

[DOI: 10.20472/IAC.2016.021.006](https://doi.org/10.20472/IAC.2016.021.006)

ENES CETİN

TURKISH NAVAL WAR COLLEGE, TURKEY

FUTURE OF EXCLUSIVE ECONOMIC ZONE

Abstract:

History shows us that strong states usually maritime nations are rigidly opposed to the limitation of the freedom of the seas, meanwhile some other states assert the limited use of the maritime domain. As a result of the trend towards increasing sovereignty of some states over seas, the concept of Exclusive Economic Zone (EEZ) emerged in 1982 United Nations Convention on the Law of the Sea (UNCLOS). The Convention provides certain economic rights and jurisdictions to the coastal states and sets forth some rights and duties to other states. However, the legal status of foreign military activities in the EEZ is ambiguous since it is not clearly defined in the Convention. As a consequence of this uncertainty, the legal status of the foreign military activities in the EEZ is interpreted from very different points of views by states. The diversity of the views causes conflicts for states from time to time. The above mentioned conflicts can affect the future of the EEZ which is at utmost importance for the use of the maritime domain. In this study; the history and the legal aspects of the EEZ should be assessed in general for predicting the future of the EEZ. Then, basic disputes over the legal status of foreign military activities in EEZ will be explored, and practices and interpretations of states will be mentioned briefly. Finally, this study will evaluate the issues about how the legal future of the EEZ might be shaped and how it should be.

Keywords:

Exclusive Economic Zone, Law of the Sea, Future, Military Activities, Freedom of the Seas, 1982 United Nations Convention on the Law of the Sea, International Law.

JEL Classification: K33

1. Introduction

This article includes review of literature, analysis and findings. The main goal of this article is to evaluate the issues about how the legal future of the EEZ might be shaped and how it should be.

Seas were used for transportation in the ancient times and then for fishing (Baykal, 1992-1993). By the means of the developing technology, today seas are used for numerous purposes.¹ In order to get more from the seas, it is necessary to have a great seapower and technology. Being strong at seas is an essential criteria to be more effective in the codifications of the international regulations related with the seas. However, this criteria is not enough on its own. Besides, the requests and needs of the other states must be taken into account as well.

To determine the distance of territorial waters, the methods used by states were “gun range” or “horizon distance” at early periods of history with regard to the communication capabilities, military efficiencies and technological opportunities (Baykal, 1992-1993). For determining this distance, states gave priority to their security rather than economic objectives.

With the effect of economic objectives like “fishing”, the idea of a fixed distance emerged which is rather acceptable for the international law of the sea (Extavour, 1981) (Baykal, 1992-1993).² On the other hand, codification of this fixed distance in the international law of the sea took a long time.

2. The Historical Development of EEZ Concept

In 1942, “*Treaty Relating to the Submarine Areas of the Gulf of Paria*” between Great Britain, Northern Ireland and Venezuela was signed. In Article 8 of the Treaty, state parties accepted to give the right to use or run natural resources in submarine areas beyond territorial waters to industrial companies (Treaty Between Great Britain and Northern Ireland and Venezuela Relating to the Submarine Areas of the Gulf of Paria (February 26, 1942)).³

In the 1945 Truman Proclamation, it is stated that national law will be applied in the zones known as high seas beyond territorial waters in order to protect fishing rights of USA. However, the width of these zones is not clearly defined or specified in the Proclamation (Truman Proclamation 2667/2668, 1945). After the Proclamation it can be

¹ For example; the world’s first floating wind turbine has been in use by Norway in Norwegian coast of the North Sea since 2009. (World’s first floating wind turbine opens in Norway, 2009)

² For example; 3 nautical miles.

³ Gulf of Paria is located between Venezuela and Trinidad and Tobago extending 80 miles to east-west and 40 miles to north-south directions.

observed that Latin American States declared fishing zones up to 200 miles (Bozkurt, 2006).⁴

The opening of the “*Pandora’s Box*” with the USA and England’s initiatives which were seapowers of that era led the coastal states to give more daring declarations on the maritime domain (Nye, 1983).

