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Hugo Grotius' Theory of Trans-Oceanic Trade
Regulation: Revisiting *Mare Liberum* (1609)

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Abstract

Four hundred years ago, the Dutch humanist and juriconsult Hugo Grotius was commissioned by the United Netherlands' East India Company (VOC) to write a defense of Admiral Jakob van Heemskerck's seizure of a Portuguese merchant carrack in the Straits of Singapore (February 1603). At the time of the commission, Grotius was twenty-one years old. Between 1604 and 1606 he wrote a is comprehensive political and historical exposé on war, prize taking, and Dutch commercial penetration in the East Indies. Today, this work is known as *De Jure Praedae Commentarius*, or Commentary on Law of Prize and Booty. Only one portion, namely chapter 12, was published during the author's lifetime: *Mare Liberum*, the Freedom of the Seas (1608).

The *Mare Liberum* is propagandistic in its intention and makes a plea for traders from Holland to freely access market places and emporia in Asia by unimpeded navigation on the high seas. The freedom of navigation forms a subset to the overarching arguments on the freedom of access and trade. This particular interpretation stands in sharp contrast to past interpretations of *Mare Liberum*, insofar as these have placed the freedom of the seas – and not the issue of trade – at the forefront of scholarly attention. From this vantage point, Grotius is surprisingly consistent in his thinking on the wider issues of maritime trade and navigation, including the two colonial conferences of 1613 and 1615 and even beyond.

During the first two decades of the seventeenth century, Grotius lent a helping hand in the process of forging political and commercial treaties between the VOC and Asian rulers. Far from just championing freedom and peace, the Dutch humanist should also take his due place among the fathers of Dutch colonial rule in Asia.

Hugo Grotius' Theory of Trans-Oceanic Trade Regulation: Revisiting *Mare Liberum* (1609)

by
Peter Borschberg¹

Introduction

The setting is February 25, 1603. At dawn the three ships under the supreme command of Jakob van Heemskerck spot a Portuguese carrack in anchor off the Eastern shores of Singapore Island. She was richly laden with wares from China and Japan. The battle for the carrack lasted for most hours of daylight, and as night was about to fall, the Portuguese captain, crew, soldiers and passengers surrendered. They forfeited ship and cargo for having their lives spared.²

This was the seizure of the *Santa Catarina* one of the best-known acts of freebooting committed by the Dutch in Asian waters at the opening of the seventeenth century. It became famous, because its cargo, brought back to Europe, reaped proceeds which amounted to double the paid-in capital of the then recently formed United Netherlands East India Company, better known by its corporate initials VOC. But the seizure of the *Santa Catarina* was not without controversy. Perhaps it was the European market value of the cargo; or it may have been the international attention that the public sale attracted. Although the Admiralty Board had already adjudicated the carrack and its lading as valid prize, politicians and company directors appeared

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A shortened version of this paper is currently in press with the Leiden-based journal *Itinerario* and is expected to be published in December 2005.

² Concerning the broader diplomatic and historic context of the seizure, see: Martine van Ittersum, "Hugo Grotius in Context" (2003) 511-548 and Borschberg, "Portuguese-Dutch Naval Battle" (2003) 157-175 and "Seizure of the Sta. Catarina off Singapore (2004) 11-25.

edgy. The task of politically, legally and morally defending the seizure fell on an ambitious young man by the name of Hugo Grotius who was then just twenty-one years old. The VOC directors fed him with transcripts, attestations and letters.³ What he produced was a substantial political-historical apology that became known as *De Jure Praedae Commentarius*, or the *Commentary on the Law of Prize and Booty*.⁴

Encouraged by the profitable show of force such as the *Santa Catarina* incident, the VOC stepped up its freebooting activities and attacked Iberian targets on every possible occasion. The Straits of Singapore became a favourite site for such attacks, mainly targeted at richly laden west-bound vessels.⁵ The year 1605 was particularly notorious – no less than four Portuguese merchant vessels were seized in that year – and one cannot help but wonder how different this tropical wonder-world was compared to the stuffy boardrooms and chambers back in Amsterdam, Middleburg or even Lisbon. What happened in Southeast Asia during the early Dutch expansion of the late sixteenth and early seventeenth century was something the Europe-based directors might have been able to imagine, but not fully appreciate, comprehend or perhaps even visualize.

While sea dogs like Admiral Jakob van Heemskerck represented the “hero” at the front line in Southeast Asia, Grotius clearly belongs into the boardroom and chambers back in Europe. Far from complete are, therefore, his understanding of events and the dynamics of power in the Indies, and in writing the work he appears to have relied first and foremost on material fed to him by the VOC and also on classic authors. Many – if not most - of the references to legal scholars and the canonists, with the notable exception of Francisco de Vitoria and Diego de Covarrubias y Leyva, appear to be inserted in later stages of the manuscript’s composition. Contrary to what Alexandrowicz contended in the 1960s, I am confident to argue that Grotius’

³ See especially W. Ph. Coolhaas, “Een bron” (1965) 415-537.

⁴ The original Latin text was transcribed and published as Hugo Grotius, *De Jure Praedae* (1868). The English translation appeared as: Hugo Grotius, *Commentary on the Law of Prize and Booty* (1964).

⁵ See also Peter Borschberg, “The Seizure of the Santo António” (2002) 59-72; “Portuguese, Spanish and Dutch Plans” (2003) 55-88; “Luso-Johor-Dutch Relations” (2004) 15-33.

familiarity with the Portuguese *Estado da Índia* and of accepted maritime or commercial practices in Asia were absolutely minimal in 1605-1606.⁶ Any suggestion that the young humanist had immersed himself into the study of Asian legal systems, commercial practices, let alone navigational customs belongs to the realm of dismissible speculation.⁷ Still, true to his mandate from the VOC directors, Grotius did what any good apologist would do: put up a valiant defense of the Dutch cause in favor of “free trade” (and I wish to place this expression within inverted commas).⁸ Contrary to the views of many scholars, I reject the classification of *De Jure Praedae* as a legal brief or even a juridical treatise proper, although in parts it does admittedly address certain legal issues. At its core and in its intended objective this work is a piece of propaganda that has been enriched by largely circumstantial evidence and highly tendentious historical testimonies. With its partial publication, however, Grotius introduces himself to the political leaders and scholarly community of Europe as a theorist of trade and inter-imperial rivalry. It is against the backdrop of this insight that the present paper will explore the essentially political meaning and intention of *Mare Liberum*.

⁶ Borschberg, “Grotius, East India Trade” (1999) 236.

⁷ In this regard, see especially Alexandrowicz, *History* (1967) 65, “When Grotius studied the facts of the case of the Santa Catharina, which led to the writing of the treatise *De Jure Praedae*, he acquired from the relevant documents and sources first-hand knowledge of the problems of the East Indies and the habits and laws of its peoples and rulers.” And (ibid.) “It is therefore possible to assume that Grotius in formulating his doctrine of the freedom of the sea found himself encouraged by what he learned from the study of Asian maritime custom... a brief analysis of various passages of Grotius’ *Mare Liberum* may confirm the correctness of the above assumption.” - Some more recent authorities, including Asian scholars, have followed Alexandrowicz in this fallacious observation. See for example Anand, *Origin and Development* (1983) pp. 5-6: “The East Indies constituted the meeting ground of the Portuguese and the Dutch, the English and the French East Indian Companies on the one hand, and Asian sovereigns, on the other. The more these contacts became intensified, the more they affected each other’s practices with a common framework of diplomatic exchanges and treaty making. Grotius, Spanish theologians, and other classical jurists, writing in the 16th and early 17th centuries, were not ignorant of these exchanges and Asian state practices ... It is important to mention, however, that the rules of maritime law, as practised by Asian states and explained and recommended in a European context by Grotius and other classical jurists, were not immediately accepted or acceptable to the European states who were too busy vying with each other to grab as much of the Asian spice trade as they could to the exclusion of others.”

⁸ See the particularly important statement at the opening of chapter 13 in Grotius, *Mare Liberum* (1609) 62 and (1916) 72: “Wherefore since both law and equity demand that trade with the East Indies be as free to us as to any one else” – The bi-lingual Latin-English edition prepared by James Brown Scott and Carnegie Endowment for International Peace uses the text of the 1633 Latin edition. For this reason also, it has been found prudent to correlate and verify the text and wording against the original text and reading of 1609. The English translation has been reproduced in the main text and footnotes for the benefit of readers.

The seizure of the Portuguese merchant carrack *Sta. Catarina* is the cornerstone in the politico-historical apology that Grotius commenced around October 1604 and may have completed in 1606 or perhaps even later.⁹ The more precise circumstances that led to the writing of his exposé as well as the reasons for publishing but a single chapter – the *Mare Liberum* (The Freedom of the Seas) – from this larger work have been reconstructed with great diligence in the Harvard doctoral thesis of Martine van Ittersum.¹⁰ Suffice it to say that Grotius revised the chapter in 1608 and published it under significant time pressure in early 1609 as an anonymous work entitled: *The Freedom of the Seas, or a Dissertation on the Right which belongs to the Dutch to participate in the East India Trade*. Grotius took the draft chapter from *De Jure Praedae* (The Law of Prize and Booty) and simply added a new introduction and conclusion.¹¹ Whether at the instigation of the Dutch East India Company's (VOC) directors, one of its constituent chambers, or perhaps also at Grotius' own initiative, the *Mare Liberum* was intended to influence the negotiations for a truce with Spain. These were drawing rapidly to a close when Grotius revised the piece for publication. Spain was willing to accept peace, but only at the price of complete withdrawal by the United Provinces and its merchants from the Indies trade.¹² In his treatise *Mare Liberum*, Grotius underscores that this trade was quite “natural”, “necessary” and “good” for the continued prosperity of the United Provinces.

⁹ The initial dating of *De Jure Praedae* was set by Robert Fruin as approximately October 1604-1605. The date of completion was revised forward to about the autumn of 1606 as a result of supplementary evidence published in 1928. In a letter to the Heidelberg-based councillor Georg Michael Lingelsheim, Grotius announces that he has “finished” his work on the Indies affairs, but doubts whether he should publish the whole manuscript or only the parts pertaining to the law of prize and booty. See: *Briefwisseling van Hugo Grotius*, edited by P.C. Molhuysen, The Hague: Martinus Nijhoff, 1928, no. 86, 1 November 1606, p. 72: “De rebus Indicis opusculum perfectum est: sed nescio, an ita ut scriptum est prodire debeat, an ea duntaxat, quae ad universum ius belli et Praedae pertinent ...”

¹⁰ Van Ittersum, *Profit and Principle* (2002). A revised text version of her thesis is currently in press with E. J. Brill in Leiden.

¹¹ Borschberg, “Grotius, East India Trade” (1999) 227.

