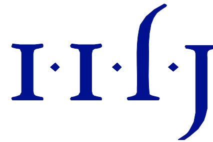

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Grotius' Theory of Trans-Oceanic Trade Regulation: Revisiting *Mare Liberum* (1609)

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

by

Peter Borschberg[1]

Abstract

Four hundred years ago, the Dutch humanist and jurisconsult Hugo Grotius was commissioned by the United Netherlands' East India Company (VOC) to write a defence of Admiral Jakob van Heemskerk's seizure of a Portuguese merchant carrack in the Straits of Singapore (February 1603). At the time he was twenty-one years old. What Grotius produced between 1604 and 1606 is a comprehensive political and historical exposé on war. Today, this work is known as *De Jure Praedae Commentarius,* or "Commentary on Law of Prize and Booty". Only part of this comprehensive manuscript was published during its author's lifetime and is known as *Mare Liberum* or "The Free Sea" (1609).

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[1] The author is Associate Professor in History at the National University of Singapore. He can be reached at HISPB@nus.edu.sg An earlier draft of this paper was first presented at the seminar *Foundations of Modern International Thought, 1494-1713,* Folger International Center for the History of British Political Thought, and organized by Prof. David Armitage in May 2002. The paper was subsequently revised at the Netherlands Institute for Advanced Studies (NIAS) as part of the Grotius Research Group activities in 2005. Borschberg wishes to thank the participants of the 2002 seminar, and especially also Prof. Benedict Kingsbury (NYU) and Dr. Eric Wilson (Melbourne) for their incisive comments on improving the focus and academic quality of the present paper. The University Library in Leiden, the Library of the Peace Palace in The Hague, and the University Library in Lund deserve special thanks for granting access to their collections of manuscripts and rare printed materials.

A shortened version of this paper was published by the Leiden-based journal Itinerario. See: "Grotius' Theory of Trans-Oceanic Trade Regulation: Revisiting Mare Liberum (1609)", *Itinerario,* 29.3 (2005) pp. 31-53. The present article represents the revised and enhanced text of July 2006.

Mare Liberum is essentially a propagandistic treatise and argues for Holland's merchants to freely access emporia in Asia by unimpeded navigation across the high seas. The freedom of navigation forms a subset to the overarching arguments on the freedom of access and trade. This particular assessment of *Mare Liberum* stands in sharp contrast to past interpretations, insofar as these have placed the 'freedom of the seas' - and not the broader issues surrounding 'free trade' - at the forefront of scholarly attention. From this vantage point, Grotius was surprisingly consistent in his thinking on the broader issues of maritime trade and navigation.

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 championing peace and the freedom of navigation on the high seas for which the Dutch humanist is best remembered in modern times, Grotius should also assume a place among the intellectual fathers of Dutch colonial rule in Asia.

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

by

Peter Borschberg[1]

Introduction

The setting is February 25, 1603. At dawn the three ships under the supreme command of Jakob van Heemskerk spotted 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

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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 dawn 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 United Netherlands East India Company (VOC) formed in 1602. 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 edgy. The task of politically, legally and morally defending the seizure fell on an ambitious patrician, politician and pamphleteer, Hugo Grotius, who was then just twenty-one years old. The VOC directors intellectually armed the young Dutch humanist with transcripts, attestations, letters, maps and books.[3] What he wrote was a substantial politico-historical

[2] Concerning the broader diplomatic and historic context of the seizure, see: Martine van Ittersum, "Hugo Grotius in Context: Van Heemskerk's Capture of the Santa Catarina and its Justification in De Jure Praedae (1604-1606)"*, Asian Journal of Social Science,* 31.3 (2003) pp. 511-548 and Peter Borschberg, Portuguese, Spanish and Dutch Plans to Construct a Fort in the Straits of Singapore, ca. 1584-1625", *Archipel,* 65 (2003) pp. 157-175 and "The Seizure of the Sta. Catarina off Singapore: Dutch Freebooting, the Portuguese Empire and Intra-Asian Trade at the Dawn of the Seventeenth Century", *Revista de Cultura/ Review of Culture,* 11, Special Issue: "European Encounters and Clashes in the South China Sea" edited by Rui Manuel Loureiro (2004) pp. 11-25.

