

The Freedom of the Seas: Why it matters

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The history of the law of the sea has been dominated by a central and persistent theme – the competition between the exercise of governmental authority over the sea and the idea of the freedom of the seas. The tension between these has waxed and waned through the centuries, and has reflected the political, strategic, and economic circumstances of each particular age¹

Introduction

The unfortunate incident in March 2009 between the US survey ship USNS Impeccable and a number of Chinese vessels some 70 miles southeast off Hainan shows that China and the United States have adopted very different views as to what it is permissible for foreign ships to do in another country's 200 mile Exclusive Economic Zone. It also shows that this disagreement can have bad effects on the political relations between the two sides. Nor is this just an issue between those two countries for many other countries take the one or the other position. Because for both these are important issues it is important for both to understand as much as possible about exactly why the other side takes the position it does, lest misunderstandings grow and the relationship deteriorates.

Both sides believe their position to be supported by international customary law and the 1982 UN Convention on the Law of the Sea. This article does not

1. D.P. O'Connell and I.A. Shearer The International Law of the Sea, (Oxford: OUP, 1985)

explore who is right and who wrong in this matter. Instead it seeks to explain exactly why so many countries think the Freedom of the Seas is such an important issue and take the position that they do. This is much less a matter of law and much more a matter of national philosophy, politics and strategic culture. And probably it is in this area – the international context for the development of international maritime law – that solutions can be found, rather than in the quarrel of lawyers.

The first point, though, is that the United States and other countries that sympathise with its position, which include nearly all the ‘maritime’ ones, genuinely do feel they have the law on their side. This is not just some negotiating position they have decided to take on for their own suspicious reasons. They argue that UNCLOS was a specific bargain struck between the maritime states and some of the others that defined the nature of the Exclusive Economic Zone newly created by that convention in very special terms which were settled and which ought to be adhered to. They see it as a particular example of the balance needing to be struck between the two positions identified in the quotation with which this article began. On the one hand you have the freedom of the seas; on the other, the tendency of nations to encroach upon it. This, they think is a historic bargain between the two that should be stuck to.

But why? Why do the maritime powers take that the position they did whilst negotiating UNCLOS in the 1970s and 1980s and why have they sought to defend it ever since? We will take the position of the United States as the best example of the ‘maritime’ view, because they have articulated it most clearly and taken action to defend it, although as stated earlier, a lot of other countries (in fact most) adopt much the same position.

Freedom of Navigation and the fortunes and independence of the new American Republic were intertwined from the start. The defence of this principle was, after all, the reason why the United States almost decided to go to war with France in the so-called Quasi War of 1798-1800 and did go to war with Britain in 1812. The fact that the United States was prepared with its tiny fledgling navy to take the risk of confronting the world’s maritime hyper-power of the time demonstrates just how important the Americans thought this principle was.

Building on the Grotius tradition that the oceans were ‘the common property of all’ Alfred Thayer Mahan made this one of his basic assumptions in 1890 when

he likened the sea to ‘...a wide common over which men may pass in all directions, but on which some well-worn paths show that controlling reasons have led them to choose certain lines of travel rather than others.’ The word ‘common,’ deeply rooted in Anglo-American historical experience, was well chosen as it denoted an area essential to the well-being of the community but one which is owned by all – a common heritage. In English experience the enclosure of the commons in the 17th and 18th Centuries was a cause of much social distress and political discord; it even played a part in the English Civil War. The folk memory of this is evident in the now much smaller village greens of the English countryside, delightful areas preserved from private development, completely unfenced and reserved for the enjoyment of all. This kind of cultural experience goes deep and needs to be understood, if not accepted, by those from different historical and social backgrounds.

The American position on the free and untrammelled use of the sea helped determine America’s entry into the First World War and, for all their reservations, on Britain’s side this time, in 1917. The British, exercising their ‘rights of search,’ certainly interfered with American shipping but did not sink or capture it. The Germans did. Only 20 of the 847 neutral ships sunk by Germany up to the US Declaration of War in 1917 were actually American but for the United States it was a matter of principle. In January 1918, accordingly, President Wilson made ‘Absolute freedom of navigation upon seas outside territorial waters’ the second of his Fourteen Points.

