demanding that it cease operations. In response, the Philippines deployed an aircraft and two warships to escort the seismic vessel until it completed its mission.[65] Chinese naval militias are moreover concentrated near islands occupied by the Philippines, to control the area.[66] In Scarborough shoal, Filipino fishermen are harassed, and

62 Patricia Jimenez Kwast, 'Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Surinam Award' [2008] 13 IJCSL 49, 69-70.

63 ibid 58, 61, 71 and following. The author offers a detailed study on the criteria to distinguish between law enforcement at sea and the use of force, using diverse criteria: the functional objective of the forcible action, the legal basis and the purpose of the actions, the status of the subjected foreign vessel, or the location of the incident.

64 See for instance 'China Acknowledges Militarization of its Spratly Islands Bases' *The Maritime Executive* (4 November 2018) < https://www.maritime-executive.com/article/china-acknowledges-militarization-of-its-spratly-island-bases > accessed 17 November 2021.

65 See Jean-Paul Pancracio, 'La sentence arbitrale sur la mer de Chine méridionale du 12 juillet 2016' [2017] 18 AFRI 639, 640.

66 As well as in reaction to the arbitral award of the Permanent Court of Arbitration in the case brought to the Court by the Philippines in 2013, that China refused to implement. *In the matter of the South China Sea arbitration, before an arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the law of the sea, between the Republic of the Philippines and the People's Republic of China* (Award) [2016] PCA Rep; see also Peter Kreuzer, 'One Year after the Permanent Court of Arbitration's Decision on the South China Sea' (PRIF Blog 12 July 2017) < https://blog.prif.org/2017/07/12/one-year-after-the-permanent-court-of-arbitrations-decision-on-the-south-china-sea/ > accessed 17 November 2017.

Chinese authorities are accused of illegally exploiting protected species. Vietnam's legislature has recently passed a law that would allow the Vietnamese coast guard to fire on adversaries in disputed areas, if necessary, to 'protect sovereignty and sovereign rights in defence and security situations'.[67] Leaving aside China's excessive claims in this space, as well as the behaviours that were found to be contrary to UNCLOS in the 2016 arbitration award, one can question the compatibility of this forcible seizure of islets and adjacent maritime areas by China and the resulting increasing militarisation of the area for all the States with general public international law and particularly with the articles 74 and 83 UNCLOS.

In the Mediterranean Sea, the dispute between Israel and Lebanon is relevant. Both States have declared and fixed limits of EEZs that overlap, and have protested against the other claim. Officially, the States are at war: the maritime dispute is an aspect of a much more complex situation and a prolongation of the territorial one. The conflict was enhanced by the recent discovery of natural resources in the disputed area. Both States are conducting offshore exploitation activities, near the disputed areas, and plan to conduct activities inside the disputed areas. Therefore, to protest to the conducting of activities by each other, they strongly reinforced their military assets not only near the disputed areas[68] but also directly around gas fields and platforms.[69] To Lebanon, the unilateral exercise of sovereign authority by Israel in the region could threaten international peace and security,[70] and according to Israel, 'any non-consensual, unauthorized, economic activity in its maritime areas (…) can only jeopardize and hamper the prospects of reaching a peaceful solution to this issue'.[71]

These robust reactions to the superposition of national legal regimes in MDAs, including an important military dimension, appear far from the obligation to cooperate in good faith and to make every effort not to jeopardise or hamper the reaching of a final agreement. If States have a unilateral right to enforce their jurisdiction in MDAs, this right is clearly limited and conditioned by other rights and obligations. Importantly, according to Article 301 UNCLOS, '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', the objective of UNCLOS being to promote the peaceful uses of the oceans. Therefore, as Ryzka Darmawan summarises, 'repressive and

67 'China Acknowledges Militarization of its Spratly Islands Bases' (n 65).

68 For Lebanon, through the UNIFIL peacekeepers maritime task force, UN Security Council Res 1701 (11 August 2006) S/RES/1701 (2006): see for instance Toi Staff, 'Israeli navy ship crosses into Lebanese water – report' *The Times of Israel* (Tel Aviv, 15 July 2019). See also Identical letters dated 27 February 2012 from the Permanent Representative of Lebanon to the United Nations addressed to the Secretary-General and the President of the Security Council [2021] A/66/725-S/2021/123.