Slany claims that Truman Proclamation particularly concentrated on the control and jurisdiction on USA’s marine resources and there was no harm done in Proclamation to the principle of the freedom of the seas (Slany, 1983). According to Kraska; Treaty of Paria’s general approach is seen incompatible with the principle of the freedom of the seas, which was signed 3 years earlier than the Truman Proclamation (Kraska, 2011). It is claimed by Kraska that the origin of the coastal states’ sovereignty claims about the limitation of the high seas is not Truman Proclamation but the Treaty of Paria.

a. Unilateral and Multilateral Declarations

After the Treaty of Paria and Truman Proclamation, Chile on June 23, 1947 and Peru on August 1, 1948 asserted sovereignty claims in maritime zones beyond the territorial waters (Presidential Declaration Concerning Continental Shelf of June 23, 1947, *El Mercurio*, Santiago de Chile, and Presidential Decree No. 781 of August 1, 1947, *El Peruano: Diario Oficial*.Vol.107, No.1983).⁵

Latin American States promulgated a declaration together with a group of Arab States in 1949. This declaration claims increased jurisdictions of coastal states about oil reservoirs located in gulfs. Following the 2 month period of the declaration, the continental shelf was declared by 10 Arab states and emirates (Dahak, 1986).

Sovereignty and jurisdiction of coastal state in the zone of 200 miles from the coast has set forth by Santiago Declaration which has signed by Chile, Ecuador and Peru in Aug 18, 1952 (Declaration on the Maritime Zone, 1957). By this Declaration, sovereignty claims in the zones extending to 200 miles from the coast began to be mentioned in multilateral declarations.

Upon these increasing claims, the freedom of the high seas and the freedom of the straits which especially used for international transportation was undermined. States with the greatest seapowers began to feel threatened as a result of this situation (Kraska, 2011).

b. Conflicts Between Seapowers and Some Coastal States

⁴ The recognition of interests of the states related to fishing beyond the territorial waters can be seen as the first step of recognition of exclusive rights of the coastal states related to fishing in general (Extavour, 1981).

⁵ It is claimed by some academicians that the EEZ concept was appeared for the first time on states implementations with Chile’s Presidential Declaration in June 23, 1947 (Vicuna, 1989)

At the end of 1969, coastal states were invited to a conference by USA and USSR. The purpose of the conference was to discuss the issues of the limitation of the territorial waters with 12 miles, freedom of the passage through international straits, safety of special fishing activities of the coastal states in high seas beyond 12 miles. Thereupon, Secretary-General of the UN invited the Member States to the meeting which was held in June, 30 1970. The purpose of the meeting was to make legal arrangements by a new Conference on the law of the sea with the most possible participation of the states. As a reaction to this meeting before it was held, Declaration of Montevideo was signed in May 8, 1970 with the efforts of Uruguay that defends 200 miles. State parties were Argentina, Brazil, Ecuador, El Salvador, Nicaragua, Panama, Peru, Chile and Uruguay. After Declaration, with the proposal of Peru, in addition to the states which signed the Declaration, "Declaration of Latin American Countries on the Law of the Sea" adopted by states gathered at Lima in August 8, 1970. This Declaration was signed by Colombia, Dominican Republic, Guatemala, Honduras, Mexico and Montevideo Signatories.⁶

For the first time, with the "Declaration of Santa Domingo" announced in 1972, other states' rights and freedoms in the coastal states maritime jurisdiction areas were defined in an international document. (GAOR, 1972).

The concept of EEZ upheld by states in large scale before "The Third United Nations Conference on the Law of the Sea". Therefore, 200 miles territorial waters claims of coastal states began to be rare (Vicuna, 1989).

Finally, states gathered under "The Third United Nations Conference on the Law of the Sea" in 1973. The goal of this conference was to prevent states to declare the width of territorial waters set by themselves (Extavour, 1981) and discuss other deadlocks about seas. As a result of this Conference, "United Nations Convention on the Law of the Sea (UNCLOS)" was signed in 1982. Territorial waters width was accepted up to 12 miles under Article 3 of the Convention. Upon the request of many states, a new concept called as EEZ was set forth and defined with the same Convention (United Nations Convention on the Law of the Sea, 1982).⁷

3. Legal Status of EEZ Concept Within the Framework of 1982 UNCLOS

The concept of EEZ is set in 1982 UNCLOS between the Articles of 55 and 75. EEZ extends to 200 nautical miles from baselines where territorial sea measured from.⁸ UNCLOS defines some economical rights and jurisdictions⁹ for the coastal states over natural resources, whether living or non-living, of the waters superjacent to the seabed

⁶ Both Declaration has encouraged the EEZ (Lupinacci, 1984).

⁷ Turkey is not a state party of this Convention which entered in force on November 16, 1994.

⁸ **1982 UNCLOS**, Article 57.

⁹ For the recognized economical rights and jurisdictions of coastal states, see: **1982 UNCLOS**, Articles 56, 60, 61, 62, 73, 211 and 246.

and of the seabed and its subsoil. Besides this, some rights¹⁰ and obligations¹¹ in this zone is stated for other states.

