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THE EXCLUSIVE ECONOMIC ZONE: A LOOK AT INTERNATIONAL LAW USES FOR OTHER STATES

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INTRODUCTION

In order to have a clear appreciation of the uses for other States in an exclusive economic zone ("the EEZ"), there is need for clarity on what "other states" contemplates.

From the onset, it must be stated that Article 58(1) of the Law of the Sea Convention ("the LOSC"), provides as follows :

... all states, whether coastal or landlocked enjoy . . . the freedoms referred to in Article 87¹ of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms.

The epithet "exclusive" may therefore, strictly speaking be a misnomer, since it creates the impression that other States except the coastal States do not have any rights and duties in that zone.² This view is fortified by the provisions of Article 125(1) of LOSC which is in the following terms :

Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the seas and the common heritage of mankind.

Hence, it should be appreciated that the EEZ is a *sui generis* functional zone with neither a residual high seas character nor a territorial seas character, to obviate a presumption arising that, "any activity not falling within the clearly defined rights of non-coastal States would come under the jurisdiction of the coastal State".³ However, these freedoms may not be exercised arbitrarily, as there must be "due regard for the interests of other States".⁴

These uses will now be dealt with seriatim, and it is proposed to discuss any possible problems associated with each particular use.

NAVIGATION

The freedom of navigation entails that "every State, whether coastal or landlocked has the right to sail ships flying its flag on the high seas".⁵ Nevertheless, the coastal State retains

1 In addition to the freedoms enumerated in Article 58(1), Article 87(1) mentions the freedom to construct artificial islands and other installations, freedom of fishing and of scientific research. Hence, there are in fact uses which other States enjoy, albeit under certain conditions. See also note 2 *infra*, and Article 2 of the High Seas Convention.

2 D. P. O'Connell, *The International Law of the Sea*, Vol I, Oxford (1982) at p. 563 says, "The economic uses of the EEZ with respect to the non-living resources thereof are exclusive to the coastal State, but this is not so with respect to the living resources. In this respect the EEZ is a preferential fishery zone." (emphasis added).

3 Churchill and Lowe, *The Law of the Sea*. Manchester (1983) at p.123.

4 Art.87(2). Article 58(3) is particularly important as it lays a duty on States exercising their rights in the EEZ to "have due regard to the rights and duties of the coastal State and [to] comply with the laws and regulations adopted by the coastal State. . . and other rules of international law."

5 Art. 90.

powers of pollution control.⁶ It is relevant to note that in terms of Article 88 of LOSC the high seas shall be used for "peaceful purposes" and, as such, any aggression-orientated navigation may not be undertaken in the EEZ.

It is therefore, arguable that naval manoeuvres and weapons testing, which are *prima facie* uses related to navigation, may not be peaceful uses, and a coastal State would be within its rights to protest against these activities taking place in its EEZ.⁷ In any event, it is likely that such actions could be viewed as breaches of Article 192 of LOSC whose aim is to "protect and preserve the marine environment", since they are likely to result in ecological harm.

While a duty exists on a coastal State to avoid anything which might amount to an "unjustifiable interference with navigation",⁸ and more particularly, refraining from constructing artificial islands or other installations where they may interfere with "the use of recognised sea lanes essential to international navigation",⁹ in practice such structures may inhibit the freedom of navigation.

Theoretically, all States including land-locked States enjoy freedom of navigation in the EEZ, but in practice, as one commentator noted,

... [t]he access of landlocked States to and from the sea — on which the effective exercise of these rights and freedoms thus hinges — in turn depends on whether the States concerned enjoy freedom of transit through the countries by whose territories they are separated from the sea and on whether their vessels may freely use the appropriate maritime transit ports.¹⁰

It should be noted that Article 125(1) also provides that :

... landlocked States *shall* enjoy freedom of transit through the territory of the transit States by all means of transport (emphasis added).

Thus, it may be argued that transit rights inherently flow from the existence of the freedom of navigation. However, an equally convincing contention could be made that a sovereign State could deny transit rights if it has good reason to do so, for instance, if granting such rights would expose it to a threat.¹¹ The inevitable conclusion is that landlocked States

6 Arts.210(5), 216, 211(5) and (6), 220, 234, 208, 214.

7 Attard, *The Exclusive Economic Zone in International Law*, Oxford (1987) at p.68 remarks that "Article 88 could be constructed to give preference to peaceful activities over military ones in case of competing uses." This view is preferable. General guidance may be obtained from article 2(4) of the United Nations Charter, which requires States "to refrain from any threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Charter".