¹² See particularly Grotius' statement in his *Defensio capitis* (1928) 154; Grotius, *Mare Liberum* (1609) 62 and (1916) 72.

In his now classic work *Introduction to the History of the Law of Nations in the East Indies* Alexandrowicz writes:¹³

“... Grotius defended the rights of the Dutch and opposed the validity of the Portuguese legal titles in the East Indies *inter alia* by putting emphasis on the status of independent East Indian communities in the law of nations. The second problem with which Grotius concerned himself was the freedom of the seas”

The two facets raised by Alexandrowicz form part of a broader set of what ultimately serve as political arguments. To isolate these from the rest of Grotius’ argument proves problematic.

In a first step the present article will identify two central topics and five core principles that form the backbone of *Mare Liberum*’s argument and objective.¹⁴ It shall be noted that, while the two aforementioned insights of Alexandrowicz shall not be rejected outright, a rather different significance will be attributed to them within the wider historical and political setting that underlie the treatise.

Mare Liberum was published by Grotius anonymously and probably for good reason. Many of the points he raises were not so much unorthodox as they were hardly accepted by his contemporaries and deeply eclectic in nature and intention. Part two of this paper will, therefore, dwell upon the some aspects pertaining to the immediate reception of Grotius’ ideas. William Welwood’s reply to the *Mare Liberum*, as well as Grotius’ response to Welwood via the *Defense of Chapter Five of the Mare Liberum* are accessible to contemporary researchers. Far less familiar in the English-speaking world is the substantial reply drafted by Seraphim de Freitas which after some official feet dragging was first published in Valladolid in 1625.¹⁵ It also seems

¹³ Alexandrowicz, *History* (1967) 44.

¹⁴ Recourse to the juridical language or rights and liberties shall be very circumspect, as the present paper does not engage in a law-based interpretation of the text.

¹⁵ Scholarship on the Iberian Peninsula has established that the work was written around 1616 and subsequently revised in the 1620s. Freitas’ work does not represent a commissioned reply by the Iberian monarch, but a study by its own right. The delay in its publication was more than just an aspect of a “policy of peace and good will” by the Spanish monarchy (see Vieira, *Mare Liberum*, 2003, 362). It appears that the Inquisition had a leading hand in the delay as well. See Marcello Caetano’s introduction in: Freitas, *De Iusto Imperio*, 1960, pp. 40-41; and

prudent in this context to evaluate and explore some of Grotius' acknowledged "sources", including significantly the Castilian juriconsult and senator Vázquez de Menchaca.

Finally, there are instances where Grotius appears to contradict himself. The present author raised this problem in an article published in 1999 and questioned whether Grotius actually changed his mind between the publication of *Mare Liberum* and the Anglo-Dutch Conference of 1613. In this article it was reasoned that his exposure to the realities of early colonial expansion, commercial practices, and the conclusion of several treaties with indigenous overlords perhaps rendered Grotius "less classically idealistic".¹⁶ In the context of the present article, a revisitation of this observation is warranted and the present author will contend that, contrary to an initial reading of the Dutch humanist's early works, notes, drafts and fragments,¹⁷ Grotius was probably more consistent in applying tenets of his ideas on trade and colonial enterprise than first realized.

Part I: Navigation, Trade, and Access to Market Places

After these introductory remarks, a basic but very important question is this: What is *Mare Liberum* about? Where better to start than with a translation of the full title from the original Latin which can be rendered roughly as follows: *The Freedom of the Seas, or a Dissertation on the Right which belongs to the Hollanders to Engage in the Indies Trade*.¹⁸ Expounded here are two central themes that Grotius quite evidently binds together in this specific context. The second half of the title addresses the problem of "free trade" and "access to market places and

ibid. pp. 44-46, on a royal committee appointed to ascertain the nature and viability of Freitas' arguments. Caetano opines that some changes to the text were required before the *imprimatur* was issued on 24 October, 1624.

¹⁶ Borschberg "Grotius, East India Trade" (1999) 247-248.

¹⁷ These comprise chiefly the materials collected in Ms. B.P.L. 922 in Leiden University Library, as well as the materials pertaining to the Anglo-Dutch Conferences of 1613 and 1615.

¹⁸ The original Latin title reads: *Mare Liberum, sive de iure quod Batavis competit in rebus Indicanis*.

emporia”. It forms the first and probably also most important cornerstone in Grotius’ politico-historical edifice.¹⁹

From this initial core topic of “free trade” flow other entitlements that are firmly anchored in nature and by extension implicitly also in Creation.²⁰ The second core theme upon which *Mare Liberum* constructs a good portion of its argument addresses the historically important problem of “market access”. By this term the present author understands unimpeded access (via the high seas) to “market places” and “emporia” outside the European continent.²¹ One must remember that Grotius in *Mare Liberum* is really only advocating “free access” for the procurement of goods (such as spices) for transshipment to the Netherlands. He does not (yet) advocate the penetration of native Asian markets for the resale of goods by the Dutch to Asian consumers.²² That was not Grotius’ concern, at least not between 1604 and the revision of the *Mare Liberum* in 1608-1609.²³

Free and unimpeded access to market places assumes a lengthy and certainly not subordinate position in Grotius’ trail of thought.²⁴ In order to freely access “market places” and “emporia” in the East Indies (and by extension also other market places around the globe), the Dutch may resort to maritime navigation.²⁵ Grotius attacks the aspirations of both Portugal and

¹⁹ Grotius, *Mare Liberum* (1609) 1 and (1916) 7: “Every nation is free to travel to every other nation, and .. trade with it.”

²⁰ Ibid. (1609) 52, 53-54 and (1916) 61, 63.

²¹ Ibid. (1609) 65-66 and (1916) 75.

²² The intra-Asian market was to grow only in subsequent years of the seventeenth century and became an important source of income for the VOC during its corporate lifetime.

²³ There is evidence to suggest that Grotius became aware of the significance, dynamics and profitability of the intra-Asian trade by the time he attended the Anglo-Dutch Conferences of 1613 and 1615.

²⁴ In the past, scholarship on *Mare Liberum* has focused on the “freedom of the seas” and the legal arguments of the treatise. Modern scholars are beginning to unravel a more complex set of arguments. See for example: Thornton, *Hugo Grotius* (2004) 20, 21 where in the interpretation of *Mare Liberum* where the issues of trade and access to market places assume a more prominent position than in the past.

²⁵ This is of course under the strict proviso that the Portuguese are not actually sovereign overlords of the territories to which the Dutch sail, and Grotius is well aware that the Lusitanian crown does indeed legitimately command sovereignty over certain territories in the East Indies, including Goa and Malacca. See *Mare Liberum* (1609) 4 and (1916) 11: “The Portuguese are not sovereigns of those parts of the East Indies to which the Dutch sail, that is to say, Java, Taprobana [an ancient geographic concept variously applied to the islands Ceylon or also Sumatra], and many of the Moluccas.” The choice of Taprobana by Grotius. shows how deeply he was steeped in humanist tradition that embraced Ptolemaic geography. By 1600 The term Taprobana was no longer current among

Spain to assert a maritime-based trading preserve. He contends that efforts to establish such a trading preserve represented an open and evident infringement of nature. Unimpeded and peaceful maritime navigation is understood by Grotius as an extension of the *ius communicandi* and *ius commerciandi*, two natural rights that he adopts from the Spanish theologian Vitoria.²⁶

From the theoretical cornerstones of “free” or “unimpeded trade”, as well as “free” or “unimpeded” access to market places via innocent and peaceful passage across pelagic waters, one is now in a position to identify and elaborate on five basic principles that can be gleaned from a close reading of *Mare Liberum*. They are by no means novel to the students of Grotius, and one finds them not only here in *Mare Liberum*, but also in some of his other works and working drafts, ranging from *De Jure Praedae* across the fragments *De Societate Publica cum Infidelibus* (On Public Society with Non-Christians)²⁷ and *De Pace* (On Peace),²⁸ the treatises *Commentarius in Theses XI* (Commentary to Eleven Theses),²⁹ *Defensio Capitis Quinti Maris Liberi* (Defense of Chapter Five of the *Mare Liberum*)³⁰ to his monumental *De Jure Belli ac Pacis* (The Law of War and Peace).³¹ From the theoretical cornerstones of trade and access via innocent and peaceful passage across oceanic waters, one is now in a position to elaborate on five basic principles found in *Mare Liberum*. These echo the position Grotius would assume at the Anglo-Dutch Conferences held in London (1613) and The Hague (1615). The five principles are as follows:

cartographers: see Ortelius (1570, 1586, 1589), Plancius (1590, 1594), Claesz (1595, Linschoten), Hondius 1597, 1602, Le Clerc (1602).

²⁶ On the wider historic context of this passage, and its Biblical origins in Numeri 21:21-25, see: Janssen, *Bellum iustum* (1998) pp. 138-139. See also the useful summary and discussion in: Ziegler, *Eroberung Lateinamerikas* (2001) pp. 9, 20 et seq.

²⁷ Borschberg, “De Societate” (1998) passim.

²⁸ Borschberg, “De Pace” (1996) 268-292.

²⁹ Borschberg, *Commentarius in Theses XI* (1994); Borschberg “Commentarius” (1992).

³⁰ The Latin text was first reproduced as an appendix in Muller, *Mare Clausum* (1872) 331-361. A translation into English is reproduced in Wright, “Some less Known Works” (1928) 137-205.

³¹ First published in Paris in 1625, the text of this famous and influential work was revised several times by Grotius himself until his death in 1645. See Grotius, *De Iure Belli* (1919). The most commonly used English translation remains Grotius, *De Jure Belli* (1925/1964).

One, trade is perfectly natural and it is deemed to be bestowed upon mankind by nature, as evident *inter alia* from the winds and currents of the sea.³² This latter consideration is extracted from Seneca, albeit evidently second-hand and certainly out of context, as Knight shrewdly observed.³³ Trade is part of an interactive process willed by the Creator Himself. The following passage from Grotius' *Mare Liberum* not only gives a resounding echo to Aristotle's belief in man's innate propensity to cultivate friendly personal or societal intercourse, but also the *logos spermatikos*, the universal permeation of natural reason that is normally associated with the philosophical school of the Stoics.³⁴

“Every nation is free to travel to every other nation, and to trade with it. God Himself says this speaking through the voice of nature; and inasmuch as it is not His will to have Nature supply every place with all the necessaries of life,³⁵ He ordains that some nations excel in one art and others in another.³⁶ Why is this His will, except it be that He wished human friendships to be engendered by mutual needs and resources,³⁷ lest individuals deeming themselves entirely sufficient unto themselves should for that very reason be rendered unsociable?”

