THE EXCLUSIVE ECONOMIC ZONE (EEZ) IN THE CONSTITUTION FOR THE OCEANS

Antonios Maniatis
Teaching Staff of the University of Nicosia

Abstract

The United Nations Convention on the Law of the Sea, called by the doctrine ‘’Constitution for the Oceans’’, has resulted from an important codification of this branch. This paper focuses on the novelty of the Law of the Sea, which consists in the Economic Exclusive Zone, widely known as EEZ. Coastal States, such as Peru and Iceland, attempted to create some exclusive fisheries zones against foreign fishing fleets. Not only did they manage to promote their fishing interests but later they contributed to the adoption of a new zone at the existent High Seas, the EEZ, in the Constitution for the Oceans. This zone is not only beneficial for fishery but also for the exploitation of the natural resources of the seabed and its subsoil, following the model of the zone of continental shelf, already introduced in the 1958 Geneva convention. Besides, African and developing countries managed the adoption of an extended right to enforcement of law and regulations of the coastal State in the EEZ, as far as fishery and pollution are concerned. It results that the EEZ, like the antecedent of the exclusive fisheries zone which has been recognized as an institution of the customary law, constitutes a kind of subversive modernization of the Law of the Sea. Both types of zones could be particularly beneficial to weak countries, such as Iceland and Cyprus.

Keywords: Constitution for the Oceans; Continental Shelf; Exclusive Economic Zone (EEZ); Exclusive Fisheries Zone / Exclusive Fishery Zone (EFZ); Fisheries Protection Zone (FPZ); Law of the Sea; Territorial Sea

Introduction

The modern International Law of the Sea emerged as customary law in the 17th century. This development is attributed to the fact that maritime States expressed their interest to
govern in the sea place. One of them was Venice, which had already managed to become the biggest place of commerce of the Christian West (Vergé – Franceschi).

After almost four centuries of customary nature, this branch has an impressive development, the last four decades, within the second phase of its codification, namely after the set of the four Geneva Conventions of 1958. This phase has to do with the United Nations Convention on the Law of the Sea (UNCLOS), concluded in 1982, which constitutes the first attempt to codify the Law of the Sea, in a single text. Therefore, this text is comparable to the formal Constitutions of the sovereign States, that is why the doctrine has called it “Constitution for the Oceans” (De Pooter). As modified, it includes all institutions of this branch, with the unique exception of a relatively new zone, of customary origin, the Exclusive Fisheries Zone or Exclusive Fishery Zone (EFZ). This zone secured increasingly wider support after the 1945 Truman Coastal Fisheries Proclamation (Molenaar, 2015). Well before the entry into force of the UNCLOS – probably by the early 1970s – a coastal State’s entitlement to sovereign rights and jurisdiction for fisheries purposes within a 200-nautical mile (nm) EFZ had crystallized into customary international law. The current paper focuses on a zone being newer than the EFZ and having the same age with the archaeological zone, previewed for the first time in the Constitution for the Oceans. It is about the Economic Exclusive Zone, widely known as EEZ, which constitutes the trend of current diplomacy. Anyway, both zones relevant to fishery could be considered as comparable to the aforementioned version of the contiguous zone. Indeed, the fishing sector of the economy and antiquities have become the major legal goods implicating the recent modernization of the Law of the Sea. However, the EEZ is almost exclusively an Exclusive Fishery Zone, namely an EFZ number II?

We suppose that the EEZ constitutes a subversive kind of modernization of the Law of the Sea.

Zones Prior and Related to the EEZ

The archaeological zone is a rather insufficient zone to prevent antiquities looting in the international seabed, off the Area (Nie, 2015), which informally may constitute an extended underwater museum (Maniatis, 2010). It has as its antecedent the contiguous zone and as a complementary set of rules those of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. For instance, article 94 of the 2004 Italian Code on cultural
goods and landscape has been characterized as an anticipation of the law ratifying the
UNESCO Convention, by imposing the application of the Annex of the Convention, entitled
“Rules concerning activities directed at underwater cultural heritage”, for all historical and
archaeological objects found in the seabed backdrops extended till the 12th nautical mile from
the external limit of the territorial sea (Ferretti, 2016).