8 Art.78(2).

9 Art.60(7).

10 L.C. Calflisch : "Landlocked States and their Access to and from the Sea." (1978)49 BYIL 71 at p.72. See also Uys Van Zyl, "Access to the Sea for Land-locked States" (1988). *Sea Changes* p.128. The author discusses various methods which may be employed to guarantee transit for land-locked States, including granting an international servitude, which is "a real right whereby the territory of another State can be 'used' on a permanent basis for a particular purpose. Such servitude might include the actual grant of a corridor linking the territory of the land-locked State with the sea." Note, Zimbabwe and Mozambique might expand the scope of the Beira Corridor concept along the lines suggested by the author.

11 An immediate example is the relationship between South Africa and Zimbabwe, until recently, when Zimbabwe was housing ANC and PAC cadres engaged in sabotage activities to destabilise the South African government. At that stage, it may be argued that South Africa would have had good political ground for denying Zimbabwe transit rights and port facilities if Zimbabwe had wanted to exercise freedom of navigation via South Africa.

would have to depend on their coastal neighbours granting them generous transit and port privileges,¹² more so, considering that the *Right of Passage Case*¹³ did not settle that particular problem.

Moreover, such transit rights have to be exercised in terms of mutual agreement if conflict is to be avoided.¹⁴

Therefore, as a matter of international maritime law, neither the High Seas Convention nor LOSC provide for an unqualified limitation on the territorial sovereignty of the transit State allowing access to the freedom of the seas.

As such, the right could very well be of academic significance *vis-a-vis* the land-locked States.¹⁵

OVERFLIGHT

The right of flight, as with navigation, is enjoyed subject to the rights of other States. Consequently, a coastal State's right to construct artificial islands and installations might make it imperative to avoid low flying which could interfere with these structures. Similarly, a coastal State has the right to make laws regulating the dumping of waste in the EEZ,¹⁶ or preventing and controlling pollution of the marine environment through the atmosphere.¹⁷

It should be emphasised that aircraft overflying an EEZ are also required to comply with the Rules of Air laid down by the International Civil Aviation Organisation in terms of the Convention on International Civil Aviation 1944 which are concerned with air navigation above the high seas. As previously noted in respect of the freedom of navigation, airborne military exercises above the EEZ may be incompatible with the use for "peaceful purposes",¹⁸ and in fact may contravene the provisions dealing with the prevention of pollution which may endanger the marine environment.

12 Calflish *supra* at p.79. See also, D. J. Divine, "Southern Africa and the Law of the Sea: Problems Common, Uncommon and Unique" *Acta Juridica* (1986) p.30.

13 *Case concerning Right of Passage over Indian Territory (Portugal-vs-India)*. Judgement of 12 April 1960, ICJ Reports, 46.

14 In this regard, note that Art.3 of the High Seas Convention provides as follows: "In order to enjoy freedom of the High Seas on equal terms with coastal States, States having no seacoast should have free access to the sea. To this end States situated between the sea and a State having no seacoast shall *by common agreement* with the latter . . . accord [that State] *on the basis of reciprocity*, free transit through their territory . . . and [to that State's ships] access to seaports and the use of such ports" (emphasis added)

See also, Art.125 of LOSC which provides that "the terms and modalities for exercising freedom of transit shall be agreed between the landlocked States and transit States concerned through bilateral, subregional or regional agreement" and the transit States reserve the right to "take all the necessary measures to ensure that the rights and facilities provided for . . . landlocked States shall in no way infringe their legitimate interests" (emphasis added).

15 Calflish *supra* at p.83 rightly notes that the removal of transit obstacles for landlocked States "is a matter which remains outside the realm of the law of the sea and should thus form the object of special agreements."

16 Art.210.

17 Art.212.

18 In terms of Article 298(1)(b) disputes concerning naval and aerial military activities are exempted from compulsory settlement. The shortcomings of this, is that an opportunity may not arise for an authoritative arbitral tribunal to make a definitive statement on what constitutes "peaceful purposes".

However, it should be noted that in terms of Article 78 (1) the coastal State's continental shelf rights do not affect the legal status of the airspace above it,¹⁹ and consequently, this provision has the effect of enhancing the freedom of overflight.