Two, in line with the premises set down in the *Institutes of Justinian*, private property was not instituted by nature, but is a creation of man for his own convenience and for the satisfaction of

³² Grotius, *Mare Liberum* (1609) 1 and (1916) 7.

³³ Knight, “Grotius in England” (1919) 9.

³⁴ Ibid., (1609) 1 and (1916) 7 and the additional references *ibid.* (1609) 53 and (1916) 63.

³⁵ Grotius, *Mare Liberum* (1609) 61 and (1916) 53, citing Aristotle's *Politics*, 1.9: “For the art of exchange extends to all possessions, and it arises at first in a natural manner from the circumstance that some have too little, others too much.”

³⁶ Ibid. (1609) 52 and (1916) 61. See also the following argument advanced by Grotius in chapter 8: “By the law of nations the principle was introduced that the opportunity to engage in trade, of which no one can be deprived, should be free to all men. This principle inasmuch as its application was continually necessary after the distinctions of private ownerships were made, can therefore be seen to have had a very remote origin. Aristotle, in a very clever phrase in this work entitled the *Politics*, has said that the art of exchange is a completion of the independence which Nature requires. Therefore, trade ought to be common to all according to the law of nations, not only in negative, but also in a positive, or as the jurists say, affirmative sense.”

³⁷ Ibid. (1609) 53 and (1916) 62: “Hence commerce was born out of necessity for the commodities of life, as Pliny shows by a citation from Homer. But after immovables also began to be recognized as private property, the consequent annihilation of universal community of use made commerce a necessity not only between men whose habitations were far apart, but even between men who were neighbours...” See also the account of how trade supposedly arose among the Chinese: “They say that trade arose among the Chinese in about this way. Things were deposited at places out in the desert and left to the good faith and conscience of those who exchanged things in their own for what they took.”

his bodily needs.³⁸ According to the testimonies of the ancient writers and poets,³⁹ certain places, sites or objects remain unappropriated or common to all. These include specifically also places of public worship, air or running water.⁴⁰ Taking these tenets of Roman public law as a foundation, Grotius postulates that certain spaces remain unappropriated and cannot be made the property of individuals or states. As a result, common utilization must remain intact,⁴¹ and each individual or sovereign may enjoy such spaces.⁴² Among these unappropriated spaces or objects Grotius also lists the seas or oceans.⁴³

Three, private property, which is a positive institution created by man, may not be enjoyed by individuals without observing certain conditions that are thought to be anchored in nature or Creation. Nature wills, in the eyes of Grotius, that there should be no wastage, and also that people should not appropriate more than they can use.⁴⁴ The Dutch humanist explains to his readers that the Portuguese monopolize trade to the exclusion of others, drive up prices and also engage in profiteering.⁴⁵ Such behaviour, according to Grotius, is clearly directed against the very design of nature. The Creator foresaw through nature a free flow and exchange of goods to all parts of the world. Also, people may not acquire common things if this harms others. Profiteering not only violates the order and design of nature, but also runs counter to Christian charity.

³⁸ Grotius, *Mare Liberum* (1609) 14-15 and (1916) 23-24; See also Borschberg, "Grotius, East India Trade" (1999) 237. See also Grotius, *Mare Liberum* (1609) 16-17 and (1916) 25.

³⁹ Ibid. (1609) 17 and (1916) 28.

⁴⁰ Ibid. (1609) 17 and (1916) 28-29, particularly Grotius' reference to Virgil; *Institutes of Justinian* (1975), II.i.7. 65.

⁴¹ Grotius, *Mare Liberum* (1609) 48-49 and (1916) 57.

⁴² Ibid., (1609) 20 and (1916) 28-29, including specifically Grotius' references and footnotes; also *Institutes of Justinian* (1975), II.i., pr: "quaedam enim naturali iure communia sunt omnium, ... quaedam universitatis, quaedam nullius ..."

⁴³ *Institutes of Justinian* (1975) 65: "Et quidem naturali iure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris ..."

⁴⁴ This, incidentally is a core argument brought forward by John Locke in his famous *Second Treatise on Government*. See Locke, *Two Treatises* (1988) 285 et seq., but esp. §31, 290.

⁴⁵ Grotius, *Mare Liberum* (1609) 60-61 and (1916) 70-71.

Four, what nature has given cannot be alienated by man.⁴⁶ This is an important principle developed by Aquinas and his commentators in sixteenth century Spain.⁴⁷ Grotius concedes here in *Mare Liberum* as well as in his other treatises that there are some noteworthy exceptions. These include the waging of a just (public) war and the punishment of one's enemy.⁴⁸ Booty of war and punitive seizure can include tangibles and intangibles,⁴⁹ and can specifically encompass nature's bounty of resources, access to trade, as well as political authority. Grotius' Scholastic predecessors established (notably in line with the principles of Christian charity) that the value of goods alienated as a result of just warfare, punishment, and retaliation must be commensurate with, and in direct proportionality to, the actual injury suffered and avenged.⁵⁰

Five, every person may defend himself and his interests.⁵¹ In the absence of (effective or unbiased) arbitration, recourse to violence is permissible, and the injured person may take commensurate action to avenge injury and to restore what has been unduly denied or impeded.⁵²

In short the five basic principles are:

- 1) The engagement in peaceful societal interaction (*ius communicandi*- right of communication), with the corresponding prohibition that no one (and this would implicitly also include any sovereign as outlined in the subsequent sections) may impede others in pursuing this interaction.⁵³

⁴⁶ Ibid. (1609) 20 and (1916) 29-30; Borschberg, "Grotius, East India Trade" (1999) 237.

⁴⁷ Borschberg, "De Societate" (1998) 367; Borschberg, "Grotius, East India Trade" (1999) 238-239.

⁴⁸ This reception and its historic relevance are explained in Vasconcelos de Saldanha, *Iustum Imperium* (1999) 202 et seq.

⁴⁹ *Institutes of Justinian* (1975) II.ii.1-2; compare this also with Borschberg, "Commentarius" (1992) 468.

⁵⁰ Grotius, *Mare Liberum* (1609) 63-66 [last page erroneously numbered 42] and (1916) 73-76; and generally also Borschberg, "Commentarius" (1992) 467; Borschberg, "De Pace" (1996) 280-281.

⁵¹ Grotius, *Mare Liberum* (1609) 63 and (1916) 73; Borschberg, "De Pace" (1996) 279-280.

⁵² Borschberg, *Commentarius in Theses XI* (1994) 258-261.

⁵³ This line of reasoning whereby Grotius establishes or identifies a right and at the same time establishes prohibitions not only transpires here in *Mare Liberum*, but is manifest from the fragment *De Societate Publica cum Infidelibus*. See: Borschberg, "De Societate" (1998) 372-373 esp. note 80. – Concerning the impediment of the *ius communicandi*, see also Borschberg, "Grotius, East India Trade" (1999) 232.

- 2) Nature has willed that certain sites remain common to all, with the corresponding prohibition that certain sites and spaces may never be appropriated as public or private property.
- 3) Nature wills that all men share in the riches of the earth and Creation,⁵⁴ with a corresponding prohibition that no one may engage in acts of profiteering and permit wastage of nature's bounty.⁵⁵
- 4) Nature has given spontaneously the fruits of its bounty to all mankind.⁵⁶
Correspondingly, no one may alienate or destroy what nature has spontaneously given. Nature's spontaneous gifts include tangibles as well as intangibles.⁵⁷
- 5) In the absence of just arbitration, any individual may ensure that these basic principles are not violated. If they are, recourse to violence is permissible, with certain limitations imposed on the proportionality of retaliation and acts of revenge.⁵⁸

Grotius contends that the cause of the Hollanders against the Portuguese and their (Spanish) King was an honourable one. He underscores rhetorically the good will and preparedness of his peoples to be judged and submit to a majority opinion.⁵⁹ He appeals to his readers (whom he invokes as “[Y]e Princes, your good faith, ye Peoples, whoever and wherever ye may be”)⁶⁰ to judge their case. Grotius underscores both the good will as well as the willingness of the Dutch Republic (“a state, not ... illegally founded, but ... a government based upon law”)⁶¹ and its

⁵⁴ Grotius, *Mare Liberum* (1609) 52 and (1916) esp. 61: “Nature had given all things to all men.”

⁵⁵ Ibid. (1609) 59, 60, 61 and (1916) 69, 70, 71.

⁵⁶ Ibid. (1609) 52 and (1916) 61.

⁵⁷ Ibid. (1609) 52 and (1916) esp. 61: “By the law of nations the principle was introduced that the opportunity to engage in trade, of which no one can be deprived” with the corresponding reference to the Digest of Justinian, I.i.5. See also *Institutes of Justinian* (1975) 65.

⁵⁸ Grotius, *Mare Liberum* (1609) 63-66 [last page erroneously numbered 42] and (1916) 73-76 passim; see also Borschberg, “De Pace” (1996) 281.

⁵⁹ Ibid. (1609) unpaginated introduction, fols. ix, xi. and (1916), 4, 6.

⁶⁰ Ibid. (1609), unpaginated introduction, fol. ix and (1916) 4.

⁶¹ Ibid. (1609) unpaginated introduction, fol. ix and (1916) 5.

people to submit to a majority opinion.⁶² This verdict, he believes, will not fall in line with the pursuits of the Iberian monarch.⁶³

The central message of *Mare Liberum* may be summarized as follows: Trade is both natural and good. The Hollanders may access the markets in the Indies and do so by recourse to navigation. They suffer injury, however, on two counts: first, because the Portuguese claim for themselves spaces that cannot be appropriated (i.e. the oceans), and because they monopolize trade at the cost of others in Europe and Asia. They charge excessive prices for their goods. The Hollanders do not deny the Portuguese their right to trade in the East Indies, but simply want to share in the rich bounty. Because the Hollanders are prevented from trading in Asia,⁶⁴ and in the absence of effective arbitration (to which the Hollanders doubtlessly would subject themselves, if arbitration were available) the Hollanders resort to self-defense and become judges in their own case. The Hollanders avenge the wrongs committed against them by the Portuguese.⁶⁵ These injuries are not featured here in Grotius' hastily reworked treatise, but presented in chapter 11 of *De Jure Praedae*.⁶⁶

How does this square with the ostensible purpose and agenda staked out by the full title of the treatise? Unimpeded market access across the high seas, that is the freedom of maritime navigation, is raised by Grotius on account of Portuguese and Spanish policies of obstruction and exclusion.⁶⁷ The arguments for the freedom of navigation are collapsed into a set of arguments

⁶² Ibid. (1609) unpaginated introduction, fol. xi and (1916) 6 on the supposed antiquity of this practice.

⁶³ Ibid. (1609) 65 and (1916) 75: "Following these principles a good judge would award to the Dutch the freedom of trade, and would forbid the Portuguese and others from using force to hinder that freedom, and would order the payment of just damages."