[3] See especially W. Ph. Coolhaas, "Een bron voor het historische gedeelte van Hugo de Groots de jure praedae", *Bijdragen en Mededelingen van het Historisch Genootschap,* 79 (1965) pp. 415-537. At the time of preparing the text of *Mare Liberum* for publication, Grotius received, according to a letter of VOC director Adriaen Hendriksz ten Haeff, dated 15 November, 1607, BW 107A, pp. 37-8, eleven letters or instructions written by the King of Spain and addressed to his viceroy and leading officers of the *Estado da Índia* in 1606-1607. See also: E. N. van Kleffens, "Over zes briefen uit het bezit van Hugo de Groot",

(Continued on next page)

apology that is today known as *De Jure Praedae Commentarius* or the *Commentary on the Law of Prize and Booty.*[4] In his correspondence, Grotius himself referred to this larger work as *De Indiis* or *De Rebus Indicanis,* that is "On the Indies" or "On Matters Concerning the Indies".[5]

Encouraged by the profitable show of force such as demonstrated in 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 where richly laden west-bound vessels quickly emerged as soft targets.[6] The year 1605 was particularly notorious, for no less than four Portuguese merchant vessels were seized by the Dutch in and around the Singapore Straits that very year. The response from the Iberian Peninsula was swift and firm. In 1606 and 1607 the King of Spain and Portugal instructed his viceroy of India, Dom Martin Alfonso de Castro and his Captain

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Mededelingen der Koninklijke Nederlandse Akademie van Wetenschappen, afd. Letterkunde, Nieuwe Reeks, 23.16 (1960) pp. 447-491. (The abbreviation BW here and in subsequent footnotes refers to the *Briefwisseling van Hugo Grotius*. See the bibliography for details.)

4 The original Latin text was transcribed and published as Hugo Grotius, *De Iure Praedae Commentarius*, edited by H. G. Hamaker, The Hague: Martinus Nijhoff, 1868. The English translation appeared as: *De Jure Praedae Commentarius. Commentary on the Law of Prize and Booty. A Translation of the Original Manuscript of 1604,* translated by G. L. Williams and W. H. Zeydel, reprint of the original edition of 1950, New York: Oceana Publishing, 1964. A revised and corrected edition of this translation with additional materials was recently published as: *Commentary on the Law of Prize and Booty,* edited and introduced by Martine van Ittersum, Indianapolis: Liberty Fund, 2006.

5 The issue surrounding the original title of the treatise is raised by Richard Tuck in several of his publications, including his *Philosophy and Government, 1572-1651,* Cambridge: Cambridge University Press, 1993, and later also in his *The Rights of War and Peace. Political Thought and the International Order from Grotius to Kant,* Oxford: Oxford University Press, 1999.

6 See also Borschberg, "The Seizure of the Santo António at Patani. VOC Freebooting, the Estado da Índia and Peninsular Politics, 1602-1609", *Journal of the Siam Society*, 90, 1-2 (2002) pp. 59-72; "Luso-Johor-Dutch Relations in the Straits of Malacca and Singapore, ca. 1600-1623", *Itinerario,* 28.2 (2004) pp. 15-33; "Portuguese, Spanish and Dutch Plans" (2003) pp. 55-88.

of Malacca, André Furtado de Mendonça, to expel European foreigners from the possessions of the Portuguese *Estado da Índia,* beef up security in Malacca, build forts at critical points around the Straits of Singapore, Sabam (Kundur), as well as in Aceh, and to reinforce positions at the commercially important colony of Macao. Simultaneously, the *Estado da Índia* was to also invoke existing agreements with native princes and prevent the Dutch from accessing emporia across South, East and Southeast Asia. Grotius received transcripts and translations of eleven such royal instructions from VOC director Adriaen ten Haeff sometime in the second half of November 1607.[7]

While sea-dogs like Admiral Jakob van Heemskerk represented the hero at the front line in Southeast Asia, Grotius clearly belonged into the boardroom and chambers back in Europe. His understanding of events and the dynamics of power in the Indies was imperfect at best, and in writing his treatise he relied first and foremost on material fed to him by the VOC and to an extent, also on