According to doctrine, EEZ regime is considered as a part of international customary law apart from 1982 UNCLOS.¹²

Legally, it has been widely accepted in the doctrine that EEZ regime is neither in territorial sea regime nor in the high sea regime. It is a maritime zone which is subject to “*sui generis*” regime (Attard, 1987) (Vicuna, 1989) (Kwiatkowska, 1989).¹³ However, different views states some reasons that the concept of EEZ is closer to the concept of high sea regime in legal terms. According to this view, EEZ regulates limited rights and jurisdictions which are especially about economic activities in a specific maritime zone for coastal states. In addition, according to Article 58 (2) the high seas rights and other related international rules can be applied in EEZ in case they are not incompatible with the EEZ regulations. The idea of the EEZ concept is closer to the concept of high sea regime with regards to these reasons (Kwiatkowska, 1989) (Topsoy, 2012).

4. A Current Discussion on EEZ: Legal Status of Foreign Military Activities

Considering today’s technological developments, military activities conducted at seas spreads over a wide area. In this context, it can be said that the classification of military activities which differ from each other is very difficult. However, military activities conducted at sea can classified in general as follows:

- a. Navigation and transportation activities of warships or military aircrafts,
- b. Military exercises including live firing or not,
- c. Intelligence gathering activities,
- d. Deployment and use of military installations and structures and other devices,

¹⁰ The other States can use the rights of freedoms referred to in Article 87 of navigation and overflight and of the laying submarine cables, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of UNCLOS by Article 58.

¹¹ The only limitation on the high seas and thereby EEZ, referred in Article 87, due regard for the interests of other states in their exercise of the freedom of the high seas. (Toluner, 1989). Besides, according to Article 58 (3), foreign states shall have due regard to the rights and duties of the coastal state and shall comply with the laws and regulations adopted by the coastal state in accordance with the provisions of the Convention and other rules of international law in so far as they are not incompatible with Part V, in exercising their rights and performing their duties under the Convention in EEZ.

¹² For instance; 200 miles EEZ was declared in the Black Sea on December 5, 1986 with the Decree No: 86/11264 by Turkey who has not signed the 1982 UNCLOS (Turkish Official Gazette, 1986).

¹³ The Chairman of the Second Committee also emphasized in the preparation studies of UNCLOS that EEZ subject to the “*sui generis*” regime (Attard, 1987).

- e. Drilling of the seabed for military purposes,
- f. Military survey activities (Çetin, 2014).

Recently especially as a result of different policies of states, legal status of military activities conducted by other states in the coastal states' EEZ has become a hot topic of discussions. In general, it is observed that there are three different views about this issue. In the first view, all military activities conducted in EEZ is considered legal. On the contrary, second view defend the opinion of illegality of all military activities in the EEZ. In last view, it is asserted that legality of this issue should be determined by the way of studying military activities conducted in EEZ case by case (Çetin, 2014).

These views is seen in the policies and national law orders and practices of the states as well.¹⁴ For example, China recognizes the freedom of navigation and overflight in EEZ in Article 11 of "*Exclusive Economic Zone And Continental Shelf Act*" (Exclusive Economic Zone And Continental Shelf Act, 1998), but imposes obligation to have permission from the coastal state for all military activities of other states that would conducted in EEZ. Brazil with its Article 9 of "*Law of on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf*" dated January 4, 1993, military applications and exercises to be conducted by other states in their EEZ are subject to Brazil's permission (Law No. 8.617, 4 January 1993). Article 16 of Iran's "*Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea*" dated 1993, foreign states' military activities are prohibited in Iran's EEZ. In Uruguay's EEZ, all foreign military activities and operations are subject to the Uruguay's permission with regards to the Article 8 of "*Establishing the Boundaries of the Territorial Sea, the Adjacent Zone, the Exclusive Economic Zone, and the Continental Shelf Act*" dated 1998.

However, the subjects to make regulations on EEZ by the coastal states is limited in 1982 UNCLOS. Withi the Article 60 in the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of: artificial islands; installations and structures for economic purposes. In addition, Article 73 (1) indirectly gives jurisdiction to coastal states to make regulations in conformity with this Convention about exploring, exploiting, conserving and managing the living resources in EEZ. It is not explicitly defined in UNCLOS that the coastal states have the jurisdiction of regulating military activities in their EEZ.

According to Nordquist, Nandan and Rosenne (1993), coastal states jurisdictions for regulations in these Articles does not include the jurisdictions of regulations of military activities. However, it is asserted by some of the coastal states whose claims are above mentioned that it can be interpreted from the Convention to make national regulations about limiting military activities in their EEZ.