LAYING OF SUBMARINE CABLES AND PIPELINES

In addition to the need to pay "due regard to the interests of other States",²⁰ this right must be exercised subject to the provisions of Articles 88 to 115. More particularly, attention has to be paid to Articles 112 to 115, which make the wilful breakage of submarine cables punishable offences, and also impose a duty to repair pipelines or cables damaged in the course of laying new pipelines or cables.

A further duty is imposed to compensate ship owners who have "sacrificed an anchor, a net or other fishing gear in order to avoid injuring a submarine cable or pipeline".

Be that as it may, Article 79(2) provides that subject to a State's "right to take reasonable measures for the exploration of the continental shelf, the exploration of its natural resources and prevention, reduction and control of pollution from pipelines, *the coastal State may not impede the laying or maintenance of such cables or pipelines*" (emphasis supplied). Where consent is refused to the course of a pipeline, it is submitted that an aggrieved State could rely on this provision to lay the pipeline where they see fit.

The conclusion is nonetheless inescapable that "the rights of the other States to navigate, overfly and lay cables and pipelines in a coastal States' EEZ are less extensive than their corresponding rights on high seas".²¹ However, it is encouraging that State practice shows that agreements have in fact helped to resolve potential conflicts and are therefore a more desirable way of regulating interstate relationships on laying submarine cables and pipelines.²²

FISHING

The exercise of this right is somewhat subtle and will in practice be difficult to accomplish. One therefore has to carefully look at Article 62(2) which is in the following terms:

The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire catch, it shall, through agreements . . . give other States access to the surplus of the allowable catch.

The problem this provision presents is that, what constitutes allowable catch is exclusive to the coastal State, and so is the determination of its capacity to harvest the living resources of the EEZ. Some academic opinion²³ has argued that these are not subjective matters in

19 The EEZ concept has a significant relationship to the continental shelf concept, because in terms of Article 56(3) the EEZ includes the continental shelf interest in the seabed of the 200 mile zone.

20 Art. 79(3) provides that "the delineation of the course for the laying of . . . pipelines" and *not* cables is "subject to the consent of the coastal State". It also empowers a coastal state to lay down conditions for cables and pipelines entering its territorial sea, and to establish its jurisdiction over cables and pipelines used in the exploration of its continental shelf or operations of artificial islands and installations under its jurisdiction.

21 Churchill and Lowe *supra* at pp. 135-6.

22 For example, *Agreement between Norway and the United Kingdom on Exploitation of the Frigg Field Reservoir and the Transmission of gas therefrom to the United Kingdom*.

23 O'Connell *op cit* at p. 563.

view of the obligation placed on the coastal State "to promote the objective of optimum utilisation "and" to allocate the surplus among other States".

However, the more compelling view contends that it is possible for the coastal State to set the allowable catch at any level it wished and, perhaps set a low threshold, thus eliminating the necessity of allowing other States access to the resources of the zone.²⁴

It therefore, becomes clear that, while other States have a right to participate in the EEZ's surplus fish stocks, the right of the coastal State, in practice, may still be exclusive. This is all the more so when one looks at Article 62(3) which provides that, in giving access to other States "the coastal State shall take into account all relevant factors including . . . the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests²⁵ . . . and the need to minimize economic dislocation in States whose nationals have traditionally fished in the zone"²⁶.

It seems probable that the coastal State will use its rights to determine a surplus to claim a monopoly rather than to allow access to other States.²⁷ At any rate, this view is bolstered by the provisions of Article 62(2) which makes the obligation to give surplus to other States subject to "agreement or other arrangements".

It is stressed that the stance adopted does not mean that one has been oblivious to the provisions of Article 64(1) which provide, *inter alia*, that "coastal States and other States whose nationals fish . . . highly migratory species . . . shall co-operate directly or through appropriate international organisations with a view to ensuring conservation and promoting the objective of optimum utilisation of such species throughout the region."

Nevertheless, this Article only comes into play once access has been given by the coastal State to other States. Even though there is good sense in the argument that coastal States cannot be allowed to claim that there is no surplus when it is manifestly clear that they lack capacity to harvest the entire allowable catch,²⁸ the present machinery for dispute resolution provided for in the Law of the Sea Convention is decidedly tilted in favour of the coastal State.