As far as the EEZ is concerned, it has various historical antecedents, like the territorial sea,
which was beneficial to the coastal States not only for the primary scope of national defense
but also for exclusive exploitation of the fishing stocks. The idea of the EEZ emerges in the
late 1940s, coming from Peru, which nowadays constitutes the biggest fishery of the world
(Cury), Chile and Ecuador, countries that wanted to be endowed with the privilege to exploit
the natural resources at a minimal distance of 200 nautical miles (370,4 km) from their coasts,
as it results from the 1952 Santiago Declaration (De Pooter). Various factors are proved to be
useful to interpret this limit, which was not chosen by chance. The distance on the matter
makes it possible to include the Humboldt maritime current, which is born in the Antarctic
and rises along the Pacific coast of South America. In this cold current (being rich in
plankton), whose waters are full of fish, South American fishermen have exercised their
activity since centuries and the authors of the Santiago Declaration want to preserve this
activity. In the 1970s, the new States of Africa and Asia make use of this revindication for
their own interests, to ensure the control of their fishing resources against the fishing
capabilities of the developed countries. Finally, the practice was developed to such a pitch
that it was consecrated in the UNCLOS.

It results that the de facto initial consecration of an informal EEZ makes part of the final
phase of the customary status of the Law of the Sea, namely it is prior to the Geneva
codification. After the Geneva Convention on the continental shelf, which is regarded as the
great success among the 4 Conventions of that first attempt of codification of the Law of the
Sea, some States had a disadvantage against the others and attempted to ensure other
resources. It was about the natural resources of the sea place, over the seabed. Anyway, due to
the advent of technology, frequently some fishing fleets are installed out of the territorial
waters, damage for a long period of time (5-10 years) the fry and make poorer the fishery
fields, even within the territorial sea of a coastal State (Roukounas, 2006).

It is also to signalize that Iceland contributed significantly to the creation of the (informal)
EEZ, with its initiatives similar to those of the countries of Latin America, although it wanted
to exploit a 50-nautical mile exclusive fisheries zone. Besides the so-called ‘’cod wars’, it is also notable that even after them, the disputes of Iceland against the UK were not fully inexistent. For instance, in 1983, this State made use of its Coastguard to prevent the UK fishing fleet from fishing in the area in question. However, the UK, which had won a difficult war against Argentina the year before, could not tolerate such a development. So, the Margaret Hilda Thatcher’s government ordered the British navy to accompany the private boats to ensure these activities. As Iceland is the unique country of the political part of the NATO which is deprived of armed forces, it had no alternative but to make use of the Coastguard. When the Coastguard forces announced that the entry in the disputed area was prohibited, the British responded with warning shots and so the Icelanders retreated. However, this small nation, in terms of number of citizens, managed to protect its own interests through diplomacy, thanks to its bonds with the USA. It is quite impressive that a weak fishing nation (for instance, deprived of military forces) could proceed to unilateral measures, out of the Law of the Sea, to protect its own economic interests. Therefore, it contributed to the consecration not only of the institution of the EEZ but also to the recognition of the EFZ of some coastal States. For instance, Iceland's EFZ has an area of 760,000 square km, seven times the area of Iceland itself. This is crucial for the national economy of this State, given that some of the largest fish stocks in the North Atlantic are found in Icelandic waters, including the cod stock, which is the most important stock for the country.

In a similar way, Spain has recently acquired a ‘’fishery protection zone’’ in the Mediterranean, in which Malta (25 nautical miles) and Algeria (52 nautical miles) have already adopted such a zone (Alexopoulos and Fournaraki, 2015). The Arbitrage Tribunal in the case Canada – France, on the elaboration of fishes in the St Laurent Bay (1986), admitted the existence of the fishery zone and characterized it as equivalent to the EEZ in the matters of fishing resources. Besides, the International Court of Justice in the case of the delineation of the sea area between Greenland and the Jan Mayen island (1993) recognized the 200 -nautical mile fishery zone as an institution of the customary law, which has been formed and is valid independently to the UNCLOS. In a similar way, the doctrine signalizes that nothing in general international law suggests that the new customary right to an EEZ affected the pre-existing (customary) right to an EFZ (Molenaar, 2015). In line with the principle in maiore stat minus (who can do more can also do less), some coastal States continue to claim only EFZs. Others first established an EFZ and later also established an EEZ for the same waters ,
without revoking the EFZ (e.g. the Netherlands). While this approach can be preferred for domestic legislative reasons, from the perspective of international law such a coastal State is best categorized as having established an EEZ, as this is the more comprehensive zone. So, nowadays States have been endowed with a pluralism of zones relevant to fishery, off their territorial waters. They may decide to establish an EEZ adjacent to part of their territory and an EFZ to another part. For instance, Norway has introduced an Economic Zone (a de facto EEZ) off its mainland, a Fishery Zone (a de facto EFZ) off Jan Mayen, a Fisheries Protection Zone (FPZ) off Svalbard, but no 200 nm maritime zones at all off its (claimed) territories in the Southern Ocean and Antarctica.