¹⁴ For example, as of June 2012, Bangladesh, Brazil, Burma, Cambodia, Cape Verde, China, Egypt, Haiti, India, Iran, Kenya, Malaysia, Maldives, Mauritius, North Korea, Pakistan, Portugal, Saudi Arabia, Somalia, Sri Lanka, Sudan, Syria, Thailand, United Arab Emirates, Uruguay, Venezuela, and Vietnam limit foreign military activities beyond territorial seas. Besides, these activities in this zone limited by Ecuador and Peru which claim the extension of their territorial seas beyond 12 miles (O'Rourke, 2015).

Interpretations of some Articles of the Convention from different views underlies the conflicts of legal dimension on this issue. There are some basic concepts which are referenced by both of the views. “*Peaceful purposes*” phrase which is included in different Articles¹⁵ of UNCLOS and in Article 4 (2)¹⁶ of Charter of United Nations (UN Charter, 1945) and “*due regard*”¹⁷ phrase which is included in different Articles of UNCLOS are not clearly defined. Because of this, varied interpretations of these phrases are the examples of the basic disputes over this issue.

Zhang claims that, any information gathered in EEZ for military purposes becomes a threat for the security of the coastal state. Thereby, these activities can not be conducted for “peaceful purposes” and it should be an obligation to get a permission of the coastal state for these activities (Zhang, 2010). According to Pedrozo who reflects American perspective on this issue; any act aimed at gathering information is prohibited in the innocent passage regime which regulates the passage of other states vessels through territorial waters but not for EEZ regime. So, intelligence gathering activities conducted in EEZ are not contrary to “peaceful purposes” principle defined in 1982 UNCLOS and in UN Chart (Pedrozo, 2010).

Coastal states such as Brazil, Uruguay, India, Pakistan, Bangladesh, Malaysia and China agree that the hydrographic or military surveys except marine scientific research (MSR) conducted in their EEZ are contrary to “peaceful purposes” principle. Some coastal states such as USA, Italy, Germany and the Netherlands assess these activities as a “freedom of the high seas” (Guoxing, 2009).

USA states that, balance is aimed between coastal state and the other states, with the term of “due regard” used within the Article 87 (2) of 1982 UNCLOS. USA also states that the coastal states must avoid unlawful interference on activities which are conducted by the other states in coastal states’ EEZ (Hayashi, 2005). On the contrary, China interpretes the term of “due regard” as to be considered the sovereignty, security and national interests of the coastal states by all other states. China also claims that, all kinds of activities which endangers the sovereignty, security and national interests of the coastal states should be considered in this context (A Report of the Tokyo Meeting, 2003).

The aircraft collision event between USA’s reconnaissance aircraft EP-3 and China’s aircraft F-8 which occurred in EEZ of China in April 2001, sets an example of the

¹⁵ For example, the use of high seas for “peaceful purposes” has been reserved in Article 58 (2) and 58 and 301 and in these articles it has been set forth to refrain from any threat or use of force against political independence or the territorial integrity of any State by

¹⁶ “Non-peaceful” activities are included in the Article 2 (4) of UN Chart. The signatories admitted to refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN by this Article.

¹⁷ It is set forth in UNCLOS that all states shall due regard the rights and duties of the coastal states in EEZ. However, the rights and duties that will be due regard are not explicitly specified. So, the term “due regard” is interpreted in different meanings by the states.

implementation of military activity conducted in EEZ.¹⁸ USA announced that the freedom of overflight had used by its aircraft EP-3. China stated that, intelligence flights are illegal in the international law and required warnings had been made to US' aircraft (Kaye, 2005). According to China, intelligence gathering activities can be conducted only in the armed conflict periods and intelligence activities which are conducted in EEZ means a clear violation of sovereign rights and jurisdictions of the coastal state (Kaye, 2005) (Valencia, 2005). According to USA, air space over EEZ is international air space in international customary law, thereby military activities conducted in this zone can not be limited (Roach, Smith, 1994).

States have legal arguments which supports their views on this subject and are differentiated according to interpretations. The legal arguments of both sides are legitimate to a certain extent with regards to international law. In order to reach a legal conclusion on this issue within the framework of the preparation studies of 1982 UNCLOS, it can be seen that there are no restrictions about foreign military activities conducting in EEZ, however there are no clear references to these activities as well. Nevertheless, it is assessed that the view defending the freedom of military activities in EEZ outweighs in the texts of Convention's preparation studies and in the final text.