69 For instance, 'Méditerranée: Israël renforce son dispositif militaire autour de ses gisements de gaz', *La Tribune* (Paris, 22 July 2012); Nicolas Falez, 'Des drones pour surveiller les gisements de gaz en mer', *Rfi* (Jerusalem, 9 August 2011).

70 Lebanon, *Protestation letter of the Republic of Lebanon* [3 September 2011] < https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/lbn_re_isr__listofcoordinates_e.pdf > accessed 14 July 2022 : 'International peace and security could thus be imperiled, particularly if Israel, the occupying Power, should decide to pursue any economic activity in the aforementioned maritime area'; Lebanon, *Letter of protestation of the Permanent Mission of Lebanon to the United Nations* [26 January 2018] < https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/communications/2018_01_26_lbn.pdf >: 'The Republic of Lebanon will not hesitate to avail itself of its inherent right to self-defense if an armed attack occurs against the economic activities carried-out in its maritime areas'.

71 Israel, *Protestation letter of the Permanent Mission of Israel to the United Nations* [11 July 2019] NV-11JULY-2019-SG.

excessive law enforcement may disrupt the maritime boundary delimitation process being carried out by both countries in undetermined waters. In addition, law enforcement by excessive use of military might also threaten international peace and security'.[72]

The incompatibility of those unilateral military measures with States' obligations under UNCLOS respecting MDAs has been underlined by the Tribunal in *Guyana v. Suriname*. Indeed, the deployment of Surinamese naval vessels to remove from the area of overlapping claim the oil rig licensed by Guyana to engage in exploratory drilling appeared to the Tribunal to be excessive, which considered that the way in which Suriname responded to unilateral drilling did not correspond to a lawful robust enforcement of the law at sea, but 'a threat of force in contravention of the Convention, the UN Charter and general international law'.[73] Of course, other means were available to Suriname to challenge the legality of the unilateral activities of Guyana, for example, in addition to protestation, entering into consultation or requesting urgent interim protection before an international judicial body, as occurred in *Ghana v. Côte d'Ivoire*. The Tribunal recognised, however, that force may be used in law enforcement activities if it is 'necessary, unavoidable and proportional',[74] which could then amount to countermeasures, adding to the difficulty of interpreting the rights and duties of States. The circumstances of the case appear to be of fundamental importance in applying this distinction between law enforcement operation and use of force.[75]

3.2 Collective Responses to the Superposition of Legal Regimes

Although unilateral responses to assert their positions in MDAs are often their priority, State practice also shows that (1) bilateral and (2) multilateral responses are of great importance in the context of the superposition of States' legal regimes in MDAs.

3.2.1. Bilateral Cooperation: the Conclusion of Provisional Arrangements, According to UNCLOS

Bilateral cooperation is the outcome of the obligation of conduct to 'make every effort to enter into provisional arrangements of a practical nature', 'in a spirit of understanding and cooperation', in accordance with Articles 74(3) and 83(3) UNCLOS.[76] Bilateral cooperation for the conduct of activities at sea is actually the only means to make the superposition of States' legal regimes compatible, but it needs a peaceful context to be effective. Such a context is further complicated and less frequent when issues of territorial sovereignty are at stake, as States may feel that they are ceding part of their sovereignty claims and acting contrary to their traditional effective occupation-seeking conduct. The

72 Aristyo Rizka Darmawan, 'Law enforcement in unresolved maritime boundary: Indonesian border experience' 15.

73 *In the Matter of an Arbitration between Guyana and Suriname* (n 24) [445].

74 ibid.