⁶⁴ Note the observation of Knight, "Grotius in England" (1919), 6: "... it should be noted that at this time Spain, of which power Portugal was then a constituent, was at war with Holland as also with England. Her prohibition of enemy trading with lands, or navigation in waters, over which she claimed dominion was therefore in perfect accord with principles which, today certainly, are generally recognized. But this aspect of the case is entirely ignored by Grotius."

⁶⁵ Grotius, *Mare Liberum* (1609) 62-63 and (1916) 72-73; Borschberg, "De Pace" (1996) 281.

⁶⁶ In the full autograph manuscript of *De Jure Praedae*, the text of *Mare Liberum* is featured in the subsequent chapter 12.

⁶⁷ Grotius, *Mare Liberum* (1609) 65 and (1916) 75: "... would forbid the Portuguese and other from using force to hinder that freedom [of trade] ..."

that essentially address the competitive political and economic nature of starkly contrasting colonial systems of the late sixteenth and early seventeenth century.

Part II: Sources, Historic Reception and Criticism of *Mare Liberum*

With this insight one has arrived at part two of the present paper that addresses individual points of criticism historically brought against *Mare Liberum*. Three concrete issues merit further exploration at this juncture:

One, criticism can be directed specifically at the arguments Grotius dredged from the writings of the so-called “School of Salamanca”. Vitoria deserves special mention here and to an extent also his principal source, Thomas Aquinas. Many of the arguments advanced by Grotius in the course of his *Mare Liberum* are extracted from the Salmantino jurisconsults and theologians. Specifically, he raises issues that are also found in Vitoria’s famed and historically very influential *Two Relections on the Indies* first published in Lyon in 1557.⁶⁸ Arguments that were originally developed in the context of the American conquest are mined by Grotius and projected into the Asian scenario. When the Dutch humanist dismisses, by appeal to Vitoria, the temporal supremacy of the pope, or rejects the idea that the peoples of Asia are “insane” or mentally retarded (a classically Spanish debate over the natives in the Americas),⁶⁹ or even when he denounces European powers who strip indigenous rulers of their public authority on the

⁶⁸ Vitoria, *Relectiones Theologicae* (1557). Two different editions of Lyon 1557 and Salamanca 1564 feature starkly different page breaks and page numbering. Both have been reproduced in a fac-simile edition by Fr. Luis G. Alonso Getino in volume 1 of the *Relecciones Teológicas del Maestro Fray Francisco de Vitoria* (1933) pp. 212-452. The present author’s own careful study of Grotius’ reading notes, including those specifically taken from Vitoria and featured in Ms. B.P.L. 922 in Leiden University Library, reveal that the young humanist worked with the first edition of the *Relectiones*, a copy of which had been passed on to him through channels of the VOC.

⁶⁹ A point which Grotius also briefly touches on in his treatise, See Grotius, *Mare Liberum* (1609) 7 and (1916) 13-14: “Nor are the East Indians stupid and unthinking; on the contrary, they are intelligent and shrewd, so that a pretext for subduing them on the grounds of their character could not be sustained. And now that well-known pretext of forcing nations into a higher state of civilization against their will, the pretext once monopolized by the Greeks and by Alexander the Great, is considered by all theologians, especially those of Spain, to be unjust and unholy.” One should also note Grotius’ reference to the lawyer Ferdinando Vázquez in this particular context.

grounds of infidelity,⁷⁰ it is not entirely certain whether he is simply adding “flesh” and perhaps even a bit of sensationalism to the debate over “market access”. As Grotius himself concedes toward the end of chapter 2 of his *Mare Liberum*, there was consensus, particularly in Spain, that such views were “unjust and unholy”.⁷¹ So why wake the sleeping beasts?

These issues fall into the category of what could be called “ballast arguments”: Grotius simply reiterates what was already broadly accepted in European, and specifically Spanish or Iberian circles. More interesting are perhaps the arguments he *did not* take on board from Vitoria’s famed relections, and indeed, from other Spanish authors he is known to have consulted, such as notably Covarrubias. The topic that immediately springs to mind is “universal authority” of the Holy Roman Emperor.⁷² The reasons for avoiding a discussion on this issue are not sufficiently clear, but a link may very well be seen in the fact that the United Provinces remained a nominal part of the Holy Roman Empire in Grotius’ time, and did not formally cease to be a part until the Peace of Westphalia in 1648. In any case, the universal authority of the Emperor is also believed by some authors to extend over maritime space and the seas, as reference to the work of Julius Pacius à Beriga (1619) reveals.⁷³

It should not escape attention that Grotius cites the *ius communicandi* or right of free communication mentioned by Vitoria.⁷⁴ A denial of this right, the good professor from Salamanca argues, represents in itself a sufficient cause for commencing a just (public) war, but with some limitations.⁷⁵ Vitoria’s position is firmly anchored in a discourse that explores the

⁷⁰ See also *ibid.* (1609) 11 and (1916) 19-20 (Quotation of Cajetan’s Commentary to the Summa Theologiae of Thomas Aquinas, 2a-2ae, qu. 4, art. 66, art. 8. The problem is also discussed by Covarrubias y Leyva, *Opera Omnia* (1573) vol. 1, *In Regula Peccatum*, §10.2, pp. 508-509, where some of his acknowledged references are repeated by Grotius. Compare this with the observations in Vieira, *Mare Liberum* (2003) 366.

⁷¹ Grotius, *Mare Liberum* (1609) 7 and (1916) 14.

⁷² Vitoria, *De Indis* (1952) II, §§1 et seq., pp. 48 et seq. (Latin text). Covarrubias y Leyva, *Opera Omnia* (1573) vol. 1, *In Regula Peccatum*, §9.5, pp. 501-504.

⁷³ Pacius, *De Dominio* (1619), pp. 15 et seq.,

⁷⁴ Vitoria’s *ius communicandi* has been the subject of several learned discussions in recent years, including a book by Pérez, *Francisco de Vitoria* (1997). For a recent bibliography touching upon the works of Vitoria, see Hernández Martín, *Francisco de Vitoria* (1998).

⁷⁵ Vitoria, *De Indis* (1952), III, §§4 et seq., pp. 96 et seq. (Latin text). For Grotius’ application of this see also *Mare Liberum* (1609) 64 and (1916) 74: “If many writers, Augustine himself among them, believed it was right to

right to preach Christianity and enter into contact with the indigenous peoples of the New World.⁷⁶ Grotius' achievement is that he amplifies the underlying intentions and programme of Vitoria. As a result, market access and trade are significantly upgraded in Grotius' new scheme of things.

Vitoria's *ius communicandi* is not a concept that is easily understood. Domingo de Soto does not espouse the unconditional validity of such a right, even in the original context raised by Vitoria, i.e. the preaching of the Gospel.⁷⁷ In his *Relection* of 1534 (that actually predates Vitoria's own discourse on the subject of the "Indies") Soto argues that if the Amerindians do not want to hear the Word of God, they cannot be compelled under any circumstances.⁷⁸ De Soto does not seem to advocate the existence of a *ius communicandi*.

Given that there are only two references to de Soto's *De Justitia et Jure* in Grotius' *De Jure Praedae*, one of which was evidently added to the text at a later stage of writing,⁷⁹ it is not likely that Grotius was sufficiently familiar with the different positions among the Salmantino doctors at that stage in his life. It is against the backdrop of this and other evidence extracted from Vázquez, Covarrubias⁸⁰ and Rodrigo Juárez (Rodericus Zuarius)⁸¹ that one should

take up arms because innocent passage was refused across foreign territory, how much more justly will arms be taken up against those from whom the demand is made of the common and innocent use of the sea, which by the law of nature is common to all?"

⁷⁶ A point also touched upon in *Mare Liberum* (1609) 12 and (1916) 20-21.

⁷⁷ According to Vitoria in his *Relectio de Indis*, part II, esp. §§12, p. 78, 80, the natives may very well be compelled to listen to the word of God, they cannot however be compelled to embrace the Christian religion. The Latin text makes this very clear: "Item necessarium est eis ad salutem credere in Christum et baptizari (Marc. ult: 2)... Sed non possunt credere, nisi audient (Rom. 10:3). Ergo tenentur audire alias essent extra statum salutis sine culpa sua, si non tenentur audire." It appears however, that for practical reasons, Vitoria moderates this basic position in the following sections, notably by appeal to the canonists and Canon law, and in §14, p. 80, also on the grounds of "insufficient exposure" to Christian teachings. Further curtailment follows in §15, pp. 80, 82 where Vitoria states that war may not be waged to force people to accept the Christian religion, nor may war and victory be taken as a proof of its veracity.

⁷⁸ De Soto's little-known *Relection* (re-reading) *De Dominio* (On Dominion) was held at the end of the academic year 1535.

⁷⁹ Reference to De Soto's Book 1, question 6, article 4 is found in Grotius' autograph manuscript B.P.L. 917 on fol. 34 verso.

⁸⁰ References are made by Grotius to his work *In Regula Peccatum*. This is contained in Covarrubias' *Practicarum quaestiones liber unus*. See Grotius, *Mare Liberum* (1609) 52 and (1916) 61.

⁸¹ Rodericus Juárez (Latinized: Zuarius), *Consilia duo* (1558). James Brown Scott in the 1916 edition of Grotius' *Mare Liberum* (1916) 44, erroneously equates the author Zuarius with Philip Zuerius of Antwerp.

understand the boastful claim of Grotius to have “invoke[d] the very laws of Spain itself”.⁸² He may very well have invoked the “laws of Spain”, but the sources he consulted at the time of drafting *De Jure Praedae* (and implicitly also *Mare Liberum*) were few and eclectic, and those he carefully studied almost certainly fewer still.

As anyone who has actually combed the learned work of Freitas will be able to testify,⁸³ the issues surrounding the concept of the just war and the denial of free trade most certainly do not end here. The Iberian professor is well aware that, outside the European cultural sphere, the concept of market access is wanting. He points to the example of China as a country that does not abide by this principle. Although Freitas hastily criticizes the punishments dished out by the Chinese authorities even to those who have been shipwrecked along the coast. It is clear that he does not condemn the principle of barring access to peaceful trade, even if he readily acknowledges that both trade and navigation are actually conceded by the “law of nations” (*ius gentium*).⁸⁴ But according to Grotius, the freedom of commercial interaction is a right so basic, fundamental and natural that neither the Portuguese, nor any other sovereign, can prohibit or physically prevent others from engaging in trade. Following the reasoning of Vitoria (and those who follow him), any attempt to impede trade is thus a cause for a just war.⁸⁵ In resorting to the right of self-defense the Dutch (and also some Asian princes, such as the King of Johor) wage a just war on the Portuguese, and in this effort even forge alliances with other similarly injured

⁸² Grotius, *Mare Liberum* (1609) unpaginated introduction, fol. ix, 35-36, 41 and (1916) 4, 44, 50.