Discussions on this issue still continues. Legal aspects of this discussions spread on a broad spectrum.¹⁹ However, to set an example in terms of the current discussions on the legal aspects of the EEZ, it is assessed that revealing interpretation differences related to the basic concepts of Convention briefly and generally is sufficient.

5. Conclusion

Spanning from the history to today, sovereignty claims for wider maritime domains were made by some states especially which were not seapowers and had long coasts lines. On contrary, the freedom of seas policies were followed by seapowers states due to get the most benefit from the sea.

As a result of the inherited discussions on the ideas of Grotius' "*mare liberium*" and Selden's "*mare clausum*"; traditional implementations and systems were replaced by the new regulations and institutions. One of them is the EEZ concept (Lupinacci, 1984).

The primary discussion that remains up-to-date about EEZ which was regulated in 1982 UNCLOS is the legal aspects of foreign military activities conducted in this zone. It can be assessed that the most important reason about this issue is that there are legal gaps

¹⁸ Chinese pilot lost his life after the collision and the US aircraft made an emergency landing on Hainan Island on a mandatory basis. (George V. Galdorisi, Alan G. Kaufman, 2002). These examples can be multiplied. US naval ships Bowditch, Impeccable and Victorious which were conducting surveying operations in China's EEZ intervened by Chinese ships and aircrafts in 2001, 2002 and 2009. US Cowpens was forced to alter course by Chinese aircraft carrier Lioning in 2013 and US maritime patrol aircraft P-8 intercepted by Chinese fighter in 2014 (O'Rourke, 2015).

¹⁹ For further information for examining the legal aspects of each of the military activities, see: (Çetin, 2014).

in the Convention about some definitions and regulations. Another reason is the developing military capabilities by advancing technology. From this perspective, there is a considerable difference between the military capabilities of the time Convention was signed and the prevailing ones. Especially the states which seek the limitation of foreign military activities in EEZ use this argument effectively.

The arguments set forth by the sides are legitimate to a certain extent. However, from detailed analysis of the 1982 UNCLOS, it is not wrong to say that the arguments of the view defending the freedom of the seas have a rather legal basis than the view defending limitation.

On the other hand, it is assessed that the dispute arises from a projection of “hegemonic wars” rather than legal aspects. From this point of view, the dispute can be terminated by the won side of the hegemonic war. There appears two alternatives regarding the future of the current dispute;

- a. Maintain the current conjuncture by postponing the issue,
- b. Conclude a new Treaty or additional protocol by the way of finding a common ground between the parties.

Apparently, the first alternative is already in force. The parties; for the reasons of economic, political and social considerations, are sustaining the level of the crisis of this emerging struggle for hegemony and postponing the issue. But, when comparing the causes of wars in history, the issue discussed today should never be underestimated at all, in terms of a cause of a war that may occur in the future.

There are some obstacles with regards to the second alternative. Even if concluding with a new international Treaty which regulates and defines the legal aspects of the foreign military activities in EEZ clearly, it cannot be predicted whether or to what extent this Treaty will lead to participation of the international community. However, in order to ensure the participation of the international community in case of such an initiative, first of all;

- a. Regulations and definitions of the treaty should be defined clearly,
- b. Security concerns of the states should be taken into account,
- c. In order to delineate the maritime jurisdiction areas of the coastal states on an equitable basis (*ex aequo et bono*), the unique (*sui generis*) nature of the seas should be taken into account with regards to their geographical locations,
- d. Compliance for the treaty from international community should be ensured and the states which are resistant to these regulations should be convinced.

Even though the ideas that that the Convention does not meet today's needs and a new Convention instead of 1982 UNCLOS should be sought might be seen as utopic in the current conjuncture, it should be accepted that no international Treaty lives forever. It is assessed that the future of EEZ depends on the result of the struggle for hegemony. However, if the winner applies a new regulation, it will not be easy for the winner to persuade the international community accept the new regulation.

Another factor to be taken into account to prospect the future of EEZ is the naval strategies of the actors who defends the limitation of the freedom of the seas. The platforms such as aircraft carriers will not as valuable as today when they will not be able to be used in thee EEZ of the other states. However, the states defending the limitation of the freedom of the seas do have such platforms and increasing their numbers.

Considering the all the arguments mentioned in this study, it is assessed that the EEZ regime will not convert to territorial waters regime and the limitaiton of the freedom of the seas is not probable in the near future.

In conclusion, even in case of a change of the hegemony in the future, would it be irrational not to defend the principle of the freedom of the seas by the new hegemonic power?

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