75 Jimenez Kwast (n 63) 78 and 81.

76 *In the Matter of an Arbitration between Guyana and Suriname* (n 24) [460]. See also the BIICL Report (2016) (n 1) 14.

cooperation is also further complicated where more than two States are claiming the same maritime area, as for example regarding the Spratly islands. Bilateral cooperation, when possible, may therefore take various forms, from implicit arrangements consisting only of prior notification to moratorium or to a joint management regime.[77]

Cooperation is usually sectoral. For example, France and Canada developed a strong cooperation in the field of fisheries in the maritime area surrounding Saint-Pierre-et-Miquelon. The cooperation regarding fisheries activities began in 1972 with the signature of the Agreement between Canada and France on their Mutual Fishing Relation on 27 March, modified in 1994.[78] Recalling that 'no provision of the present agreement shall be interpreted as prejudicing the views and future claims of either party concerning internal waters, territorial waters or jurisdiction with respect to fisheries or the resources of the continental shelf', it provides for a principle of reciprocal access to certain fishing zones, i.e. each party must allow nationals of the other party access to fishing zones under its jurisdiction. The States allocate to each other quotas for scallops, cod and other groundfish, a portion of which must be processed in the Saint Pierre and Miquelon plant to maintain some employment there. An 'Advisory Board', made up of Canadian and French representatives, meets at least once a year to recommend to the parties' annual total allowable catch (TAC). Canada must also consult with France before taking any measures relating to the management and conservation of Canadian waters surrounding the French EEZ.

Sectoral bilateral cooperation may also concern mineral resources, usually embodied with the notion of 'joint development agreements'. According to the Tribunal in *Guyana v. Suriname*, 'joint exploitation of resources that straddle maritime boundaries has been particularly encouraged by international courts and tribunals', as it was the case in the *North Sea Continental Shelf* case.[79] Such agreements are well developed, for instance, in the Asia-Pacific region, where they have been concluded to allow for the exploitation of maritime resources, pending final delimitation. In 1974, for instance, the Japan-South Korea Agreement concerning joint development of the continental shelf adjacent to the two countries, with a fifty-year duration was concluded.[80] Another example from West Africa is the Treaty between the Federal Republic of Nigeria and the Democratic Republic of São Tomé e Príncipe on the joint development of petroleum and other resources, in respect of

77 Following the BIICL Report, 'the term 'arrangements' indicates that it need not be a treaty but may be informal or even non-binding, and 'of a practical nature' indicates content of an operational rather than legislative nature, consistent with the requirement that it not prejudice the final delimitation". ibid. See *supra*, Section 2.2.

78 Agreement between Canada and France on their mutual fishing relations (with annex, map and exchange of letters) [1972] 862 UNTS 12353.

79 *In the Matter of an Arbitration between Guyana and Suriname* (n 24) [463]. See the *North Sea Continental Shelf Cases (Federal Republic of Germany / Denmark; Federal Republic of Germany / Netherlands)* (*Judgement*) [1969] ICJ Rep 3 [97-99].

80 Iain Scobbie, 'The utilization of resources in disputed waters: possible mechanisms for cooperation in the South China Sea' [2018] 14 Soochow Law Review 147, 159 and following.

areas of the EEZ of the two States, of 21 February 2001[81]. It establishes a joint development zone, in an area where their EEZs overlap, for the orderly exploration and exploitation of petroleum and other resources and for a duration of 45 years. The agreement creates joint bodies to manage the development of the zone, the sharing of revenue between the parties, the laws and regulations to be applied in the zone, and environmental protection. Its preamble refers to Article 74(3): the agreement is 'without prejudice to the eventual delimitation of their respective maritime zones by agreement […]'. The long period of validity of these agreements can be explained by the fact that oil companies need security for their investments.[82]

Bilateral cooperation can even be broader and advanced, going as far as providing for 'co-management' of disputed areas. As regards the disputed islet and maritime areas around Tromelin, in the Indian Ocean,[83] France and Mauritius initiated the idea of a co-management agreement in the 1990s. This idea, broadly supported by the Summit of Heads of State and Government of the Indian Ocean Commission (IOC) held in Saint-Denis de la Réunion on 3 December 1999, led to the signature, on 7 June 2010, of the 'Framework Agreement between the Government of the French Republic and the Government of the Republic of Mauritius on the economic, scientific and environmental co-management of the island of Tromelin and its surrounding maritime areas'.[84] Recalling naturally the 'without prejudice clause',[85] fisheries, archaeological activities and protection of the environment are regulated by this instrument, through the institution of a co-management committee. An implementing agreement is annexed for each of these fields. The committee would represent each State in an egalitarian way and deliver, notably, fishery licenses. However, concerning surveillance and control activities, which have a strong sovereignty dimension, states only plan to reinforce their cooperation. Nevertheless, the ratification of this agreement has been blocked, since 2012, especially by the French National Assembly: some deputies still fear that the agreement would lead to the recognition of the validity of Mauritian claims, and amount to a renunciation of French sovereignty over the island. The process is also blocked on the Mauritian side, for the same reasons. Following Article 18 of the Vienna Convention on the Law of Treaties, the signature of this agreement obliges, nonetheless, parties at least 'not to defeat the object and purpose' of the treaty before its entry into force, 'until it shall have made its intention clear not to become a party to the treaty'.

