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Linking Territorial Waters with Deemed Importation in Customs Law: A Comparative Study of SAARC Nations with Special Focus on India

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Abstract: ***Customs Law of each nation governs the rules with regard to importation and exportation of dutiable goods. Developing nations heavily rely on a favourable trade policy which is expected to generate a surplus Balance of Trade. Disputes amongst neighbouring nations regarding territorial jurisdiction especially in coastal waters is always a bone of contention which hinders legitimate international trade. This paper explores the concept of territorial waters and its implication in Customs Law with a special focus on SAARC nations. India with the largest land mass amongst the SAARC nations and with a longest coast line faces more risk and higher disputes in maintaining her theoretical territorial waters. We explore the origin of the concept of territorial waters and study the international convention in determining the limits of territorial waters. Amongst the SAARC nations, India, Sri Lanka, Pakistan, Bangladesh and Maldives have coastal line where the concept of territorial waters is applicable. We compare the relevant limits of territorial waters amongst these nations and thereafter discuss the implications of Deemed Importation for India and the nature of the possible legal disputes that have arisen from it. We relied upon the landmark judgements to entangle the concept of deemed importation.***

Keywords: Territorial Waters, Customs Water, Customs Law, Deemed Import, Taxation

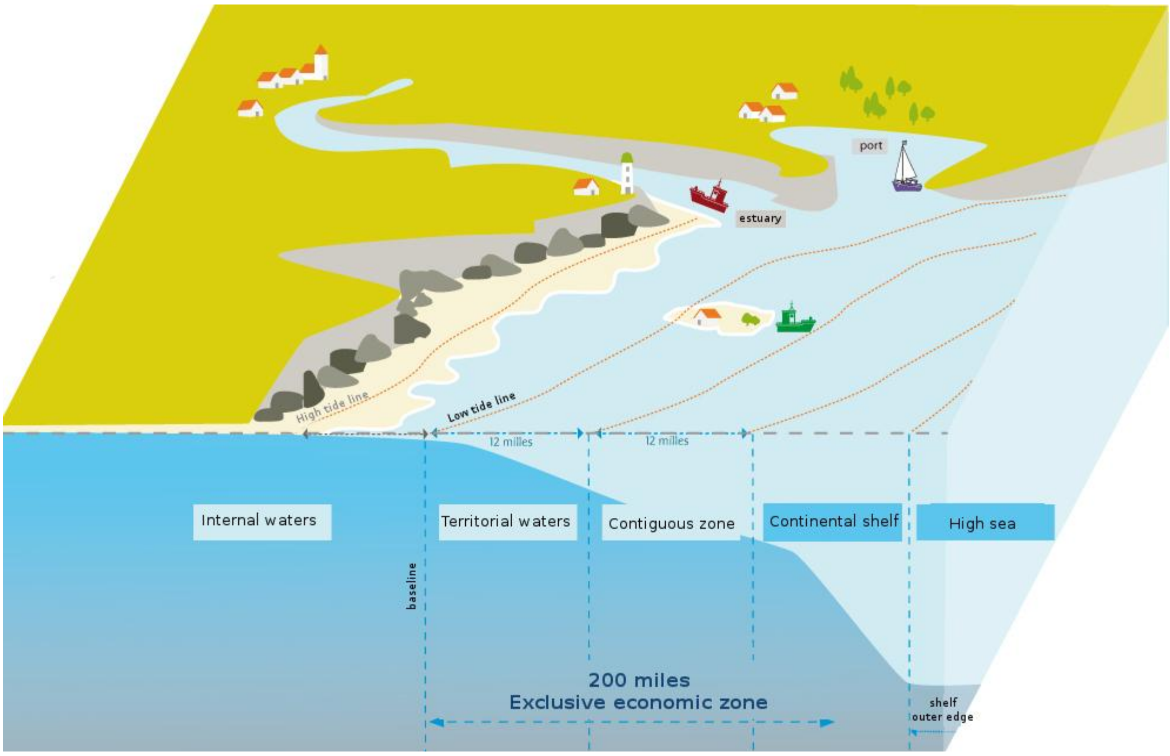
1. Introduction

Welfare Nations seek taxation revenues as a source of public finance in various forms for the balanced and optimal growth of a country. The Legislatures frame laws within the four corners of the Constitution to garner revenue as per the tenets of taxation. Customs Law are designed with a specific two point agenda in mind viz. to provide a mechanism to generate revenue duties for the government and to layout a framework to safeguard its own domestic industry from importation of foreign goods by imposing protective duties. With the realities of economic necessities and emergence of global trade in the WTO regime, it is imperative for a nation to place reliance on better quality goods irrespective of its origin of manufacture. As such nations no more view importation as anti – nationalistic and retrograde to its economic growth. Progressive taxation laws cater both to the revenue needs as also boost the economic growth of the nation.