24 Greig, *International Law*, 2nd Edn. Butterworth (1976) p.310. On the contrary, the *Fisheries Jurisdiction* case, ICJ Reports 1974 at p.27 stated:

"The preferential rights of the coastal State come into play only at the moment when an intensification in the exploitation of the resources makes it imperative to introduce some system of catch-limitation and sharing of the resources to preserve the fish stocks in the interests of their rational and economic exploitation".

25 No wonder why Phillips "*The Exclusive Economic Zone as a Concept of International Law*" (1977) 26 ICLQ 585 at p.604 makes the comment that the "coastal State is left with a free hand in the matter".

26 However, O'Connell *supra* at p.567 considers that "because traditional fishing interests have in the past been given priority over other interests, it is to be expected that they will continue to be asserted against coastal States and thus against competitors for surplus." See also Article 62(4) in terms of which access may depend on the "payment of fees and other forms of remuneration." The danger is that the fees could be fixed at unreasonably high rates which effectively prevent or discourage States from entering into access agreements.

27 However, Attard *supra* at p.164 argues that, "if it is accepted that under customary law there is an obligation to promote the optimum-utilisation objective in the EEZ, then it should follow that there is a complementary duty to give access to the surplus, thereby ensuring that there is no wastage". It should be noted that this reasoning is rendered fragile by virtue of Article 297(3)(b) in terms of whereof a coastal State is not obliged to submit to a settlement in the event of a dispute concerning its rights to living resources in the EEZ "including its discretionary powers for determining the allowable catch". Even if it were to accept a settlement, in terms of the same Article, the conciliation commission cannot substitute its own discretion for that of the coastal State.

28 O'Connell *supra* at p.563.

It can therefore be readily appreciated why another commentator²⁹ said that the effect of Article 64(1) is at least that the high seas fishing States are not free to unilaterally adopt measures applicable to the high seas fishery without first seeking co-operation with coastal States in the region, since such unilateral measures could prejudice the ultimate conservation and utilisation of "highly migratory species" within and outside the EEZ. The rationale of this observation is commendable, but should the coastal State not co-operate, the provision is no more than a *brutum fulmen*.³⁰

FREEDOM OF FISHING AND LANDLOCKED AND OTHER GEOGRAPHICALLY DISADVANTAGED STATES

It is compelling to look at the position of the landlocked and other "geographically disadvantaged States" *vis-a-vis* the freedom of fishing.³¹ These States have a right via Articles 69(1) and 70 (1), respectively, "to participate on an equitable basis in the exploitation of an appropriate part of the surplus of the exclusive economic zones of coastal States of the same subregion or region taking into account the relevant economic and geographical circumstances of all the States concerned."

The right is not an unconditional one, but relates only to "an appropriate part of the surplus" and is subject to "the relevant economic and geographic circumstances of all the States concerned". The observations earlier made in relation to land-locked States' difficulties in relation to access to their navigation rights apply *mutatis mutandi* here, more so, considering that in terms of Article 69(2)(c) the extent to which a coastal State may be burdened by such a request for access is a relevant consideration.

An additional difficulty presented to this category of States is, as pointed out elsewhere, that the term "equitable basis" does not confer priority on these States above all other States save coastal States,³² since Article 62(2) gives the coastal State the right to determine the amount of catch which corresponds to its harvesting capacity. It may be concluded that the coastal State enjoys preferential treatment in respect of the resources in the EEZ.

To compound all this, the formulation "whose geographical situation makes them dependent . . . for the nutritional purposes of their populations" is ambivalent, because one wonders whether the food value element, notably protein, is a matter which could tilt the balance in favour of these States. If such is the case, this would probably be countered by an argument that there are other food products in these countries which can sufficiently

29 See B. Kwiatkowska: "The High Seas Fisheries Regime: at a Point of No Return" (1993) *International Journal of Maritime and Coastal Law* Vol.8 No.3 at p.330.

30 *Ibid* at p. 331. State practice discouragingly shows that some States like the U.S.A, Japan and the former Soviet Union have legislated for their sovereign rights over the whole migratory species in the EEZ. Attard *supra* at p.53 also notes that legislation in some countries demonstrates an unwillingness to recognise the existence of other States' rights in their EEZ's e.g. Sri Lanka's Maritime Zone Law (1976), Malaysia's EEZ Proclamation (1978) and the same applies to Bangladesh, Colombia, Comoros, Democratic Kampuchea, Haiti and Togo.

