Law of the Sea in Historical Perspective

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Changing Dimensions of International Law
An Asian Perspective
Law of the Sea: Product of the European Civilization

- European beliefs and claims that law of the sea is a product of the European practices and is not more than four to five hundred years old.
- Asian practices rejected as of no consequence.
Freedom of the Seas: The Paramount Principle

- The bulk and essence of traditional international law for the last 400 years.
- Four freedoms as defined in Article 2 of the 1958 Law of the Sea Convention on the High Seas.

1. Freedom of unobstructed navigation,
2. Uncontrolled fishing,
3. Right to lay down and maintain submarine cables and pipelines,
4. Freedom to fly over and such other undefined freedoms as they might like to exercise with due regard to the similar rights and freedoms of others.
History of the Law of the Sea is story of Freedom of the seas

- History of the law of the sea is to a large extent the story of the development of the freedom of the seas doctrine and the vicissitudes through which it has passed through the centuries.

- For the last nearly 200 years, it had been accepted as an undisputed principle, almost a dogma, which no one could dare challenge. Recognized and referred to as jus cogens.

- Territorial waters and contiguous zone accepted only subject to freedom of the seas.

- England as the supreme power insisted on the freedom of the seas and narrow territorial waters and...
Origin of the Principle

- Hugo Grotius propounded the doctrine in his famous book *Mare Liberum* published anonymously in 1609. It was only one Chapter of his bigger book *De Jure Praedae or Law of Spoils*.
- Keen rivalry between the Portuguese, Spain, England and Holland for trade in spices with the East Indies.
- Spain and Portugal claimed monopoly of trade on the basis of Papal Bull of May 4, 1498.
- Portuguese ship laden with spices captured in the Malacca Straits by the Dutch which they wanted to sell in Amsterdam.
- Grotius wanted to defend the right of his country, Holland, to have trade with the East Indies and India which Portugal monopolized. He was advocate on behalf of the Dutch East India Company.
Asian Traditions Ignored

- Ignorance or deliberate ignoring or Asian traditions.
- When Europeans arrived in India in 1498, network of inter-state relations in Asia.
- Liberal traditions of freedoms of peaceful navigation and international maritime trade.
- Unobstructed freedoms of navigation and commercial shipping were accepted by all countries in the Indian Ocean and other Asian seas centuries before history was ever recorded, long before Grotius was heard of.
- Freedom of the seas customary law in Asia.
No Freedom of the Seas in Europe

- Maritime anarchy in Europe after the 13th Century.
- Numerous maritime disputes and continuous warfare.
- Wide claims of control of the sea by Spain, Portugal, England, Genoa and others.
Portugal disturbs Peaceful Navigation in the Indian Ocean:

- No conflicts in Asia.
- Asian land powers. Sea was only of limited use to catch fish or navigation and trade.
- No armed shipping in Asia. No warships.
- Europeans sea powers who had mastered the traditions of sea warfare.
- Portugal claimed monopoly of maritime trade in the Indian Ocean.
- Sea route to India kept a closely guarded secret.
Contest of Wits and Arms in Europe

- Portugal incited jealousy and rivalry in Europe.
- All Europeans wanted to go to India and trade in spices.
- Route found by Dutch Linschoten.
- Numerous European companies formed to trade in the Indian Ocean.
- Dutch company arrested a Portuguese shop in the Straits of Malacca.
- Grotius’ arguments for freedom of the seas.
- Neither Grotius nor Holland really wanted freedom of the seas.
- England challenged the freedom of the seas and asked Seldon to write a book *Mare Clausum* to counter Grotius’ arguments.
Mare Clausum New Law for Europe.

- For the next 300 years mare clausum was the law in Europe based on British maritime power.
- Resurgence of the Freedom of the Seas.
- Freedom of the seas revived in the wake of Industrial Revolution in Europe in late 18th or early 19th Century.
- Law Vague and Uncertain.
- Few “rule of the road”. Four freedoms.
- 70 percent of the ocean merely Legal vacuum and laissez faire which was in the interest of the big powers.
- England refused to accept limitation on the freedom, wider territorial sea or contiguous zone.
Post-1945 Era: A New World:

- By the end of World War II, the whole balance of forces had changed.
- European countries, especially England, could no longer dictate.
- Soviet Russia and the United States emerged as big powers.
- Sea no longer only a navigation route. It contained huge resources—oil, gas and others.
- Technology revolutionized fishing techniques. Over-fishing but small countries ignored.
- United States claimed continental shelf up to 200 meters or beyond until the resources were exploitable.
- Wide acceptance of the doctrine and widespread claims.
Freedom of the Seas not Immutable

- After the Second World War, Europe lost its control over the law of the sea.
- The first challenge to the law came from the USA when it came to be realized that the sea was storehouse of immense resources. Truman Declaration on Continental Shelf on Sept. 28m1945.
- Numerous other claims followed.
- Latin American countries started claiming patrimonial sea of 200 miles.
- Widening claims of territorial waters. By 1958 27 of 73 countries claimed wider than the old 3 miles territorial sea ranging from 4, 6, 10, 12 and 200 miles. Six others did not specify the limit.
UN Efforts to Codify the Law


- There was, however, no agreement on the extent of the territorial sea, fisheries jurisdiction and contiguous zone. The definition of continental shelf was vague and uncertain.

- Second UN Conference in 1960 failed to reach agreement on any of these issues.
Renewed Challenges to the Freedom of the Seas

- Exploitation of seabed became possible beyond 2500 meters.
- In 1967 Arvid Pardo of Malta pointed out that the deep-seabed beyond the limits of national jurisdiction contained tremendous amount of resources in manganese nodules which were rich in Manganese, copper, cobalt and Nickel.
- Suggestion to make seabed beyond the limits of national jurisdiction common heritage of mankind.
- Unanimous resolution of the General Assembly.
Further Erosion of the Freedom of the Seas

- Still wider claims of national jurisdiction continued.
- Continued *laissez faire* could no longer be tolerated.
- In 1982 UN Convention on the Law of the Sea concluded. It is the biggest achievement in the history of the law of the sea.
- Agreement on various limits of national jurisdiction.
Where did we reach and What was accomplished?

- A machinery for the exploitation of the deep seabed resources devised, but rejected by the USA.
- Numerous attempts to reach agreement on the deep seabed have so far failed.
- But a common agreement on large part of the law of the sea is not a mean achievement.
- Freedom of the seas still relevant, but this is only limited freedom under the law.