

EXCLUSIVE ECONOMIC ZONE – THE CONCEPT OF *SUIS GENERIS* AREA AND ITS IMPLICATIONS FOR THE LEGAL ORDER OF THE SEAS

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ABSTRACT

The Exclusive Economic Zone combines features of the high seas and the territorial sea which gives it a unique character among other maritime territories regulated by the United Nations Convention on the Law of the Sea. Finding a balance between coastal State and third states rights, reflects the very legal nature of this *suis generis* area as it is recognised by the international law. The article aims at analysing the provisions of the Convention in an attempt to understand the actual tendency to disrupt the legal order in this area.

Keywords: *Exclusive Economic Zone; coastal states rights; third states rights; UNCLOS; military activities*

1. INTRODUCTION

The legal regime of the Exclusive Economic Zone is governed by United Nations Convention on the Law of the Sea (UNCLOS), Part V Art. 55-75. The Exclusive Economic Zone combines features of high seas and territorial sea but cannot be assimilated to these [1]. According to the article 55, “The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part... and by the relevant provisions of this Convention”. Article 86 clearly states that “The provisions of this Part (High Seas- n.n.) apply to all parts of the sea that are not included in the exclusive economic zone...”. However, Article 58 paragraph 2 transposes rules into the Economic Exclusive Zone, which are applicable to the high seas to the extent they are not inconsistent with the UNCLOS and other rules of the international law. As Serdy noted, this fact led to “the frequency of reference in navigational circles to international waters, a term unknown to the law of the sea but useful nonetheless, as it refers to the area seaward of the international waters (i.e. an amalgam of the EEZ and the high seas)”[2].

In reality, the Exclusive Economic Zone is a *suis generis* area with its own arrangements. Unlike the territorial sea, it is not an area in which the coastal states should have the right to sovereignty in plenary and ipso facto, and unlike the high seas, it is not an area in which other states should enjoy unrestricted liberties [1]. It’s an amalgam or a multipurpose area where the coastal states enjoy sovereign rights in relation to economic resources and also the right of jurisdiction not only in respect of those rights but for other issues, including those related to environmental protection [1].

The legal nature of the Exclusive Economic Zone contains three main elements: the rights and obligations which are recognized by law to the coastal states; the rights and obligations the Convention recognizes to other states; and the formula provided by the Convention for activities which do not fall within any of the preceding categories [3].

2. THE RIGHTS OF THE COASTAL STATES WITHIN EXCLUSIVE ECONOMIC ZONE

Regarding this area, UNCLOS recognizes to the coastal States sovereign rights over biological resources [4], correlative requiring conformation to the rights of the third states and compliance with the Convention [4] and the adoption of appropriate conservation and management measures in order to avoid overexploitation [4]. By virtue of exercising the sovereign rights of exploration, exploitation, conservation and management of living resources within the Exclusive Economic Zone, the coastal state may take any legal action to enforce the laws and regulations it has adopted [4]. Furthermore, the Convention extends the coastal state rights granted for the exploitation of biological resources by: the possibility of licensing fishermen or vessels and fishing gear [4]; determining the species whose fishing is permitted and setting rates [4] as well as fixing the age and size of fish and other species that can be caught [4]; regulating seasons, areas of fishing and gear as well as fishing vessels that may be used [4]; requesting information concerning foreign vessels catch and vessel position [4]; regulating the conduct of fisheries research programmes [4]; controlling the catches by imposing an obligation for the foreign vessels to land the catches in the ports of the coastal State [4].

Unlike the position on the non-living resources, the Convention grants the coastal state more extensive rights that may be exercised in an area much larger than they enjoyed under international customary law on exclusive fishing zone [3]. Even in these circumstances it was noted that UNCLOS does not expressly refer to a number of fishing related activities such as bunkering and transshipment operations or other activities on board, such as fish processing [5].

In practice it will be extremely difficult for the coastal state to comply with legal provisions regarding the conservation of fishery resources. The determination of the volume of allowed catches depends on too many variables such as the lack of a precise evaluation mechanism of UNCLOS of highly mobile species such as migratory or straddling species [6]. In addition to this, it is often expensive, especially for developing states,

and inadequate for the relevant data collection and analysis [6]. The obligation to determine the volume of allowed catches is irrelevant given the fact that the coastal state can manipulate the information to appear as not having a surplus and it can thus circumvent the requirement to allow other countries access to its biological resources [6].

Moreover, it is considered that the scheme offered by the Convention for the authorized amount of catches is not appropriate for common stocks. The decisive factor for the conservation of these species with such a complex nature is particularly an agreement on a comprehensive management scheme and not the establishment of regional shares for the amount of authorized catches that forms a barrier to the rational directing fishing operations [7]. On the other hand, it will be very difficult for a third country to challenge the authorized volume of catches due to the lack of a dispute settlement mechanism with respect to the conservation of living resources in the exclusive economic zone [6].