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[7] Transcripts and translations of the documents concerned are summarized in the supplement (bijlage) to the letter of Adriaen ten Haff, dated 15 November, 1607. This supplement bears the title "brieven van den koninck van Spaengien." The relevant document summaries are as follows: BW 107A, p.38, no. 2, "Een brieff van 28 November anno 1606 wt Lisbona aen don Martin voorzegd, daerin hem gesonden wordt een placcaet, daerbij geordonneert wordt dat men alle vremdelingen als Franchoisen, Italiaenen, Hooghduytsen ende Nederlanders die in Indiën woonen ende wel over Persiën ende Turquijen daer gecomen sijn, sal doen vertrecken." Ibid., no. 3, "Een brieff van 27 January 1607 in Madril aen don Andrea Furtado Mendoza, daerbij hem geordonneert wordt aen den vice-roy wel te informeren van 't fortificeren van de stadt van Malacca, het maken van eenige forten in Sincapura en elders." Ibid., no. 4, "Een brieff van 27 January 1607 in Madril aen don Martin de Castro, daerin hij ernstigh vermaent wordt om tot Achem ende in de enghten van Sabaon ende Sincapura fortressen te maecken." Ibid., no. 5, "Een brieff van 24 November 1606 wt Lisbona aen den capiteyn van de fortresse van Megapatan, daermede incompt van de vremdelingen daer overall te doen vertrecken." Ibid, no. 6, "Een brieff van 23 December anno 1606 wt Lisbona aen den coninck van Cananor, daerin hij bedanckt wordt van de rebellen in sijn landt niet geadmitteert te hebben ende daerin voort te willen continueren, enz." and ibid. no. 10, "Een brieff van 13 February 1607 wt Lisbona aen don Martin Alfonso de Castro, daerin getracteert wordt van Machau te fortificeren."

Greek and Roman authors of classical antiquity. His familiarity with early modern travel literature appears to have been minimal at the time of writing or revising *Mare Liberum*. Many of the references to early modern scholars and also the canonists, with the notable exception of Francisco de Vitoria and Diego de Covarrubias y Leyva, appear to have been added during later stages of the writing process. These are not infrequently cited out of context and in some instances give the impression that they merely embellish the text.

Contrary to what Alexandrowicz contended in the 1960s, I am confident to argue that Grotius' familiarity with the Portuguese *Estado da Índia* and of accepted maritime or commercial practices in Asia was absolutely minimal in 1605-1606.[8] In fact, there is evidence to suggest that key documents and information had been fed to Grotius only months before he revised the text of *Mare Liberum* for publication in late 1608 and early 1609 - and he received additional information from several sources.[9] Any suggestion that the young humanist had deeply immersed himself in the study of Asian legal systems, commercial practices, let alone navigational customs belongs to the realm of easily dismissible speculation.[10] True to his mandate from the VOC directors,

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8 Borschberg, "Hugo Grotius, East India Trade and the King of Johor", *Journal of Southeast Asian Studies*, 33.2 (1999) p. 236.

9 These include, significantly, eleven documents pertaining to Portuguese affairs in the East Indies dispatched by Adriaen ten Haeff to Grotius in November 1607 (see above, notes 3 and 7) and also a letter from Cornelis Matelieff de Jonge, a key player in the Rotterdam Chamber of the VOC, whose fleet attacked Malacca in 1606. Matelieff's other achievement on his voyage to the East Indies was the conclusion of a landmark treaty of alliance between the VOC and the King of Johor. For the interesting political and market information passed on to Grotius, see: BW 198A, letter of Matelieff de Jonge, dated 31 August 1610, pp. 71-75.

10 In this regard, see especially Charles H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies,* Oxford: Oxford University Press, 1967, p. 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

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Grotius did what any hired hand would do best. He valiantly defended the right of the Hollanders to engage in "free trade" (and I deliberately place this expression within inverted commas) in the (East) Indies.[11] Contrary to many scholarly reviews published in the past one hundred years, I reject outright the classification of *De Jure Praedae* as a legal brief or even a juridical exposé, although in parts this work does indeed address an interesting spectrum of juridical issues. At its very core this work is a piece of propaganda that has been enriched by largely circumstantial and highly tendentious evidence. With

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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 Ram Prakash Anand, *Origin and Development of the Law of the Sea,* The Hague: Martinus Nijhoff, 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 eachother to grab as much of the Asian spice trade as they could to the exclusion of others."