31 Uys Van Zyl *op cit* at p.116 observes that the sea's resources now remains a compelling answer for landlocked states to develop their economies and improve the quality of life of their peoples. Art.70(2) provides that the term "geographically disadvantaged" includes coastal States and States bordering enclosed or semi-enclosed seas whose geographical situation makes them dependent upon exploiting the living resources of the EEZ's of other States for the nutrition of their population, and coastal States with no EEZ of their own.

32 See Phillips *op cit* at p.609. The author also observes that access for landlocked countries is dependent on agreements "voluntarily entered into with the coastal State". See also, note 34 *infra*.

make up for any nutrient value that may be derived from fish. Moreover, it has been argued elsewhere that the Article "ignores the position of the developing coastal country . . . which derives no substantial benefit from its economic zone because of the scarcity of fishing and mineral resources within that zone".³³ Presumably, a case could be made out that the term "geographical situation" embraces States which, as a matter of geographic reality are fated by history to occupy places lacking in fish or mineral resources.

It is tempting to associate with the view that it is in the interests of landlocked and geographically disadvantaged States to keep the coastal State's jurisdiction within reasonable limits and to endeavour to secure for themselves a fair share of the resources of the EEZ.³⁴

MARINE SCIENTIFIC RESEARCH

In terms of Article 246(2) and (3) other States may, with the consent of the coastal State concerned, carry out marine scientific research in its EEZ, and the coastal States will "*in normal circumstances grant their consent*" (emphasis added).

But they may withhold consent to resource-orientated research,³⁵ and it should be borne in mind that any research activities in the EEZ "shall not unjustifiably interfere with the activities undertaken by the coastal State in the exercise of their sovereign rights and jurisdiction provided for in the Convention".³⁶ It, therefore, becomes understandable why reservations have been expressed that under this regime, *bona fide* marine research may come across bureaucratic hindrances not connected with the merits of the project, which may lead to the programme being abandoned or changed "to accommodate coastal demands".³⁷

It would appear that, consent would have to be obtained for research directed at the testing of military equipment or which involves military surveillance, although a contrary view has been expressed.³⁸ Article 240 which imposes a general duty upon States to, *inter alia*, "conduct marine scientific research which ensures the protection and preservation of the marine environment",³⁹ seems to imply that military-orientated marine research which may involve use of explosives or discharge of radioactive substances is objectionable on the basis that it constitutes a danger to the marine environment.

33 *Ibid* at p. 610. As the author points out, no right exists to exploit mineral resources in the economic zones of other coastal States, and therefore an argument based on scarcity or otherwise of resources is self-defeating.

34 Calflish *supra* at p.71

See also, Attard *op cit* at p.207 where he says that the legal rights of disadvantaged States will have to be realised through "the normal process of negotiated agreements according to which political support or some other commodity will be exchanged" as a *quid pro quo* for right to exploit a neighbouring State's EEZ.

35 Art.246(5) lists various forms of research related to the economic exploitation of the zone.

36 Art.246(8).

37 Attard *op cit* at p.122. See also, Art.297(2)(b) which does not oblige a coastal State to submit to dispute settlement and paragraph (2)(b) of this Article which provides that even if it agrees to a settlement, the exercise of its discretion shall not be questioned.

38 Phillips *op cit* at p. 598. Military surveillance may therefore be inconsistent with use for peaceful purposes. See also, note 7 and 18 *op cit*.

39 See also, Art.193 which gives States the sovereign right to exploit the natural resources "pursuant to their environmental policies and in accordance with their duty to preserve the marine environment." Hence, other States could possibly have no greater rights.

Finally, it will be observed that, despite provision for the rights enumerated above to other States, their practical realization may be of limited significance or virtually non-existent, when regard is paid to the leeway available to a coastal State. In that scheme of things, the discretion might be improperly used to thwart the interests of other States, especially land-locked States. These States can only place their hope in Article 300 which enjoins all States to act in good faith and "in a manner which would not constitute an abuse of right." As noted hereinbefore, State practice does not encourage a development of confidence in this provision.

CONCLUSION

It is clear that the democratisation process that has taken place in South Africa must be viewed as significant for the sub-region. There is no doubt at all that South Africa commands enormous economic and technological resources and potential. As such its role in the maritime politics of the sub-region is predictable.

The need is now inevitable for Zimbabwe and other sub-regional countries to co-operate fully with South Africa in trade matters, so that their dream of enjoying the freedom of the seas and EEZ, through South Africa, may be accomplished to the betterment of their economic development.



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