The Maximum Sustainable Yield is also a contested concept of the conservation objective because it doesn't take into account a series of factors such as the economic objectives or ecological relationship of species, the habitat quality conditions, the limits of the biomass within the area concerned [6].

Under the terms of Article 56, paragraph 1, the coastal state equally enjoys the sovereign rights on the non-living resources "of the seabed, its subsoil and superjacent waters". The legal regime for the coastal state is identical with the benefiting states on seabed resources in the 1958 Geneva Convention on the Continental Shelf and international customary law [3].

Under the regime established for both the Exclusive Economic Zone and the continental shelf, the coastal state enjoys unfettered rights of exploration and exploitation of non-living resources located under the seabed such as oil or minerals without the obligation of judicious use or conservation [1]. Also, the coastal state has "sovereign rights... with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds" [4]. The article, designed to anticipate future technological developments, has gained increasing relevance under exploitation of renewable energy conditions [1].

In addition to sovereign rights, the Convention offers the coastal state jurisdiction over artificial islands, installations and structures used for economic purposes and installations and structures which may interfere with the exercise of the rights of the coastal state in the zone [4]. The provision does not however preclude other states to deploy listening devices or other devices used for military purposes [8] to which the coastal state shall have no jurisdiction [3].

A number of measures will be taken in the interest of navigation safety. The coastal state shall properly notify the construction of artificial islands, installations and structures [4] and may, where necessary, establish safety zones which shall not exceed a distance of 500 metres around such structures [4]. Artificial islands, installations or structures may not be established; the safety zones around these areas are not allowed because they might

interfere while using the recognized sea lanes essential to international navigation [4]. In practice, the states have imposed by national law all sorts of restrictions on navigation and on other activities in the vicinity of artificial islands affecting the interests of other states regarding *ius communicationis* [7].

In the Exclusive Economic Zone, as provided by the relevant provisions of the Convention, the coastal state has jurisdiction over other two activities respectively, marine scientific research and the protection and preservation of the marine environment [4].

Part XIII of the UNCLOS details the conduct of marine scientific research. The marine scientific research is not a term defined by the Convention but it is often used to describe those activities in ocean and coastal waters designed for expanding the scientific knowledge of marine environment [9]. The marine scientific research includes marine biology, fisheries research, oceanography, geological and geophysical scientific research, ocean drilling scientific research [9]. The lack of clarity of the Convention made some activities such as hydrographic studies, considered by the coastal state as a threat to national security, take place under the umbrella term ambiguity [9].

The marine scientific research in the Exclusive Economic Zone will be conducted by the third states only with the consent of the coastal state [4] exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind [4]. The consent shall be granted in normal circumstances [4] which imply even "the absence of diplomatic relations between the coastal State and the researching state" [4].

Situations of abnormal circumstances can be considered imminent danger of an armed conflict or a legal dispute concerning the delimitation of maritime boundaries in the area where marine scientific research is to be conducted [10].

The consent may be refused in certain strictly defined conditions: if that project is of direct significance for the exploration and exploitation of natural resources [4]; if it involves the construction, operation or use of artificial islands, installations and structures [4]; if the information regarding the nature and objectives of the project is inaccurate or the contract statements from a prior research project have not been paid to the coastal state [4].

The states which intend to undertake marine scientific research in the Exclusive Economic Zone of a coastal state shall provide that state with a series of information regarding the project to conduct [4]. In accordance with Article 56 paragraph 1(iii), within the Exclusive Economic Zone, the coastal state has jurisdiction as provided for in the relevant provisions of this Convention with regard to protection and preservation of the marine environment. The relevant provisions to which reference is made are contained in Part XII. The coastal states shall adopt laws and regulations regarding the marine pollution arising from seabed activities, subject to their jurisdiction, and from artificial islands, installations and structures under their jurisdiction [4]. The states shall adopt laws and regulations on pollution of the marine environment

resulted from dumping [4]. The coastal states may, in respect of their Exclusive Economic Zones, adopt laws and regulations regarding the pollution from vessels [4]. The rights of the coastal state under UNCLOS is a novelty from the previous period where the only powers given to state were measures in the event of maritime accidents threatening or causing serious oil pollution and which were adopted under the 1969 International Convention relating to the intervention on the high seas in the event of a maritime accident [3].

Depending on the nature of pollution, the rights of the coastal state differ. Regarding installations and dumping, the coastal state has a large discretion and may adopt laws and regulations which are more stringent than those contained in international standards. As for pollution from ships, the powers afforded to the coastal state are more limited, being forced to comply with the international standards contained within the IMO conventions [1]. Where there is clear objective evidence that a vessel navigating in the Exclusive Economic Zone of a state has committed a violation of the applicable international laws and regulations concerning pollution, that state may institute proceedings, including detention of the vessel, in accordance with its laws [4].