⁸³ Freitas, *De Justo Imperio* (1625). From the published correspondence of Grotius it transpires that he was aware that a reply had been written in Spain, and later also read this work. Despite the customary Baroque pose of flattery, it does appear that Grotius was duly impressed by Freitas’ reply, commenting that it was a piece worthy of a reply. – There is presently no translation of this important work of Freitas into English, but there are extant editions in Portuguese, Spanish, French and German. One of the most accessible editions is the Latin-Portuguese text version: Frei Serafim de Freitas: *Do Justo Império Asiático dos Portugueses*, 2 vols., Lisbon: Instituto Nacional de Investigação Científica, 1983. The present article, however, will work with the Latin text as well as the German translation prepared and critically annotated by Jörg Hardegen: *Seraphim de Freitas: Über die Rechtmässige Heerschaft der Portuguesen in Asien. Freitas gegen Grotius im Kampf um die Freiheit der Meere*, doctoral dissertation in Law, University of Kiel, 1979.

⁸⁴ Freitas, *Über die Rechtmässige* (1976) pp. 88, 91, 92, 195, 283. It should be expressly stated that Freitas does not believe the law of nations to be the outcome of a consensus of all peoples, but only the product of “natural reason”. See *ibid.*, p. 300.

⁸⁵ Grotius, *Mare Liberum* (1609) 3-4 and (1916) 9. Freitas bitterly disagreed with Vitoria’s position, see Freitas, *Über die Rechtmässige* (1976) 92.

parties. In this context, Grotius upholds in *De Jure Praedae* that the Dutch and the Johoreans were justified in entering into such a compact of trade as well as mutual assistance and co-operation.⁸⁶ But may Christians ally with non-Christians to wage a war against another Christian party, if the latter is clearly in violation of divine or God-given rights? At this juncture Freitas assumes a conservative stance and denies that under such circumstances and conditions, a war can be deemed legitimate.⁸⁷ This is not only the position of the Catholic lawyers of the time, but also Protestant thinkers as well.⁸⁸ As the present author has argued elsewhere, Grotius did recognize this as a serious problem and addressed it in other writings, including the full manuscript of *De Jure Praedae*, the fragment *De Societate Publica cum Infidelibus* and also in *De Jure Belli ac Pacis*.⁸⁹

Two, Grotius is not always loyal to the sources he cites from. He is known to have either quoted selectively, out of context, lifted clusters of quotations from other authors,⁹⁰ or even (dishonestly) changed the wording of the text to suit his case. Any reader who ventures to trawl the diligently researched and formulated counter-arguments of Freitas will soon learn of several such shameful contortions by Grotius.⁹¹ One particular passage is the young Dutchman's reference to the Leiden-based jurisconsult Hugo Doneau (Donellus) who, as Freitas underscores, is boldly quoted in a sense exactly contrary to the original!⁹² Grotius is also known to have changed the wording of quoted texts in order to suit his point. In one instance he changed the

⁸⁶ Borschberg, *Grotius, East India Trade* (1999) 230 et seq.; Tuck, *The Rights* (1999) 92-94.

⁸⁷ Freitas, *Über die Rechtmässige* (1976) 289-290.

⁸⁸ Concerning the general issue of forging alliances with infidel overlords at the time, See esp. Saldanha *Tratados* (1999) 212 et seq.

⁸⁹ Borschberg, "Grotius, East India Trade" (1999) 234, esp. note 54.

⁹⁰ The classic example to this effect can be found in the autograph manuscript of *De Jure Praedae*, Ms. B.P.L. 917, in Leiden University. On fol. 69 verso there is a cluster of quotations referring to the Glossators, Aquinas, Adrian, Florus, John Mair, Alphonso de Castro, Tiraqueau, etc. The whole list is evidently lifted in that very sequence from Covarrubias, *In Regula Peccatum*, part II, §11.

⁹¹ Knight, "Seraphim de Freitas" (1925), 8.

⁹² Grotius, *Mare Liberum* (1609) 21 and (1916) 30; Freitas, *Über die Rechtmässige* (1976) 238. Donellus, *Commentariorum* (1596) p. 230.

original wording “canal” to “particular sea”.⁹³ The two terms can hardly be considered synonyms.

Selectively quoting from acknowledged sources is a problem of a completely different, but admittedly not insignificant nature. For example, Grotius adduces in *Mare Liberum* the authority of Ferdinando Vázquez on several counts, such as in chapter 7 of *Mare Liberum*, where the Castilian jurisconsult argues that “public places and spaces common to all by the law of nations (*ius gentium*) cannot become objects of prescription” (i.e. acquisition of something over a long period of time)⁹⁴ and Grotius quotes this passage while discussing the issue: “Neither the Sea nor the right of navigation thereon belongs to the Portuguese by title of prescription or custom.” Perhaps deliberately, perhaps inadvertently, Grotius is giving his readers the impression that Vázquez argued against the appropriation of the sea, and clearly for the freedom of navigation. But the quotation is not actually representative of the Spaniard’s thinking. Anyone who simply thumbs through Vázquez’ *Controversiae* might be surprised to find that the Castilian jurisconsult whom Grotius exalts and hails as the “Pride of Spain,” “one of the most learned Spaniards” and “that Glory of Spain”⁹⁵ is not consistent in his views on navigation.⁹⁶ In fact and quite to the contrary, Vázquez’ oft-cited collection of legal cases and advisories contains several lengthy sections that assert exactly the opposite of the “freely navigable” seas.⁹⁷ Not unlike Grotius, Vázquez adduces the authority of the Roman lawyers and the ancients, including poets, to drive home his point that navigation across the high seas is tantamount to suicide, and therefore something completely “unnatural”. It is perhaps against the backdrop of this and related

⁹³ Knight, “Seraphim de Freitas” (1925) 7.

⁹⁴ Grotius, *Mare Liberum* (1609) 44 and (1916) 52.

⁹⁵ Ibid. (1609) 43 and (1916) 52; *De Jure Praedae* (1964) 249; *De Jure Belli ac Pacis*, Proleg. §55.

⁹⁶ Vázquez de Menchaca, *Controversiae Illustres* (1934), 2.20.11 et seq. that are not favourable to navigation on the high seas; and 2.89.16 et seq. and 2.89.30 et seq. Vázquez states in 2.89.30 that arguments in favour of the Venetians and Genoese prohibiting navigation on “their seas” are “suspect” (*apparet suspecta sit sententia*), not least because they run “counter to natural law or primary law of nations which, as has been said, cannot be changed.” (*est contra ipsim jus naturae, aut gentium primaevum, quod mutari non posse diximus*).

⁹⁷ Ibid., 2.20. §13 *navigare contra naturam est*; §14: *Navigare periculosissimum est*; §19: *Navigare est ire contra leges naturae*.

evidence that Grotius turned the inherent and undeniable perils associated with overseas trade into a great human virtue and courageous enterprise, and invoked the authority of Aristotle that the “most honourable of all [forms of trade] is the wholesale overseas trade, because it makes so many people sharers of so many things.”⁹⁸ What could more natural than that?

Is trade something that is bestowed unto man by the “spontaneous hand of nature” – to borrow a famous phrase from John Locke’s (1632-1704) *Second Treatise on Government* — or is it, as the formidable Iberian authorities Vázquez and Freitas contend, something that is “unnatural” that is, a sign of decadence and a form of human interaction not foreseen by God who created the Garden of Eden without need or want. The question whether trade is, or is not, part of nature’s perfect design and order is of central significance – because of the implications it has on the right of maritime navigation – but it is a question that finds little consensus among the authorities of the sixteenth and seventeenth century. It should not surprise that Grotius and Vázquez do not at all share the same view, and Freitas sides with his Castilian counterpart, but on different grounds. Indeed, Freitas makes it actually quite clear – and this marks a sharp contrast to Grotius – that he does not hold Vázquez in high esteem, but tends to regard him more as a politician than a scholar of jurisprudence.

Three, Grotius treats the sea as spaces unappropriated (in strict contrast to public property or public patrimony) by the law of nature which cannot be made the property of any party.⁹⁹ The arguments underlying this position are chiefly expounded in chapter 5 of the *Mare Liberum*, the section of the treatise that specifically evoked the refutation by the Oxford-based lawyer Welwood.

First it shall be seen how this passage fits into the framework of *Mare Liberum*. Broadly speaking, Grotius stipulates that the Dutch in exercising their right of free trade and interaction also have a right to access ports in the Indies via oceanic waters. This is because he regards these

⁹⁸ Grotius, *Mare Liberum* (1609) 54 and (1916) 63.

⁹⁹ Ibid. (1609) 26 and (1916) 34.

oceans as “unappropriated space”, as something that remains in its primitive natural state and thus comprises part of the heritage of all mankind. Grotius consequently concludes that the sea must be freely navigable to all. Specifically, this argument is directed against the historic claims advanced by the crowns of Portugal and Spain to have appropriated the vast oceanic waters of the world. The legal grounds upon which they based their claim are of course well known, and include significantly rights of ownership by first discovery (*res nullius*),¹⁰⁰ papal donation,¹⁰¹ prescription as well as custom and continuous use.¹⁰² Foreign parties could only ply their maritime routes or “trespass” the high seas claimed by Spain in Portugal if they are in possession of a *cartaz*. This “license to navigate” was issued only against a (substantial) upfront fee. Depending on the finances of the crown, the issuance of such *cartazes* was often limited to the subjects of Spain and Portugal respectively and denied to other European nations.¹⁰³

Citing passages from Roman law and the ancients, Grotius contends that by natural law the high seas remain both open and common to all. By definition, the sea extends to the level of the highest (winter) tide,¹⁰⁴ which interestingly also renders the beach common space. Such common spaces cannot possibly be appropriated by any individual or state, nor can by implication, any maritime routes across the high seas. A sign of ownership, Grotius also contends, is when the claimant can occupy and defend his claim to proprietorship. In what appears to be a “backup argument”, Grotius stipulates that even if it were theoretically permitted

¹⁰⁰ Ibid. (1609) 5, 6, 12-13, 20-21, 31-32, 49-50 and (1916) 12, 13, 21, 29, 39-41, 59-60.

