Chapter Six

Coastal State Jurisdiction and High Seas Freedoms in the EEZ in the Light of the *Saiga* Case

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*Introduction*

Some activities in the exclusive economic zone (EEZ) are clearly subject to the jurisdiction of the coastal State; others clearly represent the exercise of high seas freedoms. Occasionally, it is not clear on which side of the line a particular activity falls. My chapter examines this interface between coastal state jurisdiction and high seas freedoms in the EEZ. It does so in the light of the *Saiga* case in which the International Tribunal for the Law of the Sea addressed the issue of bunkering. The Tribunal considered the extent to which a coastal State was entitled to subject the bunkering of fishing vessels in its EEZ to its jurisdiction. However, the Tribunal decided this issue on a very narrow point, leaving the general question of bunkering largely unanswered. As a result, the interpretation of the LOS Convention and State practice remain important factors.

As well as bunkering, several other activities in the EEZ raise similar issues of where to draw the line between coastal State jurisdiction and high seas freedoms. Examples include the filleting, transport and trans-shipment of fish, three activities that have also been involved in cases before international courts and tribunals. Accordingly, my paper will look at all the relevant cases, as well as the provisions in the LOS Convention and State practice. On this basis, this chapter will suggest how and where the lines should be drawn.

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1 ITLOS Reports 1999, p. 4. An examination of the question of foreign military or naval activities in the EEZ is beyond the scope of this paper.

I. Some Diplomatic or Legal History of the EEZ

One of the most technically difficult and controversial issues at the Third UN Conference on the Law of the Sea during the 1970s was how to introduce into the existing law a new zone situated between the territorial sea and the high seas. The problem was made more difficult by the demand that this new zone should be more than a simple resource zone. To the overwhelming majority of Delegations in 1973, these waters between the 12 mile limit and the 200 mile line had the status of high seas. The freedom of navigation, in particular, remained vital for all manner of reasons and had to be preserved. Several rival proposals were tabled, for a Patrimonial Sea and for an EEZ. The eventual solution to this major problem emerged from the Evensen Group and was incorporated into the Revised Single Negotiating Text (RSNT) in 1976. Coastal State jurisdiction over the living resources of the EEZ was provided for in Article 56, read with Articles 61 to 73. This ended the general freedom to fish in those waters that became EEZs. Other high seas freedoms were protected in the EEZ by the detailed terms of Article 58. This was a negotiated package which did not change in any essentials during the remaining years of the Conference. The package was tied together by Article 59 produced by the “Castaneda Group” and addressing the new, unknown or overlooked aspects.

II. The Relevant Articles of the Convention

Looking more closely at the key articles in the solution to the problem, Article 56 provides that in the EEZ the coastal State has “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and its subsoil, and 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.” These words were the result of thorough debate and confer extensive powers on the coastal State. Indeed, it is worth recalling that when, in 1956, the International Law Commission put forward the concept of “sovereign rights” in regard to the resources of the continental shelf, it added in its Commentary that the term covered “all rights necessary for and connected

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3 Such was the pent-up pressure for wider limits, especially from fisheries interests in coastal States, that the legal concept of the EEZ was introduced into customary international law on the basis of State practice in 1977, fully 17 years before the entry into force of the Convention on the Law of the Sea in 1994. Very many coastal States enacted legislation based to a large extent of the RSNT advancing claims to generally exclusive rights over the living resources of the proclaimed EEZ; and other States, especially affected States, did not protest, often because they were establishing their own zones. The late 1970s were a remarkable period in the evolution of the law of the sea.