The doctrine has concluded that the FPZ established by Norway off Svalbard is a new maritime zone, which relies on the customary right to an EFZ but also takes account of the diverging views among States on the spatial scope of the Spitsbergen Treaty ((Molenaar, 2015). While several other coastal States have also established FPZs, their enactments show that these zones really consist in de facto EFZs. For instance, this is the case of Spain, which adopted Royal Decree No. 1315/1997, of 1 August 1997 ‘establishing a Fisheries Protection Zone in the Mediterranean Sea’ whilst the same country established an EEZ off its coast in the Mediterranean in 2013, but without formally revoking its FPZ.

According to an approach, the ‘‘fishery zones’’, ‘fisheries protection zones’’, ‘‘ecological protection zones’’ and ecological and fishery protection zones’’ have been claimed by a number of Mediterranean coastal States and can therefore in terms of UNCLOS be understood to amount to a sub-category of EEZ (MRAG et al., 2013). Because such zones derive from the rights conferred on coastal States to claim an EEZ, they are described as ‘‘derivative zones’’.

**The Rights of the Coastal State to the EEZ**

According to article 55 of the UNCLOS, ‘‘The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention’’. The doctrine is not unanimous on the question of the legal nature of the EEZ, particularly as for its status as a thoroughly new zone, independent to the High Seas.

The coastal State has the following two categories of rights in the EEZ, according to article
56 of the UNCLOS:

(a) “sovereign rights”, for exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil. These rights “emerging” from the older, similar zone of the continental shelf unify the regime of the seabed and its subsoil with the regime of the superjacent waters in a 188-nautical mile breadth beyond the classical zone of the territorial waters (Roukounas, 2006). “Sovereign rights” are also previewed by the UNCLOS with regards to other activities for the economic exploitation and exploration of the EEZ, such as the production of energy from the water, currents and winds;

(b) “jurisdiction” as provided for in the relevant provisions of this Convention regarding the establishment and use of artificial islands, installations and structures, the marine scientific research and the protection and preservation of the sea environment from the pollution.

The doctrine assumes that it is too early to distinguish the difference between sovereign rights and jurisdiction (Roukounas, 2006). The key point is that the Convention allows a very limited merge for other countries to fish or in general to exploit the zone without the explicit consensus of the coastal State. Furthermore, the jurisdiction of this State in the matter of the confrontation of the pollution becomes more and more extended.

The Right to Intervention of the Coastal State in the EEZ

Before the UNCLOS, the intervention of foreign ships in the High Seas was merely the exception, which was introduced through a bilateral or regional convention. In virtue of this text, there is a significant enforcement of the right to such an intervention in the specific zone of EEZ (former zone of the High Seas) for illegal fishery and pollution, whilst the consensus of the flag State is not necessary. This regime has been regarded as a success of the African States and generally of the developing countries (Roukounas 2006). According to article 73 of the UNCLOS,

“I. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.
2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed’.

Lastly, it is important to point out that in the comparable case of the EEZ of the Republic of Cyprus in 2018, the Turkish war navy illegally impeded the preparation of exploitation of the seabed by an Italian company. Cyprus had been prudent enough to make business not only with Italian partners but also with the USA and French ones, so Turkey did not manage to impose the “law of the mighty” against the American company. The adventures of Cyprus highlight a very important dimension of the EEZ, beyond its obvious usefulness for fishery and other aspects of economy: the geopolitical interests of the coastal State, let alone in the “open market” of the global economy.

**Conclusion**

The paper hypothesis on the non-conventional modernization of the Law of the Sea has been fully confirmed. Indeed, the EEZ constitutes a quite original and subversive modernization of the Law of the Sea, let alone the fact that it shares a common antecedent with the EFZ. As far as its “prehistory” is concerned, the EFZ has been gained de facto, by weak countries against extremely powerful ones. This is the case of Iceland mainly against the UK, let alone the fact that the “fishery protection zone” later gained jurisdictional recognition. The third United Nations Conference on the Law of the Sea (UNCLOS III) formally commenced in 1973 among widespread but diverging State practice on claims to breadths of territorial seas and EFZs (Molenaar, 2015). An early proposal at UNCLOS III for a 200 nm EEZ soon made its way into State practice and at least its general aspects had already become part of customary international law before the end of that Conference.

Besides, it is to point out that weak countries, such as Cyprus, have recently begun to enact a significant role in the international scene through the acquisition and exploitation of their EEZ. Both types of the aforementioned zones could be particularly beneficial to weak countries, such as Iceland and Cyprus.
The Law of the Sea is an interesting and particularly dynamic branch of law, in which weak countries and customary rules can beat superpowers and positive law, respectively...

References


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