CHAPTER TWO


Ian Townsend-Gault*

INTRODUCTION

In 1956, Professor Josef L. Kunz of the University of Ohio published a paper in the American Journal of International Law, responding to the proliferation of State claims to the continental shelf and the natural resources of its seabed and subsoil.1 If this phraseology seems overly broad, referring as it does to claims to the shelf, and then seabed and subsoil resources, this is because following the Truman Proclamation of 1945,2 which was somewhat studied as to the precise nature and extent of the rights being claimed therein, States which claimed to follow the American lead were very much less restrained. There were claims, sometimes expressed in terms of sovereignty, over the shelf and superjacent waters. Alternatively, there were claims that sovereignty merely with respect to the natural propagation of the landmass. For Professor Kunz, these developments sounded the death knell of the ‘Freedom of the Seas’, an article of faith for international lawyers, as he reminded his readers, which dated back to the time of Grotius.3

The present author encountered this paper as a law student, in the context of a course on oil and gas law, and since this was at a British university, our focus was

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* Director, Southeast Asian Legal Studies, Faculty of Law, University of British Columbia, Canada.
3 Hugo Grotius, De Mare Liberum (Ralph Magoffin translation) (Oxford: Oxford University Press, 1916).
almost exclusively on the North Sea. This was in the mid-1970s, when the Third United Nations Conference on the Law of the Sea (UNCLOS III) was still meeting. So far as we were concerned, the applicable rules of international law had been codified and developed by the Convention on the Continental Shelf (Continental Shelf Convention). We looked back to the Truman Proclamation, and traced the development of state practice from then, through the First United Nations Conference on the Law of the Sea, to what was then the present day. Professor Kunz’s lament seemed rather quaint to us, a lone figure bewailing and development which had been endorsed, so far as we could see then, by the entire international community. A development, moreover, which had started to pay dividends for the North Sea countries and beyond, and would of course transform the economy of States such as Norway. This was no time to be harking back centuries, and besides, wasn’t it the case that the ‘Freedom of the Seas’ as Grotius understood it remained more or less intact?

One contemporary event which might have disturbed this complacent notion was the fact that the 200 nautical mile exclusive fishing zone was in the process of evolving from a preoccupation of a handful of countries of comparatively slight geostrategic importance and into the mainstream of state practice, and hence customary international law. Even as the arguments of the proponents of these zones gathered steam, it appeared that the ‘Freedom of the Seas’, meaning unrestricted fisheries beyond territorial waters, might come at a hefty ecological price. If one of the rationales for the doctrine of the continental shelf was the need for control over resource activities, then who better to exercise this but the adjacent coastal State, the same argument could be applied to living resource exploitation in the superjacent waters. The proposals for the exclusive economic zone emanating from the Third Conference seemed a logical extension of such ways of thinking.

One of the most powerful motivating factors that led to the calling of the Third Conference was the need to place firm limits on the nature and extent of State jurisdiction over maritime areas. By the same token, marine areas seaward of those limits, and their resources, could not be claimed by any State. At the same time, it was understood that despite its all-embracing title, the regime of the EEZ allocated some rights to coastal States but left others untouched. Such rights were governed, in other words, by what was left of the ‘Freedom of the Seas’. Like its companion regime governing the continental shelf, with which it overlaps in large part, the EEZ was seen primarily as one governing resource activities, although it

4 Convention on the Continental Shelf, opened for signature 29 April 1958, entered into force 10 June 1964, 499 UNTS 311 (Continental Shelf Convention).

5 Mention should be made here of the “companion” Truman Proclamation issued on the same day whereby The United States similarly claimed the right to designate fishery conservation zones beyond its claimed territorial sea. The Proclamation is reprinted in 40 American Journal of International Law, Official Documents: 45.