11 See the particularly important statement at the opening of chapter 13 in *Mare Liberum, sive de iure quod Batavis competit in rebus Indicanis,* Leiden: Raphelengius, 1609, p. 62 and *Mare Liberum, The Freedom of the Seas, or, The Right which Belongs to the Dutch to Take Part in the East Indian Trade*, translated by Ralph van Deman Magoffin, edited and introduced by James Brown Scott, New York: Oxford University Press, 1916, p. 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 published by the Carnegie Endowment for International Peace uses the text of the 1633 Latin edition. This was still published in Grotius' lifetime. 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 in the footnotes.

its partial publication, however, Grotius introduced himself to the political elite and scholarly community of Europe as a theorist of trade and inter-imperial rivalry. Against the backdrop of this insight the present paper will explore the fundamentally *political* meaning and objective of *Mare Liberum.*

The seizure of the Portuguese merchant carrack *Sta. Catarina* marks the theoretical cornerstone in the politico-historical apology that Grotius commenced around October 1604 and may have completed in 1606 or perhaps even later.[12] The more precise circumstances that led to the writing of his exposé as well as the reasons for publishing but a single chapter from this larger work as *Mare Liberum,* have been reconstructed with great diligence by Martine van Ittersum in her recently published monograph *Profit and Principle* (2006).[13] Suffice it to say in the present context that Grotius revised chapter twelve of his then unpublished manuscript *De Jure Praedae* and published it under significant time pressure in early 1609 as an anonymous treatise. The Dutch humanist took the draft chapter from *De Jure Praedae* (The Law of Prize and Booty) and simply added a new introduction and conclusion.[14] Whether at the instigation of the Dutch East India Company's (VOC) directors, one of its

12 The initial dating of *De Jure Praedae* was set by Robert Fruin as approximately October 1604-1605. The date of completion was revised back to about the autumn of 1606 as a result of supplementary evidence published in 1928. In a letter to 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 book, or only the parts pertaining to the law of prize and booty. See: BW 86, dated 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 …"

13 Martine Julia van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595-1615,* Leiden: E.J. Brill, 2006, esp. chapters 3 and 5.

14 Grotius, Hugo, *Commentary on the Law of Prize and Booty* (2006) pp. 300-390 for the text of *Mare Liberum* within *De Jure Praedae* as a whole. See also Borschberg, "Grotius, East India Trade" (1999) p. 227.

constituent chambers, or perhaps even at Grotius' own initiative, *Mare Liberum* was meant to influence the negotiations for a truce with Spain. These were drawing to a close when Grotius reworked the manuscript for publication in late 1608 and early 1609. As is known, Spain was willing to accept peace, but only at the price of complete withdrawal by the United Provinces (i.e. the Dutch Republic) and its merchants from trade in the Indies.[15] Against the backdrop of these and related considerations, Grotius underscored in *Mare Liberum* that direct trade with the Indies was natural, necessary and beneficial for the prosperity of the Low Countries.

In his now classic *Introduction to the History of the Law of Nations in the East Indies* Alexandrowicz wrote:[16]

> "… 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 an overarching argument that are fundamentally political in nature. To isolate these from the rest of Grotius' overall line of thought proves problematic.

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15 See particularly Grotius' statement in his *Defensio capitis* (1928) p. 154; Grotius, *Mare Liberum* (1609) p. 62 and (1916) p. 72. - Readers are strongly encouraged to check Magoffin's translation here and in subsequent instances against the most recent English language edition of the text: *The Free Sea,* translated by Richard Hakluyt; edited and introduced by David Armitage, Indianapolis: Liberty Fund, 2004, pp. 10-62.

16 Alexandrowicz, *History* (1967) p. 44.

The present article will first identify two central topics and five core principles that form the backbone of *Mare Liberum's* argument.[17] 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 broader historical, economic and political parameters staked out by the treatise.