¹⁰¹ Ibid. (1609) 7-9, 36-38, 56 and (1916) 15-17, 45-46, 66. — Grotius only refers to the bulls of donation dating from 1494 and issued by Pope Alexander VI. He is evidently not aware that the donation of Nicholas V, dating from 1455, is of much greater significance to the Portuguese *Estado da India* than the Alexandrine bulls. In my opinion this can be taken as proof that the Dutch humanist was not deeply familiar with the legal literature from the Portuguese side. At best he studied some Spanish sources such as for example Vitoria and Covarrubias y Leyva who of course both address and discuss the merits the Alexandrine bulls. It is questionable how familiar Grotius really was with the writings of Ferdinando Vázquez at the time of writing *De Jure Praedae* or even at the time of hastily revising chapter XII as *Mare Liberum*. Fresh research on Grotius’ reading notes and on the autograph manuscript owned by Leiden University will hopefully shed new light on this question.

¹⁰² Ibid. (1609) 38 et seq., 57-59 and (1916) 47 et seq., 67-68.

¹⁰³ A law passed in 1601 prohibited in Portugal the issuance of cartazes to non-Portuguese citizens. Dutch aggression and freebooting in the Atlantic appears to have been the immediate reason behind the move.

¹⁰⁴ *Institutes of Justinian* (1975), II.i.3, 65: “Est autem litus maris, quatenus hibernus fluctus maximus excurrit.”

to appropriate the vast open ocean, how could any person, let alone a sovereign, defend it? It is on these broader grounds that Grotius rebuffs Iberian claims to dominion and ownership of the seas as non-viable and even unreasonable.¹⁰⁵

In advancing his case for access to markets in the East via oceanic waters, Grotius put up a valiant defense of free trade for his compatriots. But he treads on proverbial thin ice, and Grotius appears to be well aware of this. Chapter five of the *Mare Liberum* is by far the boldest, but also the most controversial of his generation. The Dutch humanist must have been aware that his postulations were contrary to actual state practice in Europe at the time, and would thus not be readily accepted.¹⁰⁶

Evidence for this can be found in the treatise *Dominio del Mar Adriatico* which in the past rightly or wrongly has been attributed to the famed Venetian cleric and state historian Paolo Sarpi.¹⁰⁷ On the basis of papal donations (many issued in the historical context of Crusades), imperial edicts and popular festivities, including a special discussion on the law of war and its effects, the author of *De Dominio Adriatico* constructs his case for the Republic of Venice that is essentially based on custom and prescription.¹⁰⁸ He is not particularly interested in delving into the subject of natural rights, but contends that over the centuries the dispatch of navies against

¹⁰⁵ Grotius, *Mare Liberum* (1609) 30-31 and (1916) 38-39.

¹⁰⁶ Concerning Genoese claims to sovereignty in the Mediterranean, see: Burgus, *De Dominio* (1641) esp. pp. 141. Sovereignty over the Ligurian sea is chiefly claimed on the basis of prescription, rather than an actual title or (Papal) donation (ibid., esp. pp. 228, 237). Appeal is made in this context to the Medieval Italian jurisconsult Baldus de Ubaldis and Jason who claim that the Genoese (ibid., p. 232) “*sum mare habent distinctum ex inveteratissima consuetudine*” (i.e. ... have their separate sea on the basis of most ancient custom [*consuetude*]) and “*Genuenses licite perscripserunt sinum maris*” (The Genoese prescribe by law (licite) their maritime gulf”. Other authorities invoked here include Johannes Gryphiander and Pacius. Claims that the Genoese historically also exercised *dominium* in oceanic waters other than the Ligurian and Aegean Sea are found on pp. 234-236. For Venice, see the works of Gasparo Contarini and Paolo Sarpi mentioned in notes **Error! Bookmark not defined.** and 109.

¹⁰⁷ The edition consulted was printed in Venice in 1685 and consists of two parts featuring separate page numbering: *Dominio del Mar Adriatico* and *Dominio del Mar' Adriatico per il Ius Belli*. These will be hereafter abbreviated as *Dominio I* and *Dominio II*. – Concerning a dating of the treatise, see the introduction of Roberto Cessi in Sarpi, *Il Dominio* (1945) p. xxxiii, and especially also the additional sources and information he furnishes ibid., note 2. For the historic context of the treatise, see also Cozzi, *Paolo Sarpi* (1979) pp. 268 et seq.

¹⁰⁸ Cessi's introduction in: Sarpi, *Il Dominio* (1945), p. xxxiv, “... *possessione per antichità di tempo e longhissima e consuetudine immemorabile.*”

pirates has given the Venetian Republic real and effective control over the Adriatic.¹⁰⁹ Cardinal Gasparo Contarini and the treatise *De Dominio Adriatico* see Venetian Republican liberty and the control of the Adriatic as inseparable.¹¹⁰ Another treatise published in Lyon in 1619 by Pacius advances in premise 5 that there are three kinds of *dominium* over the sea: property, use and jurisdiction. In terms of property, the sea belongs to no one, in terms of use, the sea is technically open to everyone, and in terms of jurisdiction, that belongs to the prince.¹¹¹ Still, Pacius contends that Venice is in a position to claim *dominium* of the Adriatic on a number of important practical counts: long established custom, effective occupation, keeping the waters clear of pirates, chasing after delinquents and punishing them, issuing regulations affecting navigation, and imposing dues and tolls on ships plying these waters.¹¹² In modern terminology one would say that the Venetians are simply exercising “acts” of sovereign control over the seas.

But what does the Adriatic represent in the eyes of seventeenth century politicians, lawyers and merchants? Is it just a bay? Or is it a sea? Did the issues surrounding a *dominium* of the Adriatic by Venice pose a completely different set of practical problems, demanding different answers or solutions? Or was it just a matter of political and commercial expediency? As a European power favourably disposed toward the Dutch Republic, did Venice not see itself addressed or even threatened in its interests by the very argument of *Mare Liberum*?

The author of *De Dominio Adriatico* could afford to simply ignore Grotius, because in the eyes of that controversial cleric from Venice, the Adriatic is the great historic exception

¹⁰⁹ Sarpi, *Dominio* II (1685), p. 12. A similar point is also made by Contarini, *De Magistratibus* (1592) p. 65 verso. See also Vázquez, *Controversiae Illustres* (1934) 2.89.16 et seq. on the subject of prescription of the seas with his many references to Medieval juridical sources.

¹¹⁰ Sarpi, *Dominio* I (1685), p. 6; also Contarini, *De Magistratibus* (1592) pp. 64 recto - 65 verso, passim. Grotius would not speak of *dominium*, but of *imperium* of the Adriatic. The former term is closely associated with the property (*proprietas*) of the head of household (*paterfamilias*), the latter with public jurisdiction (*iurisdictio*) and effective protection. The author wishes to thank Dr. Eric Wilson (Melbourne) for reminding of this important distinction in Grotius.

¹¹¹ Pacius, *De Dominio* (1619), p. 9.

¹¹² See for example *ibid.*, pp. 26, 30, 31, and esp. the five grounds listed and annotated with quotational evidence on pp. 35-38.

rather than the legal norm.¹¹³ But a close and careful reading of *Mare Liberum* also reveals a sharply different vocabulary employed when discussing the Portuguese on the one hand, and the Venetians and Genoese on the other. It is clear that when Grotius speaks of those vast open oceans, he has the Portuguese and Spanish maritime policies of exclusion in mind, but he becomes significantly more accommodating when it comes to speaking of “bays” and “gulfs”. On this subject, Grotius treads far more deftly and diplomatically. The following excerpt from *Mare Liberum* illustrates that the maritime interests of Genoa, and especially also Venice,¹¹⁴ are not the target of his scornful pen:¹¹⁵

“[Those authors...] are talking about the Mediterranean, we are talking about the Ocean, they speak of a gulf, we of the boundless sea, and from the point of view of occupation these are wholly different things. And too, those peoples, to whom the authorities just mentioned concede prescription, the Venetians and Genoese for example, possess a continuous shore line on the sea, but it is clear that not even that kind of possession can be claimed for the Portuguese.”

This excerpt shows very clearly that Venetian *dominium* of the Adriatic and Genoese control of the Ligurian Sea are not really a major point of contention.¹¹⁶ Admittedly, Grotius is known to be far more willing to accommodate the prospect of controlling confined maritime space (bays, gulfs) later in *De Jure Belli ac Pacis* than he is in *Mare Liberum*.¹¹⁷ Taken from that vantage point, Grotius sees eye to eye with the author of *De Dominio Adriatico*, even though at the surface they seem galaxies apart in their thinking. Perhaps this can help serve to explain why

¹¹³ On this also see Cessi’s introduction in Sarpi, *Il Dominio* (1945) p. xxxiv.

¹¹⁴ One surmises greatly that for reasons of politics and trade in the Baltic, where, as is well known, the Dutch were major players in shipping. Grotius does not utter a single word concerning Denmark’s historic claims to the Sound, and indeed, to the whole of the North Sea between the European mainland and Iceland. At the open of the seventeenth century, this claim was of considerable concern to the English. See the “Instructions given by Queen Elizabeth to the British envoys for the Bremen negotiations with Denmark on fishing licenses and sound tolls” (1602) in: Grewe, *Fontes Historiae*, vol. II, p. 157.

¹¹⁵ Grotius, *Mare Liberum* (1609) 49-50 and (1916) 58.

¹¹⁶ Tuck, *Rights of War* (1999), p. 91.

¹¹⁷ See for example the occupation of gulfs and bays in Grotius’ *De Jure Belli ac Pacis* 2.3.8. and of coastal waters in *ibid.* 2.3.10.2 and 2.3.13.2. These concessions are clearly made from considerations of practical politics and established custom, but in defense of his earlier, theoretical interpretation in *Mare Liberum*, he also argues that one can also conceive of maritime space that cannot at all be occupied, see: *De Jure Belli ac Pacis*, 2.2.3 and *ibid.*, 2.3.10.3.

Mare Liberum is ignored in the latter. It is, to the best of the present author's knowledge, not mentioned or cited a single time in the *Dominio Adriatico*.

With the publication of *Mare Liberum*, Grotius managed to seriously ruffle some feathers among court and university lawyers. That is clear from printed reactions and one only need point to the now classic exposés of Welwood,¹¹⁸ Freitas or John Selden.¹¹⁹ The concrete objections historically brought forward against the *Mare Liberum* are of course well known. Welwood staunchly defended the existence and need for territorial waters, citing specifically the security needs of coastal commerce and shipping, as well as the protection of marine fishing stock. For this purpose he suggested that a notional boundary of 100 leagues (or nautical miles) from the coastline apply for the creation of territorial waters (other than bays, straits, etc.). In his *Defense of Chapter Five of the Mare Liberum*, Grotius rebuffs Welwood's demands for territorial waters as arbitrary and ultimately meaningless. "What reason operates, if the sea can be occupied up to one hundred miles, to prevent it being occupied up to 150, thence to 200 and so on?"¹²⁰

While Welwood is quite prepared to keep the high seas open for international commerce by distinguishing the "open ocean" from "enclosed regions of the sea", Freitas is clearly not. In an argument that with the hindsight of historic perspective rings very modern indeed, Freitas argues that no sphere of the globe can be placed outside the authority of the sovereign, and therefore outside legal jurisdiction. If it is not possible to appropriate the high seas, then it is absolutely imperative that quasi-possession apply. This is not least because it is both desirable and necessary to preserve order along the main maritime trading routes and also to keep pirates at bay.