The Indian Customs Act has its origin in the Sea Customs Act, 1878 which was replaced with the present Act promulgated by the Indian Parliament in the year 1962. In line with it, the Indian Tariff Act, 1934 was also abolished to give way to the Customs Tariff Act in the year 1975. The entire chargeability of customs duty stood on the concept of "*Importation of Dutiable goods*". Import is being defined as "*bringing into India from a place outside India*". This very definition under the Act, even though it seems so innocuous, is the root cause of all territorial limitation troubles of a nation. Let us now delve into the definition of „Import" under the Act. The Act simply states "*bringing into India*" which in an ordinary parlance means goods brought into India from abroad. Here India refers not only to the land mass but also her territorial waters which extends currently to 12 nautical miles (nm) from the appropriate coastal base line. The same principle of including territorial waters as a part of a nation holds good for other SAARC members also other than that of Bhutan, Nepal and Afghanistan, which being land locked geographically do not face such territorial waters juggernaut under the customs law. Amongst all the SAARC nations, India with its longest coast line of 7,516.6 km including the Lakshadweep and Andaman and Nicobar islands is highly vulnerable to taxation disputes arising within her territorial waters and even beyond. Besides India, such disputes are also faced by Sri Lanka followed by Pakistan, Bangladesh and Maldives which enjoys absolute sovereignty over their respective territorial waters.

2. International Convention

Under the aegis of United Nation, almost all member nations have agreed and accordingly ratified their respective domestic laws to incorporate the provisions regarding territorial waters as specified in Article 2(1) of the United Nations Convention on the Law of the Sea (UNCLOS-III) which was adopted on 30th April, 1982 but came into force after a long twelve years on 16th November, 1994. The said convention however has not used the phrase „territorial waters" instead it referred as „territorial sea". Sea area adjacent to coastal states have been earmarked into four zones namely internal waters, territorial sea, contiguous zone and exclusive economic zone. Article 3 of the said convention defines the breadth of the territorial sea as "*up to a limit not exceeding 12 nautical miles, measured from baselines*". Internal waters are those waters which are towards the landward side of the baseline. Nations can determine the limits of territorial waters based on this convention and can even settle for lesser nautical miles but not exceeding 12 nautical miles. India had a 6 nautical mile limit long back which was later extended to 12 nautical miles with effect from 12th Sept, 1967. Such a move was seen as a knee-jerk reaction to Pakistan‟s policy of extending her territorial waters up to 12 nautical miles. Coastal states enjoy complete sovereignty over the territorial waters as such nations prefer to utilise the maximum possible limit to have an effective control over it. Beyond the territorial sea up to another 12 nautical miles is the limits of contiguous zone which is used for the purpose of customs, sanitation, immigration and security; whereas up to 200 nautical miles the exclusive economic zone extends for the purpose of prospecting, exploring, extracting and exploiting any mineral resources and other resources in the sea and seabed. Further beyond 200 nautical miles commences high seas where all nations have equal rights. In case of any overlapping of zones among opposite or adjacent states, nations can amicably settle such disputes amongst themselves or else as per the convention their territorial seas cannot extend beyond the median line as defined. The imaginary visual depiction of all the four zones is shown in the image below.



Source: http://www.marbef.org/m/images/a/a1/Zonesmaritimes.jpg

3. SAARC Snapshot

SAARC as a regional block amongst the south asian neigbouring countries in the Indian sub-continent is a forum for mutual co-operation in various aspects including trade and commerce. An agreement for free trade with minimal trade restrictions in the form of tariff barriers is already in place amongst the SAARC nations since 2006. The agreement is being coined as SAFTA which entails for economic growth of the region through gradual reduction of customs duties amongst the member states to achieve a zero-duty region. An agreement on avoidance of double taxation was also reached upon by member states on November, 2005 which later on got ratified and implemented by each member.

Amongst the eight member states, India enjoys the longest coastline followed by Sri Lanka, Pakistan, Maldives and Bangladesh while the remaining three of Afghanistan, Bhutan and Nepal are land- locked countries. Coastal states are involved significantly in foreign trade through sea route and thus the importance of delineating territorial waters is of prime importance to define the process of importation or exportation. The following table depicts SAARC facts regarding territorial waters for the purpose of Customs Law.