The *Mare Liberum* was published anonymously and possibly for good reason. Many of the points raised by Grotius in the course of this treatise were not so much unorthodox as they were hardly accepted by his learned contemporaries. The evidence which he presented is on occasion deeply eclectic and certainly tendentious. Part two of this paper will thus dwell upon select aspects pertaining to the more immediate reception of Grotius' arguments. William Welwood's reply to the *Mare Liberum,* as well as Grotius' response to Welwood through the *Defence of Chapter Five of the Mare Liberum* are accessible to contemporary researchers.[18] Far less familiar in the English-speaking world is the substantial reply drafted by Seraphim de Freitas, published in 1625 after some official feet dragging by the Spanish Inquisition

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[17] 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.

[18] The Latin text was first reproduced as an appendix in: Samuel Muller, *Mare Clausum. Bijdrage tot de geschiedenis der rivaliteit van Engeland en Nederland in de zeventiende eeuw,* Amsterdam, 1872, pp. 331-361. The first English translation was reproduced in H. F. Wright, "Some Less Known Works of Hugo Grotius, Consisting of: A Translation of his Works on the Fisheries in his Controversy with William Welwood. A translation of Extracts from his Letters Concerning International Natural Law and Fisheries. An Account of his Controversy with Johan de Laet on the Origin of the American Aborigines. And a Translation of Peerlkamp's Appreciation of his Ability as a Poet", Leiden: E. J. Brill, 1928, pp. 137-205. The most recent translation into English can be found in Grotius, *The Free Sea* (2004) pp. 77-130. See also Martine van Ittersum, "'Mare Liberum' versus the Propriety of the Seas? The Debate between Hugo Grotius and William Welwood and its Impact on Anglo-Scotto-Dutch Fishery Disputes in the Second Decade of the Seventeenth Century, *Edinburgh Law Review,* 10 (2006) pp. 239-275.

and the Crown of Castile.[19] It also seems prudent in this context to explore some of Grotius' acknowledged core sources, including specifically also the Castilian jurisconsult and senator Vázquez de Menchaca.

Finally, there is a number of instances where Grotius appears to contradict himself. This problem I had previously raised in one of my articles published in 1999, and at the time questioned whether Grotius changed his mind between the publication of *Mare Liberum* in early 1609 and the first Anglo-Dutch colonial conference in 1613. At the time, I reasoned that Grotius' exposure to the realities of early colonial expansion, commercial practices, and the conclusion of several treaties with indigenous overlords in Asia perhaps rendered him "less classically idealistic".[20] A revisitation of this judgment is now warranted and in the present paper I will argue that, contrary to my initial reading of Grotius' early works, notes, drafts and fragments (many of which remain unpublished),[21] he was far more consistent in applying his ideas on trade and colonial enterprise than I had originally realized.

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[19] 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 Mónica Brito Vieira, "Mare Liberum vs. Mare Clausum. Grotius, Freitas and Selden's Debate on Dominion of the Seas", *Journal of the History of Ideas,* 63.3, 2003, p. 362) but it also appears that the Inquisition had a leading hand in the delay as well. See Marcello Caetano's introduction in: Seraphim de Freitas, *De Iusto Imperio Lusitanorum Asiatico,* translated into Portuguese by Pinto de Menses and introduced by Marcello Caetano, 2 vols., Lisbon: Instituto de Alto Cultura, 1959-1961, vol. 1, pp. 40-41; 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.

[20] Borschberg, "Grotius, East India Trade" (1999) pp. 247-248.

[21] 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.