The powers given to the coastal state are balanced by measures which prevent possible abuses on international shipping [5]. The ship shall be released even in the case of violation of the applicable laws and regulations or of the international rules and standards subject to prior bonding or other financial guarantee [4]. Proceedings to impose penalties in respect of any violation of applicable laws and regulations or of international rules and standards shall be suspended upon the taking of proceedings to impose penalties in respect of corresponding charges [4] by the flag State and only monetary penalties may be imposed [4].

3. THIRD STATES RIGHTS WITHIN THE EXCLUSIVE ECONOMIC ZONE

Within the Exclusive Economic Zone other states enjoy the freedom of navigation, over flight and laying of submarine cables and pipelines, as well as the freedom of using the sea for other internationally lawful purposes related to these freedoms and compatible with the other provisions of this Convention [4]. In exercising their rights and performing their duties under this Convention within the Exclusive Economic Zone, the 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 [4].

The rights given to third states are subject to a number of limitations. First, the rights and obligations of third states are governed by the provisions of Articles 88-115 applicable to the high seas as well as by other pertinent rules of international law in so far as they are not incompatible with the UNCLOS [4]. Secondly, third states are obliged to exercise these rights and freedoms with due regard for the interests of other states concerning activities taking place in this area [4]. There is no explicit delimitation based on security criteria afforded to the coastal state beyond those associated with the third state rights. The unique restriction in

conducting military activities within the Exclusive Economic Zone of another state will be subject to non-interference with the rights of other users [11]. Definitively, although it is no clear stated that military activities are among freedom of navigation, over flight and other legitimate uses of the sea available under Articles 58 and 97 from UNCLOS, the maritime powers have sought to ensure at negotiations for UNCLOS III that these military operations shall not be excluded from this area [12]. The United States insist upon the freedom of conducting military activities within the Exclusive Economic Zone, being concerned about the fact that its mobility and its naval and aerial access will be severely restricted by the international tendency of "broadening of the jurisdiction" [12]. Causes of concern are in sight. The military activities include manoeuvres of intervention forces, flying missions, military exercises, spatial and telecommunications activities, surveillance activities and intelligence gathering, collecting data on the marine environment, exercises and weapons testing [12; 8].

A number of states among which India, Pakistan, Bangladesh have questioned the right of other states to conduct military activities in the area based on the fact that these may threaten their national security and undermine their sovereignty upon resources [12]. The attempts made to reach a compromise have not yet found the answer. The meeting of Group 21 held between 15-18 September 2005 in Tokyo has reached an agreement concerning the *Guidelines related to navigation and over flight within the Economic Exclusive Zone* [12] but they are soft law and by consequence they lack practical utility.

Many states have chosen to delimitate security zones within the Exclusive Economic Zone with special reference to military activities [11]. Other states banned not only military activities, manoeuvres and weapons testing but they also imposed restriction on navigation and over flight in the interest of national security, in particular to prevent proliferation of weapons of mass power destruction [1]. Australia established a "Maritime Identification Zone" of 1000 nautical miles in which all ships, except agreement ships, are required to provide information before reaching an Australian port [1].

Another problem is represented by the ships carrying dangerous cargo within the Exclusive Economic Zone. Unlike provisions related to territorial sea contained by Article 23, there is no text law within UNCLOS which should regulate the navigation of ships transporting this type of cargo. By consequence, it is difficult to imagine the way in which the coastal states may claim it in order to regulate navigation of such ships [11]. Many states have reserved the right to exclude ships carrying dangerous goods, particularly nuclear material in transit to nuclear power plants, reprocessing plants and waste to disposal [1]. New Zealand, South Africa, Mauritius, Argentina, Columbia, Dominican Republic are among the states who have done so [1]. In the absence of compliance with the provisions of UNCLOS, justification was found in the provisions of the international environmental law and in particular, in the precautionary principle [1].

4. CONCLUSIONS

The Exclusive Economic Zone remains one of the most controversial areas recognized by the international law. Having already a tradition before the UNCLOS recognition of the current legal formula, the area is a source of disputes between third states and coastal states.

The need for security in the military and economic sense causes navigational and other activities restrictions imposed by the coastal state affecting other states. From the moment of the UNCLOS drafting, the coastal states fight for extensive rights within the Exclusive Economic Zone although they enjoy only theoretically of sovereign rights and not sovereignty in the plenary sense. On the other hand, its equally true that maritime powers insist upon their military presence (whatever their form including scientific studies) in the Exclusive Economic Zone of other states based on the freedoms recognised by the Convention and the lack of express interdiction of such activities. The ambiguity of the UNCLOS leaves room for interpretation. Justified or not, the actual tendency of the coastal state to impose its presence increasingly will remove the character of this maritime territory from its initial sense of sui generis area that provided a delicate balance between the rights of the coastal states and the ones of the third states.

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