Table 1: Brief overview of Key Coastal Waters statistics of SAARC Nations

Member-state	Governing Law	Coastal Line (Km)	Territorial Waters (nm)	Contiguous Zone (nm)	Exclusive Economic zone (nm)
India	Customs Act, 1962	7,517	12	12	200
Sri Lanka	Imports and Exports (Control) Act, 1969	1,340	12	12	200
Pakistan	Customs Act, 1969	1,046	12	12	200
Maldives	Export Import Act, 1979	644	12	12	200
Bangladesh	Customs Act, 1969	580	12	12	200

Source: Collated from respective nation’s custom law

The table clearly indicates that all the coastal member states have framed their coastal waters as per the convention of UNCLOS and have extended the boundaries of territorial waters to the permissible maximum limit.

4. Deemed Importation

The basic theme of this paper revolves around the concept of Deemed Import within the purview of Customs Taxation Laws as linked with the territorial waters of a nation and in no way we intend to study the territorial disputes or maritime conflicts amongst SAARC nations. It is thus vital for us to understand the process of importation in the light of the statutory tax provisions enacted by the member states. With reference to India, the Customs Act provides for a three tier structure for application of duty imposition viz. Levy of Duty, Assessment of Duty and finally Collection of Duty. The Law categorically stated that for the purpose of administrative convenience these three stages might not be affected simultaneously and thus duty can be assessed and collected at a much later stage way beyond the point of incidence of taxation which is usually referred in taxation parlance as a taxable event. In the context of importation by sea route, goods are deemed to have been imported once the vessel carrying such dutiable goods crosses the imaginary twelfth nautical mile and enters into Indian territorial waters. The moment it happens so, the levy of customs duty is said to have arisen and accordingly liability is created even though it might happen the imported goods do not reach the main land India. This itself gives rise to several queries regarding the point of taxation and revenue collection. Such deeming provision have far reaching consequences and several duty assessments based upon such deeming provisions by the Customs Officer were being challenged in the Court of Law.

5. Tax Liability Disputes

We now focus on the various tax disputes which had arisen in the context of India due to the interpretation of the provision of the law which defines India as including her territorial waters. Let us refer to the charging section 12 of the Act which states "*duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 or any other law for the time being in force, on goods imported into or exported from India.*" Section 12 categorically identifies the taxable event as the importation of goods into India which are chargeable to Customs Duty. Thus in this context, duty liability arises as soon as the vessel enters the territorial waters and goods are deemed to have been imported. The following case studies are adopted to illustrate and interpret the consequences of such deeming provisions under the Indian Customs Act, 1962 to give an overview of the possible taxation disputes.

- Case I: MV Kanishka, a cargo vessel, loaded with dutiable goods entered Indian territorial waters on 13th September, 2012 at 03.15 AM IST for the purpose of unloading her cargo in Mumbai Port. The master of the vessel carrying the goods calls on the port but was denied entry inwards by the port authorities due to unavailability of quay in Mumbai Port and the vessel sailed towards Karachi port, her next port of call, for delivering cargo. MV Kanishka returned back to India and entered territorial waters again on 26th September, 2012 at 15.12 Hours IST and this time granted entry inward to dock in Mumbai Port for unloading the cargo. Obviously the question of law here is which date is relevant for the purpose of determining tax liability under the Indian Customs Act. The provisions of the above Law states that goods are deemed to be imported the moment the vessel enters Indian territorial waters. Accordingly the taxable event for charging duty shall be 13th September, 2012 and if so then what is to be done for the re-entry of the vessel on 26th September, 2012 in Indian waters. The stated case becomes more interesting if suppose the customs duty rate prevailing at the time of first entry was nil or less than that prevailing at the time of re-entry.
- Case II: MV Alexander entered Indian territorial waters on 26th April, 1998 at 14.22 Hours to unload her cargo meant for Vizag Port. After crossing territorial waters, the vessel got severely damaged because of which the cargo have to be abandoned in the sea itself. The dutiable goods do not reach the actual Port of Call. Can the customs authorities claim duty on such goods abandoned in the sea and accordingly the importer of goods be made liable based on the provisions of Deemed Importation under the Act?
- Case III: Dutiable goods brought into India to be used as stores for vessels operating for the purpose of exploring and extracting mineral resources or for those vessels which are operating as oil rigs beyond the 12 nautical miles from the base line but within the exclusive economic zone of 200 nautical miles. Such goods when being imported into India for the sole purpose of using in such vessels is beyond the legal territory of India as defined in the Act. So when vessels carrying goods meant for stores of oil rigs, cross the 12th nautical mile and enter Indian territorial waters, can such event be termed as a taxable event and accordingly made chargeable to duty under the Indian Customs Act, 1962.
- The above three cases highlight the implication of considering territorial waters limit as the cut-off point for the purpose of duty assessment and revenue collection and raises some pertinent issues with regard to the question of law under the Act. Disagreements in interpreting the laws open up the possibility of either wrongful liabilities being imposed on the incumbent or else an altogether revenue loss for the government. Such disputes give way to litigation in the court of law for its resolution thereby enabling us to rely upon the judgements to clarify its interpretation. Both regressive judgements and retrograde laws are harmful for the greater cause of economic trade and well being of a nation and as such hinder progress of international trade and commerce.