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

After these introductory observations, a basic but very important question must be asked: What is the treatise *Mare Liberum* actually about? Where better to start than with a translation of the full title from the original Latin which can be rendered roughly as: *The Free Sea, or a Dissertation on the Right which belongs to the Hollanders to Engage in the Indies Trade.*[22] Addressed in the full title are two central themes that Grotius quite evidently wrought together in this specific context. The second part of the title takes on the problem of free trade and access to market places and emporia. It lays in my opinion the theoretical groundstone in Grotius' politico-historical edifice.[23]

From this core of free trade flow other entitlements that are firmly anchored in nature.[24] The second core upon which *Mare Liberum* based its arguments pertains to the historically challenging problem of rightful (or at least legally permissible) market access. By this term I understand unimpeded entry (via the high seas or maritime highways) to emporia outside the European continent.[25] It is important to recall that Grotius was only advocating free access for the procurement of goods, mainly spices for transhipment to, and resale in, the United Provinces and beyond. He did not advocate the penetration of native Asian markets for the resale of goods by the Dutch to Asian

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

23 Grotius, *Mare Liberum* (1609) p. 1 and (1916) p. 7: "Every nation is free to travel to every other nation, and … trade with it."

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

25 Ibid. (1609) pp. 65-66 and (1916) p. 75.

consumers.[26] Evidently Grotius did not seriously concern himself in *Mare Liberum* with the problem of accessing Asian markets or consumers, at least not until *after* its publication in 1609.[27]

Unimpeded access to emporia and market places assumes a lengthy and certainly not subordinate position in Grotius' trail of thought.[28] In order to freely access these in the East Indies (and by extension also other market places around the globe), the Dutch may sail the high seas.[29] Grotius attacked the

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[26] 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.

[27] 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.

[28] 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: Helen Thornton, "Hugo Grotius and the Freedom of the Seas", *International Journal of Maritime History,* 16.2 (2004) pp. 20, 21 where the issues of trade and access to trading places assume a more prominent position than in the past for the interpretation of *Mare Liberum.*

[29] 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 possess sovereignty over certain territories in the East Indies, including Goa and Malacca. See *Mare Liberum* (1609) p. 4 and (1916) p. 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." See also Emmanuel van Meteren, *Memoriën der Belgische ofte Nederlantsche Historie van onsen tijden,* Delft: Jacob Cornilisz Veenecool, 1599. A copy of this work featuring extensive underlinings and marginalia in the hand of Grotius can be found in the University Library in Lund Sweden, Bibl. Grotiana, no. 13, fol. 406 verso. The context is the earliest Dutch voyages to the East Indies and the underlined passages in the quotation correspond to the markings made by Grotius in the original print: "Dese Schepen zijnde ghevordert by de Staten van Hollandt, ende gheassistert van Metalen gheschut, etc. wel toegherust, hebben sy na Oost-Indien gedestineert, om daer een vaert te beginnen, ende handel op te speuren van Specerijen te halen, daer de Portugesen dien coopen, ende die Landen van Indien wijt ende breet zijnde, beseylende, souden sy daer eenen vasten handel moghen opspeuren mette Indianen, daer de Portugesen gheen ghebiet en hadden…." A full description of the Grotiana in the University Library in Lund can be found in: Folke Dovring, "Une

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aspirations of Portugal and Spain to assert, with the help of diplomacy, law and the force of arms, a maritime-based trading preserve. He contended that concrete measures to establish such a trading preserve represented an open infringement of nature. The Dutch humanist understood unimpeded and peaceful maritime navigation as an extension of the *ius communicandi* and *ius commerciandi,* two natural rights that he adopts from the Spanish theologian Vitoria.[30]

From the theoretical cornerstones of free or unimpeded access to market places via innocent and peaceful passage across pelagic spaces, one is now placed in a position to elaborate on a series of core arguments gleaned from a close reading of *Mare Liberum.* To serious researchers of Grotius these are not new and are encountered not only in the *Mare Liberum,* but also in some of his other treatises and working drafts, including specifically also *De Jure Praedae, De Societate Publica cum Infidelibus* (On Public Society with Non-Christians),[31] *De Pace* (On Peace),[32] *Commentarius in Theses XI* (Commentary

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partie de l'héritage littéraire de Grotius retrouvée en Suède", *Mededelingen van de Koninklijke Akademie van Wetenschappen,* afd. letterkunde, nieuwe reeks, 12, 1949, pp. 237-250.