¹¹⁸ Welwood's attack on Grotius first appeared in chapter 26 of his *Abridgement of All Sea-Lawes, Gathered Forth of all Writings and Monuments which are to be found among any people or Nation, upon the coasts of the great Ocean and Mediterranean Sea*, London: Humfrey Lownes for Thomas Man, 1613, cf. esp. the discussion on pp. 61et seq.

¹¹⁹ John Selden, *Mare Clausum seu De Dominio Maris Libri Duo*, London: Will Stanesbeius for Richard Meighen, 1635.

¹²⁰ Grotius, "Defensio Capitis" (1928) 202.

Grotius adduces evidence from the *Institutes of Justinian* to argue that “air and water” generally speaking, and with this statement implicitly the sea, are common to all by nature.¹²¹ In their replies, Welwood and Freitas contend that references to the communality of water by the law of nature only refer to fresh running water. If the seas were indeed free and open to “all” in ancient Rome, Freitas explains, this was not because they were “common to all by the law of nature”, but common to all Roman citizens (as the patrimony of the Roman people) a reality effected by public policy.¹²² The Roman jurists use the expression “no one” to refer to “no one individual”,¹²³ but this statement is not necessarily binding to or valid for a prince or sovereign who represents the collectivity and the interests of the body politic.¹²⁴

In his *Defense of Chapter Five of the Mare Liberum* Grotius categorically rebuffs both arguments surrounding the interpretations over “fresh running water” and “patrimony”. Not only does he render passages that identify “running water and the sea” as two distinct but identifiable cases of natural, common property,¹²⁵ he equally dismisses the view that the freedom of navigation has its origins in Roman public policy. Freedom of navigation and free market access from across the sea was clearly a *natural right*,¹²⁶ and Grotius underscores the conclusion: “[T]hose who, borne from abroad, navigate on the sea, do not do this on another’s property by

¹²¹ Grotius, *Mare Liberum* (1609) 22-23 and (1916) 31. Grotius treats provisions in Roman law that permitted the occupation of the shore not as sign that the shores were public property, but that Rome passed regulations that ensured that the acknowledged provisions of natural law were not violated; see also *Institutes of Justinian* (1975), II.i.1., 65.

¹²² Ibid. (1609) 22-23, 34-36 and (1916) 31, 43, where Grotius already produced arguments to counter this particular position.

¹²³ As is for example made in the provision of *Institutes of Justinian* (1975), II.i.6., 65.

¹²⁴ A similar point is also advanced by Welwood *Abridgement* (1613), esp. the discussion 61et seq.

¹²⁵ See *Institutes of Justinian* (1975), II.i.1., 65.

¹²⁶ It should be underscored at this juncture that the wording in the *Institutes of Justinian* stipulates that the seas and shores are freely usable by the *ius gentium* or law of nations. Influenced perhaps by the thinking of the statement that follows in §11 (See *Institutes of Justinian* [1975], II.i.11, 66), Grotius equates the *ius gentium* or law of nature with the *ius naturale* or law of nature. He makes the same association in *De Jure Belli ac Pacis* 1.2.4 (De jure naturali ergo, quod et gentium dici potest ..). Technically however, the dictates of nature and the standing consensus of men may not be the same, the latter resembling a positive law that is also subject to change or alteration.

the right of servitude, but on something that is common to all by the right of liberty.”¹²⁷ Grotius

later adds:

“[Celsus said] that the use of the sea is common to all men, which phraseology manifestly excludes every exception. For it is one thing to say ‘all men’ and another to say ‘all citizens’. Neratius likewise stated no less absolutely that the shores have come into the dominion ‘of no one’ He did not say ‘of no private citizen’, but simply of ‘no one’, therefore neither the people nor the prince.”

Critics like Freitas contended that Grotius was not consistent in his treatment of the sea as a possession, or even a quasi-possession. On the one hand, he advocates that the freedom of the seas and shores extend to the level of the highest tide; from this he deduces that no sovereign authority may lawfully impede his citizens from engaging in something as “natural” as trade. But these are bold, categorical statements on which Grotius also imposes certain limitations that again accommodate commercial and political realities. He readily admits that he is not talking about “Goa or Malacca”, ports that he willingly concedes were rightfully owned as colonies by the Portuguese *Estado da Índia*.¹²⁸

The issue is the open sea,¹²⁹ not the coastal waters, bays, gulfs, ports, estuaries and the like.¹³⁰ But why concede one but not the other? The answer depends on a nation’s military ability to physically defend these waters and effectively exercise control over them. The Venetians could patrol the waters of the Adriatic, but the Portuguese cannot control the whole of the South Atlantic and the Indian Oceans. It’s simply not possible. The oceans are so vast, they cannot be protected or effectively monitored by the Portuguese *armada*.¹³¹

¹²⁷ Grotius, “Defensio Capitis” (1928) 158.

¹²⁸ Knight, “Grotius in England” (1919), esp. 7, 10-11.

¹²⁹ Grotius, “Defensio Capitis” (1928) 158 (attacking Welwood): “Far different is the opinion of my little book, as is clear even from that Chapter V itself. For there it is shown that by nature neither land nor sea is the property of anyone, but that land through nature can become property, while the sea can not. A great difference, therefore is established in this part between land and sea.”

¹³⁰ See also Grotius, *Mare Liberum*, (1609) 22-23 and (1916) 31: “The nature of the sea, however, differs from that of the shore, because the sea, except for a very restricted space, can neither easily be built upon, nor enclosed; if the contrary were true yet this could hardly happen without hindrance of the general use. Nevertheless, if any small portion of the sea can thus be occupied, the occupation is recognized.”

¹³¹ Ibid. (1609) 6 and (1916) 12.

In that immortal image encountered in Act 8 of Friedrich Schiller's *Die Braut von Messina oder die Feindlichen Brüder* (The Bride of Messina or the Inimical Brothers):¹³² "Auf den Wellen ist alles Welle, Auf dem Meer ist kein Eigenthum." The German historian Heinrich von Treitschke may very well have cited these catchy words in criticism of British maritime hegemony during the late nineteenth century.¹³³ Indeed, Grotius envisions a freedom of the high seas, but in actual fact this translates into a brutal free-for-all struggle, an indivisible trinity of commerce, war and plunder. The Dutch humanist was most certainly not alone in promoting and propagating this outlook. It was happily espoused by his political superiors and by a powerful faction among the merchant community in the early seventeenth century Netherlands. The unfolding of early VOC history lends ample evidence to this.

Part III. Did Grotius change his mind?

We now arrives at section three of the present paper in which we will examine some individual points of contention. The central question that arises at this juncture is this: Did Grotius change his mind?

Not only are there internal problems with the argument of the *Mare Liberum*, it also appears that with the shifting circumstances relating to the Indies trade, Grotius also adapted his ground of defense. This transpires not only from the documents drafted or perused by Grotius in the course of the Indies Conferences of 1613 and 1615, but also later on in his *De Jure Belli ac Pacis* first published in 1625.

¹³² A translation of this catchy German line into English would be: "On the sea everything is in flux, on the sea there is no property." The full text from Schiller is most appropriate in the context of the present exposé: "Bauen wir auf der tanzenden Welle /Uns ein lustig schwimmendes Schloß? /Wer das grüne, krystallene Feld /Pflügt mit des Schiffes eilendem Kiele, /Der vermählt sich das Glück, dem gehört die Welt, /Ohne die Saat erblüht ihm die Ernte! /Denn das Meer ist der Raum der Hoffnung /Und der Zufälle launisch Reich: /Hier wird der Reiche schnell zum Armen, /Und der Ärmste dem Fürsten gleich. /Wie der Wind mit Gedankenschnelle /Läuft um die ganze Windesrose, /Wechseln hier des Geschickes Loose, /Dreht das Glück seine Kugel um, /Auf den Wellen ist Alles Welle, / Auf dem Meer ist kein Eigenthum."

¹³³ Heinrich von Treitschke, *Politik*, (1898), vol. II, p. 572.

Let us first turn to the issue of prohibiting what nature has supposedly given to all, namely free trade. It will be recalled that Grotius advances in *Mare Liberum* the bold particularistic statement that the “Portuguese, even if they were sovereigns in those parts to which the Dutch make voyages, would nevertheless be doing them an injury if they should forbid access to those places and to prevent them from trading there.”¹³⁴ In other words, the Portuguese do not have the legal capacity to deny access to ports and the conduct of free trade in ports under their direct sovereignty, let alone those that do not belong to them at all. This statement is later elevated to a general principle in *Mare Liberum*:¹³⁵ “Besides, what are we to say of the fact that not even temporal lords in their own dominions are competent to prohibit the freedom of trade.” This bold statement on the unconditionality of free trade is subsequently put in perspective in chapter 11 of *Mare Liberum*: Whilst it is possible to restrict free trade, the enforcement of such restrictions by the sovereign cannot be selective, it must be across the board, or in the words of Grotius: “it is not sufficient that some be coerced, but it is indispensable that all be coerced.”¹³⁶ The situation is simply this: all or nothing, either everyone is granted access to trade, or one becomes a completely isolationist nation, hermetically sealed off from the rest of the world.¹³⁷ In theory this is feasible, but in reality it is not a viable option.

It shall be recalled that the English delegates at the Indies Conferences thought that Dutch practices of exclusion were in effect little different from what the Portuguese were attempting to enforce, a position Grotius clearly rebuffed. Was he initially advocating unhindered access by the Dutch to the Indies when they wanted to become established there, and a few years, after having set up numerous outposts and factories, sought to keep others out, just like the Lusitanian foe? Did Grotius change his mind about free trade?

¹³⁴ Grotius, *Mare Liberum* (1609) 4 and (1916) 10.

¹³⁵ Ibid. (1609) 56 and (1916) 66.

¹³⁶ Ibid. (1609) 58 and (1916) 68.

¹³⁷ Knight, *Grotius in England* (1919) 14.