6. Landmark Judgements

The situations portrayed in the above cases with regard to the point of taxation and thus determining the taxable event for imposition of customs duty will be clearly understood if we now go through some of the path breaking verdicts of the apex court of India in the recent past in the context of the significance of territorial waters.

- **Union of India and Others vs. Apar Private Ltd. And Others on 22nd July, 1999**: The judgement of this case categorically stated that though the definition of India includes her territorial waters and accordingly the moment the vessel crosses the 12th nautical mile and enters the territorial waters goods are deemed to have been imported into India but for the purpose of duty imposition and liability the relevant date is not the date when the vessel crosses the territorial waters but the date on which the bill of entry is filed for home consumption or the date when goods are actually removed from the warehouse for home consumption. Therefore even though imported goods were exempted from duty or liable to a lesser rate of duty at the time of crossing into the territorial waters, the importer cannot claim such benefit if on the relevant date the exemption is withdrawn or if goods get attracted to a higher rate of customs duty.
- **M/s. Bharat Surfactants (Pvt.) Ltd. and Another vs. Union of India and Another on 17th May, 1989:** The vessel approached the designated port of lading but was unable to unload because of unavailability of berth moved on to some other port and then returned back on a later date to file bill of entry in advance before granting of entry inward when the duty prevailing was lesser. In the mean time when the actual entry was given into the port the duty rate has increased. The fact of the dispute was whether the goods are chargeable to such increased rate of taxation. The judgement as laid down by the apex court considered the date of entry inward as the relevant date for imposition of duty and not the date on which the bill of entry has been originally presented. Clearly the judgment again corroborated the fact that even though importation is deemed to have been done when the vessel enters Indian territorial waters but the process of importation gets completed only when the goods crosses the customs frontier of India and became a part of the mass of goods in India.
- **Garden Silk Mills Ltd. and Another vs. Union of India and Others on 29th September, 1999:** The crux of the case was to determine whether landing charges can be added to the imported price of the goods which are already invoiced on a CIF basis. The valuation of goods is done based on the provisions of Section 14(1) of the Customs Law which allows customs officer to consider "*the price at which such goods or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation in the course of international trade*" as deemed value, instead of the actual price as reflected in the invoice. The contention of the appellant was that since importation is said to have been done when the vessel enters territorial waters then accordingly CIF value of the goods should be the appropriate value for the purpose of duty imposition and as such any landing charges levied at the port is way beyond the point of taxation which must not be added for determining the value of imported goods. The Supreme Court of India ruled in favour of the Customs Department and justified including Port landing charges as part of the valuation of goods on the ground that importation commences when the vessel crosses the 12th nautical miles and enters the territorial waters but the process gets completed only when such goods reach the customs barrier and become a mass of the goods in India. Thus valuation based on deemed importation concept at the time of crossing territorial waters limit is not correct under the law.

7. Conclusion

Based upon the above judgements of Supreme Court of India, the stated position of deemed import at the time of entering territorial waters aptly redefines the concept of importation. No doubt the process of importation begins when the vessel crosses into the territorial waters but it continues till the time the goods become part of the mass of goods in India which is after crossing the customs frontier and accordingly it is not the date on which the vessel crosses the territorial waters which is relevant for the purpose of duty determination and tariff classification under the Act but the date on which the bill of entry is presented either for home consumption or for removal from bonded warehouse or in case when the bill of entry is filed prior to the date of entry inward granted to the vessel then such date of entry inward of the vessel. Regarding vessels operating as oil rigs within the exclusive economic zone there is now a clear circular which has extended the purview of Customs Act beyond the territorial waters up to the exclusive economic zone for the purpose of imposition of duty in such notified designated areas. Thus all legal disputes arising from the concept of deemed import based on territorial waters have now been put to rest.

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