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81 Treaty between the Federal Republic of Nigeria and the Democratic Republic of São Tomé e Príncipe on the joint development of petroleum and other resources, in respect of areas of the EEZ of the two States [2001].

82 See BIICL Report (2016) (n 1) 15.

83 See Denys-Sacha Robin, 'Le récif de Tromelin, France/Maurice' (ZOMAD, Un observatoire de la pratique des zones maritimes disputées, May 2020) 7 < https://zomad.eu/fr/ind03-france-mauritius/ > accessed 17 November 2021 and Denys-Sacha Robin 'La zone maritime disputée entre la France et Maurice autour du récif de Tromelin' [2020] 65 AFDI 579.

84 Accord-cadre entre le Gouvernement de la République française et le Gouvernement de la République de Maurice sur la cogestion économique, scientifique et environnementale relative à l'île de Tromelin et à ses espaces maritimes environnants (ensemble deux annexes et trois conventions d'application) [2010].

85 Article 2: «*rien dans le présent accord, ni aucun acte en résultant, ne peut être interprété comme un changement de la position* [française ou mauricienne]*, en ce qui concerne la question de la souveraineté ou des compétences territoriales et maritimes sur l'île de Tromelin et les espaces maritimes environnants*».

Finally, the claiming States can directly agree on a 'provisional boundary line', in order to clarify the areas where each can operate in a temporary manner. The Agreement on provisional arrangements for the delimitation of the maritime boundaries concluded between Algeria and Tunisia on 11 February 2002 is one example: it established, after a 1995 incident that resulted in the death of two trawler fisherman, a provisional single maritime boundary between the two States, while referring to UNCLOS, and including a without prejudice clause. It was conducted for six years, after which the parties undertook to agree on a definitive maritime boundary or extend or revise the agreement (art 9 and 10). The final agreement was reached on 11 July 2011.[86]

3.2.2 Multilateral Responses

Bilateral cooperation being the outcome of the obligation of conduct contained in Articles 74(3) and 83(3) UNCLOS, one may wonder if there is some room for plurilateral or multilateral cooperation, or, rather, plurilateral or multilateral responses. Indeed, third parties to a dispute often take a stand and either affirm their position by recognising a State or a situation, or through protest. Does this reaction of third parties have a role in the persistence or otherwise the settlement of the dispute? A few examples show that although third-party States or organisations may in theory have an important role in the settlement of the dispute, in practice their intervention does not really influence the situation and is more akin only to position-taking.

The case of Cyprus is a good example of the regional consequences of a situation and the possible involvement of third States and organisations in a territorial dispute. Indeed, the activities located off the coast of Cyprus crystallise the tensions between the Republic of Cyprus and Turkey, but also the tensions that arise from it with the other regional States. These activities are numerous and include hydrocarbon exploration or drilling activities, laying of submarine cables, scientific research, electrical connections. It is mainly the activities relating to hydrocarbons which have prompted the greatest number of incidents between the States, ranging from the denunciation of the 'harassment' of Cypriot vessels by Turkish frigates to the arrest by Turkish authorities of Egyptian fishermen working on a Cypriot-flagged vessel. Turkey and the Turkish federal State of Cyprus concluded an agreement on 21 September 2011, delimiting their continental shelves, in order to allow for exploration permits. This is contested by the Republic of Cyprus, and further fuelled the dispute.[87]

To overcome the impasse of this complex and historic dispute, solutions have been proposed by different actors, though without an agreement being reached. The European Union, and a large number of third States comment, therefore, on the current situation of this dispute by frequently attributing to Turkey violations of international law. For instance, the EU, which recognises 'only the