The answer is clearly negative. Effectively, Grotius legitimized Dutch exclusion policies by invoking the one and only condition upon which exclusion could be deemed legitimate: by excluding everyone, including the Asian traders. The treaties signed between the Dutch and the Asian princes were valid but exclusive contracts.¹³⁸ The Portuguese, by contrast, were clearly selective in their exclusion policies, and Asian traders continued to blissfully engage in commerce as they had done before the arrival of the Europeans. Portuguese contracts with Asian sovereigns, moreover, were according to Grotius not “exclusive” by nature. This is not quite accurate, for the Portuguese did sign treaties that, after about 1605, which began to contain clauses that specifically target the Dutch, the English or the French.¹³⁹ But this too corroborates Grotius’ earlier position, for either one excludes everyone or nobody. The VOC, of course, excluded everyone, and bound princes in Asia to abide by their “valid” contracts with the Dutch – no matter how dubious the conditions might have been under which these contracts were procured.¹⁴⁰ Grotius himself was aware what implications such treaties exacted by arm-twisting and force would invariably have on the liberty of sovereign princes and peoples. His citation from Isocrates loosely rendered in *Mare Liberum* should have served many potential and future Asian allies of the VOC as a classic warning:¹⁴¹ “...[I]n his speech on the liberty of the Rhodians [Demosthenes] says that it was necessary for those who wished to be free to keep away from treaties which were imposed on them, because such treaties were almost the same as slavery.”

Surely, one might wish to retort, this maxim of all or nothing exclusion is tantamount to creating a monopoly, and we know what Grotius has to say about monopolies in his *Mare*

¹³⁸ Borschberg, “Grotius, East India Trade” (1999) 246.

¹³⁹ Several of these are contained in the monumental publication by Biker, *Collecção* (1881-1887). See in *ibid.*, vol I, (1881), particularly the clauses of the treaty concluded with the King of Jahangar, dat. June 7, 1615, p. 190; also the treaty with the King of Kandi, dated 30 June 1617, p. 206, §5 (where it is expressly stated that the Indian monarch should not trade with the Dutch, English or French); treaty with the King of Arakan, 1620, pp. 229 et seq.

¹⁴⁰ Clark and Eysinga, *The Colonial Conferences* (1951) 73, 126.

¹⁴¹ Grotius, *Mare Liberum* (1609) 62 and (1916) 72.

Liberum.¹⁴² He criticizes the Portuguese monopoly on the grounds that they were driving up prices, engaged in profiteering and failed to share with the other nations of Europe the plenty of the East Indies. It shall be recalled that monopolies were legitimate and justified in one and only one instance: if the party claiming the monopoly did not engage in hoarding and profiteering. At the Indies Conferences, Grotius drove home two points: first, that current Dutch prices are justified because of the high costs incurred as a result of “protecting” native Asian princes from encroachment by no lesser parties than the two Iberian crowns.¹⁴³ But the cost of lending protection to trade, as Grotius later advocated, should not be excessive.¹⁴⁴

This position, in turn leads to two scenarios: firstly, the Dutch must sustain the independence of the rulers, on whose continued (but legally compromised) sovereignty Dutch presence in the Indies ultimately rested. The price for the independence of the Asian rulers was paid by European consumers who were heavily surcharged on products imported from the Indies. In other words: “Paying high prices helped the Asian princes keep their sovereign existence against Iberian encroachment.” This point of contention was as unbelievable then as it appears to the modern reader.

Two, Grotius clearly distinguishes the Iberian exclusion policy from the Dutch case on the additional grounds that his countrymen did not claim for themselves and occupy vast tracts of land, but only certain places. Exclusion was thus limited to certain ports and places under contract.¹⁴⁵ With this argument, no doubt, Grotius wanted to forestall also the possible accusation that other parties were being denied from sharing in the bounty and wealth-nature has given to all mankind. Given that much of the discussion with the English over the Indies addressed the spice trade, surely Grotius and the merchants present at the conferences in London and The Hague were well aware that the key spices nutmeg, mace and cloves grew only in a few places and not

¹⁴² Ibid. (1609) 61 and (1916) 71.

¹⁴³ Clark and Eysinga, *The Colonial Conferences*, (1940) 207; *The Colonial II* (1951) 118.

¹⁴⁴ Grotius, *De Jure Belli* (1925/1964) 200.

¹⁴⁵ Borschberg, “Grotius, East India Trade” (1999) 247.

everywhere in Asia. This would have left the “other European parties” engaged in the spice trade, like the English, with little more than a legitimate participation in dealings with pepper. But trading in this spice was not where the highest profits were made.

Epilogue

It would appear that *Mare Liberum* has been misunderstood in its broader intention and rhetorical objective: It’s about the high seas, not about coastal waters, gulfs bays or estuaries. It’s about Portugal and Spanish policies of obstruction and impediment, not about the Genoese and the Venetians. It’s about the crimes committed by the Portuguese against nature and God’s creation: they commit a serious offence in seeking to impede trade and communication at large between the Dutch traders and the Asian princes and peoples; they commit a serious crime by unjustly claiming the oceans to be their exclusive preserve; and they commit a serious offence by abusing their monopoly, by hoarding, and by letting nature’s bounty go to waste.

The *Mare Liberum* makes a plea for the ability of Dutch traders to freely access market places and emporia in Asia by unimpeded and unharassed navigation on the high seas. The freedom of navigation forms a subset to the overarching arguments on the freedom of access and trade. This particular interpretation stands in sharp contrast to past exposés on the treatise, insofar as these have placed the freedom of the seas – and not the issue of trade – at the forefront of scholarly attention. From this vantage point, Grotius is surprisingly consistent in his thinking on the wider issues of maritime trade and navigation, including the two colonial conferences of 1613 and 1615 and even beyond.

To the Dutch, “free trade” and “free access” to market places and emporia became enshrined in a series of treaties signed between the VOC (as a representative of the sovereign state, the Dutch Republic) and many princes of Southeast Asia. Most of these agreements concluded between “sovereign parties” (and therefore carry the weight of an international treaty)

feature clauses that were either specifically directed against the Iberian powers of Portugal and Spain, or in other ways curtailed the freedom of the contracting Asian prince and his people to sell commodities to outside parties. In the early years of the VOC's corporate lifetime, Grotius is known to have had a hand in formulating or drafting such provisions. From an historical perspective the outcome is clear: the treaties effectively curtailed the scope of action for the Asian princes and their peoples, and "divided" their sovereignty. Any breach of the provisions was taken by the VOC as an invitation to attack and punish the defaulting party, chiefly citing the principle *pacta sunt servanda* – "contracts must be honoured". Grotius not only insisted on this principle throughout the colonial conferences of 1613 and 1615, he also sanctioned the idea of a divisible sovereignty. The different "marks" of sovereignty could be distributed among different agencies and officeholders both inside and outside a given body politic. This is made very clear in his treatise *Commentarius in Theses XI* and later in his *De Jure Belli ac Pacis* of 1625. The divisibility of sovereignty in Grotius has captured the imagination of several researchers and is recognized by a growing number of scholars, including the present author, to have significantly strengthened the legal foundations for European colonial rule in Asia and the New World.¹⁴⁶ All peoples are originally free; they are even free to irreversibly sign away their liberty of choice and sovereign rights at the stroke of a pen! Grotius should not merely be simply labelled "prince of peace", "champion of reconciliation", or early advocate of the "freedom of maritime navigation" as he has been for much of the twentieth century. Such views have served to distort beyond recognition Grotius' standing among the architects of early modern colonial rule.¹⁴⁷ The misguided "celebration" of Grotius as the champion of the "free seas" is captured, in

¹⁴⁶ The recently completed doctoral theses of Martine van Ittersum (Harvard), Edward Keene (London), and Eric Wilson (Melbourne) exemplify particularly well this shift in thinking about Grotius and his role in establishing the foundations of colonial rule. Concerning the growing interest of the Grotian concept of divisible sovereignty, see: Thomas Berns, "La souveraineté" (2000) 615; Van Gelderen, "Soto to Grotius" (1999) 202.

¹⁴⁷ Concerning the growing awareness of Grotius' role as an architect of colonial rule, see some recently published works: Keene, *Beyond the Anarchical*, 2002, for example pp. 145 et seq.; Rolf Schwarz and Oliver Jütersonke, "Divisible Sovereignty" (2005) 651-655.

a nutshell, by the following testimony of Christian Meurer in 1919 and verbally enriched by Anand in 1981:¹⁴⁸

“‘The freedom of the seas slumbered the sleep of a Sleeping Beauty’ ... until this gallant knight from the Netherlands appeared ‘whose kiss awakened her once more.’”

As history teaches, the awakening was not to happen in the lifetime of that “gallant knight” Grotius, but was delayed, alas, by several hundred years. In Europe and in their respective colonial empires, including the Dutch, the principle of *mare clausum* clearly prevailed and in more recent times appears to be experiencing a Renaissance.

In the age of globalization the issues of free trade and navigation are as important as they were in the sixteenth and seventeenth centuries. With the introduction of the new law of the seas, it is very clear that the problems already addressed by Grotius and his opponents like Welwood and Freitas remain core issues that plague modern nations today.¹⁴⁹ The ongoing disputes cover the reach of territorial waters and economic zones, the protection of fishing stocks in coastal waters,¹⁵⁰ the need to combat piracy, the rights and obligations of “neutral” shipping, and the development of marine resources, including the exploitation of the deep-sea bed.¹⁵¹ With the benefit of historical hindsight perhaps, Grotius was on select issues of maritime law and policy “less modern” in his thinking than some of his opponents, such as Freitas, who for all his flaws actually foresaw the need for sovereign bodies to possess, or at least remain in effective control of, the sea bed and “spaces” filled by ocean waters.¹⁵² With the advancement of technology, it is now possible to exploit minerals from the seabed. Oil has been extracted offshore for many

¹⁴⁸ Anand, “Maritime Practice” (1981) 440.

¹⁴⁹ On this, see generally: Beesley, “Grotius and the New Law”, *Ocean Yearbook* 18 (2004) esp. pp. 100 et seq.

¹⁵⁰ Ibid., p. 105, where it is made clear that Grotius himself did not foresee that over-fishing could ever become a problem.

¹⁵¹ Many of the issues raised by Grotius, Freitas and Welwood are also pressing issues today demanding swift resolution, See Oda, “Some Reflections” (2002) 218-221. On the possibility of occupying the ocean bed (together also with air, water and other “spaces”), see esp. Freitas, *Über die Rechtmässige* (1976) 229-230.

¹⁵² Freitas also argues for a similar “possession” of air-space. See *ibid.*, p. 230.

decades.¹⁵³ Modern environmental problems underscore the recognition that the high seas cannot remain zones entirely freed of, or completely detached from, legal order.

What about the freedom of trade and commerce? One thing becomes clear from a close reading of Grotius' *Mare Liberum*: "free trade" has never really been cleanly separated from politics. Issues of trade and commerce have been, and may always remain, inseparably coupled with the tenets of political expediency.

¹⁵³ Oda, "Some Reflections" (2002) 219, 221.

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