But after the First World War, there was continuing discord between Britain and the United States over what Freedom of the Seas actually meant. From the start, the United States had aimed at securing the immunity from capture of private property on the high seas. As A. Garfield Hays maintained in April 1918, ‘Freedom of the seas means abolition of the doctrine of contraband and of commercial blockades and of the right of capture and destruction of enemy [merchant] vessels.’ Even though they were by far the biggest strategic victims of a *guerre de course* in the First World War, the British fiercely resisted what they regarded as a notion that would emasculate their naval power in war particularly against land-powers and which they considered, quite correctly as it turned out in the Second World War, in any case unworkable and naively unrealistic.

For all that the Freedom of the Seas was often described in romantic almost lyrical terms:

Here you have an almost limitless expanse and without a barrier, here you have the estranging ocean, what is now Nature's great medium of communication. There are no difficult mountains to cross, no scorching deserts, the way lies open...Imagine then a road which leads everywhere and you have the first clue to the meaning of that majestic thing, sea traffic....Safe in times of peace from all dangers save the natural perils of the sea, the freedom of this, the broadest and busiest of highways, open to all, used by all, vital to the modern structure of civilisation, is unchallenged¹ .

This tendency to see the world ocean as a place distinguished by the absence of constraint, 'a road that leads everywhere' leads to its being considered a 'flow resource' (for transportation and unhindered movement) not just a 'stock resource' (from which fish and other marine resources can be extracted). Nowadays, the movement of manufactured goods and commodities free from hindrance in the shape of pirate attack, terrorism, criminal behaviour and political interference is regarded as the basis for the health of the world's economic system, its prosperity and its security.

Of course, it is the free movement and operation of warships, rather than in merchant shipping that the contention arises. The issue though is that most navies regard the protection of trade from anything that might threaten it, either at sea or from the land, as second only in their priorities to the defence of national territory and its population. This in turn means that ideally they should have the capacity to go, and to operate, wherever merchant ships are to be found. For this reason, even where the much more strictly enclosed and controlled 12 mile Territorial Sea is concerned, the natural tendency is for the maritime powers to insist on their rights for innocent and transit passage, for the 'right of assistance' to go to the rescue of sinking or distressed merchant vessels wherever they are and to seek agreement for the hot pursuit of drugs smugglers and pirates into the territorial sea of other countries. For this reason, also, they insist on the right of warships to behave as normal in the EEZ provided they do not interfere with the economic rights of the coastal state, nor threaten its security – the latter caveat being equally true under the UN Charter of their behaviour on the high seas.

1. Dixon, W. MacNeile, *The Fleets Behind the Fleet* (London: Hodder & Stoughton, 1917) pp 94-5.

The so-called tanker war between Iran and Iraq saw many navies from around the world behaving in exactly this way, protecting the world's oil tankers from attack from Iran and Iraq by what they did at sea in terms of direct defence, and from the sea in terms of deterrence. This example is an interesting one because it saw a great deal of multinational naval cooperation in defence of a common interest (the international oil trade) and a bid to reassure other countries in the area (most obviously Kuwait and the other Gulf states) against attack from either of the contestants. This activity depended on the creation and maintenance of a facilitating set of cooperative security relationships with local states and with external partners, serviced in this case by the forward presence of a large number of navies by no means restricted to 'western' ones.

The defence of trade in the Gulf also increasingly depended on what is now called 'Maritime Domain Awareness' which in this case meant familiarity with the geographic environment and sufficient knowledge of tanker movements and developing threats. Finally it depended in large measure on the capacity to keep the sea safe and in extremis to project power ashore against anything that might threaten it, although, given its deterrent effect, this in fact rarely proved necessary. Much of all this would equally well apply to the current containment of piracy in the Gulf of Aden. The common element in both instances, the maritime states would say, is the requirement for warships to operate in their normal mode in all areas outside the territorial sea.

But this of course is not how every country sees it, including in some ways, China. But this very brief survey of the Freedom of the Seas issue shows that things change in line with the developing context. Given its growing exposure to the world economy and its increasing reliance on distant markets and sources of supply, China will need to become even more 'maritime' in its perspective. The fact that it had a warship standing by when Chinese citizens had to be rescued from the Libyan civil war clearly points this way. If this is so, we may see something of a convergence of view on the vexed issue of the 'Freedom of the Seas.'