86 Scheyma Djaziri, 'La délimitation des espaces maritimes entre la Tunisie et l'Algérie' [2017] 22 ADM 43.

87 See Letter dated 25 April 2014 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General [29 April 2014] A/68/857 and Nikolaos Ioannidis, 'The Continental Shelf Delimitation Agreement Between Turkey and "TRNC"' (2014) *EJIL: Talk!* < https://www.ejiltalk.org/the-continental-shelf-delimitation-agreement-between-turkey-and-trnc/ > accessed 17 November 2021.

Republic of Cyprus as a subject of international law',[88] has expressed several times its 'serious concern about the renewed tensions in the Eastern Mediterranean and urged Turkey to show restraint and to respect Cyprus' sovereignty over its territorial sea and Cyprus' sovereign rights in its exclusive economic zone'.[89] It 'urgently calls on Turkey to cease these actions and respect the sovereign rights of Cyprus to explore and exploit its natural resources in accordance with EU and International Law',[90] and 'strongly condemns Turkey's continued illegal actions in the Eastern Mediterranean and the Aegean Sea'.[91] The EU, moreover, decided to impose sanctions on Turkey in July 2019.[92] Some States, like France or the United Kingdom, officially adopted the same position.[93]

The role of the United Nations in these contexts can also be stressed. The Security Council as well as the UNGA adopted several resolutions where they took position for one claimant State, recalling the obligation to comply with international law. The Security Council asked Turkey, after the de facto separation of the island between the Republic of Cyprus and the Turkish Federated State of Cyprus in the 1970s, to respect the sovereignty of the Republic of Cyprus.[94] In other cases, it is the UNGA that condemned, for instance and as mentioned above, the presence of France in the archipelago of Mayotte, inviting it to renounce to its project to separate this island to the rest of the Comoros archipelago.[95]

4. Conclusion

Superposition of national legal regimes in MDAs is a classic and normal phenomenon. It is however governed by a set of international rules provided by UNCLOS: not all activities in MDAs are permissible. Claimant States are bound by a general obligation of restraint that, at the very least, imposes a duty not to harm the marine environment in a permanent way. Besides and in order to achieve this obligation, States are also required to negotiate in good faith provisional arrangements of a practical nature that are meant to limit conflicting national legislation and conflicting uses at sea. In the period when a maritime overlapping claims area is not covered by any provisional arrangement

88 Council of the European Union, Enlargement: Turkey; Declaration by the European Community and its Member States, C/05/243.

89 See, for instance, the document European Council (23 and 24 October 2014) – Conclusions [24 October 2014] EUCO 169/14, CO EUR 13, CONCL 5.

90 European Council (22 March 2018) – Conclusions [23 March 2018] EUCO 1/18, CO EUR 1, CONCL 1.

91 ibid.

92 European Council (20 June 2019) – Conclusions [20 June 2019] EUCO 9/19, CO EUR 12, CONCL 5 [17].

93 See, for instance, the website of the French Ministry of Foreign Affairs, France-Diplomatie, Chypre (5 October 2019), and of UK Ministry of Foreign Affairs, Press release, 'The President of the Republic received the UK's Minister for Europe' (4 October 2019).

94 Security Council Res 541 (18 November 1983) S/RES/541(1983) and Security Council Res 550 (11 May 1984) S/RES/550(1984).

95 See for instance UNGA Res 3385 (XXX) (12 November 1975) A/RES/3385(XXX) on the admission of the Comoros to membership in the United Nations, or 'Question of the Comorian Island of Mayotte', UNGA Res 31/4 (21 October 1976) A/RES/31/4.

and bilateral cooperation is not possible because of the tense context between the States, the activities in the area and the legislative frameworks of the claimant States may be challenged by the other State. Their legality is not always clear. To date, conflicts arising from the overlapping legal orders of States in MDAs have been resolved by international courts on a case-by-case basis, without a consensual and generalised interpretation of the self-limitation obligation emerging. Nevertheless, case law, combined with observation and analysis of State practice, is likely to shed more light on how States interpret UNCLOS and this obligation in the future.