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## **Freedom of the high seas in the Exclusive Economic Zone**

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*This article explores the EEZ regime described in Part V of UNCLOS and reviews the extent to which the freedom of the high seas applies in the EEZ.*

The United Nations Convention on the Law of the Sea 1982 (UNCLOS) divides the oceans into maritime zones each with corresponding rights, duties and jurisdictions of coastal and user states. Three key principles underpin UNCLOS: territorial sovereignty, freedom of the high seas, and the common heritage of mankind. These principles and varying degrees of their implementation in the maritime zones (Figure 1) have been established for the purpose of achieving an equitable balance between the interests of coastal and user states.

The common heritage of mankind principle applies in what is designated *The Area* and described as the seabed, ocean floor and subsoil beyond national jurisdiction. This principle ensures that there remains a region common to and for the benefit of all mankind. The principle of territorial sovereignty in its most undiluted form finds expression on land and in internal waters. Its strength tapers off further away from land. Likewise, the principle of freedom of the high seas is most undiluted in the high seas and is increasingly restricted landwards. The concept of sovereign rights is its compromise with territorial sovereignty in the Exclusive Economic Zone (EEZ) and the continental shelf. These principles guide state relations in addressing issues such as ownership to ocean spaces, resources and stewardship of the environment.

Principles	<b>Territorial Sovereignty</b>	<b>Freedom of the High Seas</b>			<b>Common Heritage of Mankind</b>
Airspace					
Water Column	<b>Territorial Sea</b>	Contiguous Zone	Exclusive Economic Zone	<b>High Seas</b>	
Seabed & Subsoil	<b>Land</b>	Continental Shelf		Extended Continental Shelf	<b>The Area</b>
Baseline	12NM	24NM	200NM	350NM	

**Figure 1:** Expression of UNCLOS principles in the maritime zones

The EEZ refers to the maritime zone beyond the territorial sea (Article 55) but not extending beyond 200NM from baselines (Article 58). Read together with Articles 78, 86 and 89, it would appear that the EEZ has neither residual territorial sea nor residual high seas character. Part V is best understood on the premise that it establishes a unique regime of its own – a transition zone of sorts between the territorial and the high seas, where a balance is sought between the jurisdictions of coastal and flag states, on a case-by-case basis in accordance with the formula described in Article 59.

The rights, duties and jurisdictions of coastal states in the EEZ are specified in Article 56 where they have the sovereign right for the economic exploitation of the natural living and non-living resources of the EEZ. Coastal states have jurisdiction (law-making and enforcement) pertaining to the establishment and use of artificial islands, installations and structures and conduct of marine scientific research. They have a duty towards the protection and preservation of the marine environment in EEZ (Article 56(1) (b)) and to ensure the safety of navigation with regard to the artificial islands, installations and structures constructed within the EEZ (Article 60(3)).

In exercising their rights and performance of duties in accordance with the EEZ regime, coastal states must have due regard to the rights and duties of other states and act in a manner consistent with the provisions of UNCLOS. Also, in exercising their sovereign rights, coastal states may enforce laws consistent with UNCLOS (Article 73).

Article 58 provides that all states enjoy the freedom of navigation, overflight, and of laying submarine cables and pipes in the EEZ, and other internationally lawful uses of the sea related to these freedoms and compatible with other provisions of the Convention. It should be noted that the article only makes reference to the freedom of navigation, overflight and laying of submarine cables and pipes. The freedom to construct artificial islands and installations in the EEZ is an exclusive right of the coastal state which other states do not enjoy (Art.60). Other states also do not enjoy the freedom to fish in the EEZ as this would be incompatible with Part V if given this

freedom. The freedom to conduct marine scientific research is subject to the coastal state's right to regulate, authorise and conduct scientific research in its EEZ (Article 246(1)). The coastal state shall normally allow the conduct of scientific research in its EEZ for peaceful purposes and to increase scientific knowledge of the marine environment for the benefit of all mankind (Article 246(3)); but it has the discretion to withhold consent to the conduct of marine scientific research directed towards exploitation of natural resources, or is likely to introduce harmful substances to the marine environment (Article 246(5)).

There are varying degrees to the exercise of the right to freedom of navigation depending on the passage regime applicable within each maritime zone (Table 1). In the case of the EEZ, freedom of navigation is read subject to Articles 58 and 59.

Maritime Zones	Territorial Sea	Archipelagic waters	Straits used for international navigation	EEZ	High Seas
Passage regimes in the maritime zones	Innocent passage	Innocent passage/ archipelagic sea lane passage	Transit passage/ unsuspendable innocent passage	Limited freedom of navigation and overflight	Freedom of navigation and overflight

**Table 1: Passage regimes in the maritime zones**

In exercising the limited high seas freedoms in the EEZ, flag states must comply with duties described in Articles 88 – 115, which must be read in a manner compatible with Part V (Article 58(2)).

One ongoing issue in relation to the freedom of the high seas in the EEZ relates to military activities in another State's EEZ. Before the EEZ regime was created, waters beyond the territorial seas were characterised as the high seas and open to all States. During the negotiation of UNCLOS and the formal creation of the EEZ regime, military activities in another State's EEZ were a point of contention among coastal and maritime States resulting in a compromise, and ambiguity, of the legal status of military operations in foreign EEZ. Competing views on the definition, scope and nature of military activities among States have led to differing practices on permitting and regulating military activities in their EEZ.

Maritime States such as the US, Germany, Italy, the UK and the Netherlands consider that military activities are not prohibited by the EEZ regime under UNCLOS and therefore permissible as part of *freedom of navigation and overflight* and *other international lawful uses of the sea related to these freedoms...* In contrast, some Coastal States such as Brazil, China, Bangladesh, India, Malaysia and Pakistan subscribe to the view that UNCLOS does not authorise other States to carry out military exercises and manoeuvres and that a Coastal State's prior consent is needed for such activities to be carried out.

Article 59 provides for the basis of resolution of conflicts on areas of rights or jurisdictions on which UNCLOS is silent, which is on the basis of equity and in light of all relevant circumstances taking into account interests involved. Hence, it doesn't necessarily follow that if something is not specifically mentioned in Part V (EEZ), it automatically falls under Part VII

(high seas). Further, Article 297(1) (a) and (b) provide that any dispute concerning the interpretation or application of UNCLOS on the exercise of sovereign rights by a Coastal State, including allegations of contravention of freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines or other international lawful uses of the sea specified in Article 58 either by Coastal State or User State, shall be subject to compulsory dispute settlement under Section 2 of Part XV.

In conclusion, the EEZ regime should not be approached from the basis that it has either a residual territorial sea or a residual high seas character. In attempting to balance interests of coastal states and flag states, UNCLOS has created a unique regime which permits the exercise of some high seas freedoms and their corresponding duties in the EEZ.