30 On the wider historic context of this passage, and its Biblical origins in Numbers 21:21-25, see: Dieter Janssen, "Bellum iustum und Völkerrecht im Werk des Hugo Grotius", in: *Krieg und Kultur. Die Rezeption von Krieg und Frieden in der Niederländischen Republik und im Deutschen Reich, 1568-1648,* edited by Horst Lademacher and Simon Groenvelt, Münster: Waxmann, 1998, pp. 138-139. See also the useful summary and discussion in: Karl-Heinz Ziegler, "Völkerrechtliche Aspekte der Eroberung Lateinamerikas", *Zeitschrift für Neuere Rechtsgeschichte,* 23 (2001) pp. 9, 20 et seq. and more extensively in Isabel Trullo Pérez, *Francisco de Vitoria : il diritto alla comunicazione e i confini della socialità umana,* Turin: G. Giappichelli, 1997.

31 Borschberg, "'De Societate Publica cum Infidelibus': Ein Frühwerk von Hugo Grotius", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Romanistische Abteilung, 115 (1998) pp. 355-393.

32 Borschberg, "De Pace. Ein unveröffentlichtes Fragment von Grotius über Krieg und Frieden", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,* Romanistische Abteilung, 113 (1996) pp. 268-292.

to Eleven Theses),[33] *Defensio Capitis Quinti Maris Liberi* (Defence of Chapter Five of the *Mare Liberum*)[34] and of course also *De Jure Belli ac Pacis* (The Law of War and Peace).[35] From the theoretical cornerstones of trade and unimpeded access via innocent and peaceful passage across pelagic waters, it is now possible to discuss five underlying principles that can be extracted from *Mare Liberum.* These foreshadow the position that Grotius assumed at the Anglo-Dutch colonial conferences in London (1613) and The Hague (1615). The five principles are as follows:

One, trade is perfectly natural and is bestowed upon mankind through Creation. This is evidenced *inter alia* by the winds and currents of the sea.[36] The latter observation was taken on from the writings of the Roman philosopher Seneca, albeit second-hand and most certainly out of context, as Knight once shrewdly observed.[37] Trade is thus seen as part of an interactive human process expressly willed by the Creator. The following excerpt from *Mare Liberum* packages several strands of thinking that broadly characterize

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[33] Borschberg, *Hugo Grotius Commentarius in Theses XI. An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt,* Berne: Lang, 1994; Borschberg, "Commentarius in Theses XI. Ein unveröffentlichtes Kurzwerk von Hugo Grotius", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,* Romanistische Abteilung, 109 (1992) pp. 450-474.

[34] See above, note 18.

[35] First published in Paris in 1625, the text of this treatise was revised several times by Grotius himself until his death in 1645. See Grotius, *De Iure Belli ac pacis Libri tres, in quibus ius naturae et gentium, item iuris publici praecipua explicantur,* edited by Philip C. Molhuysen, Leiden: A. W. Sijthoff, 1919. The most commonly used English translation remains Grotius, *De Jure Belli ac Pacis,* translated by F. W. Kelsey and edited by James Brown Scott, reprint of the original edition of 1925, New York: Oceana Publications, 1964.

[36] Grotius, *Mare Liberum* (1609) p. 1 and (1916) p. 7.

[37] W. S. M. Knight, "Grotius in England: His Opposition There to the Principles of Mare Liberum", *Transactions of the Grotius Society,* 5 (1919) p. 9.

Grotius' early political treatises: the centrality of Divine voluntarism, Aristotelian perceptions of man's innate desire to cultivate friendly relations with fellow men, and also to the *logos spermatikos,* the universal permeation of natural reason widely associated with the Stoics of antiquity:[38]

> "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,[39] He ordains that some nations excel in one art and others in another.[40] Why is this His will, except it be that He wished human friendships to be engendered by mutual needs and resources,[41]

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

39 Grotius, *Mare Liberum* (1609) p. 61 and (1916) p. 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."

40 Ibid. (1609) p. 52 and (1916) p. 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."

41 Ibid. (1609) p. 53 and (1916) p. 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 began among the Chinese: "They say that trade arouse 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.."

> lest individuals deeming themselves entirely sufficient unto themselves should for that very reason be rendered unsociable?”

Two, in line with the premises established in Roman law, such as notably in the *Institutes/ Enactments of Justinian*, private property was not instituted by divine will or nature, but is a positive creation of man for his own convenience and for the satisfaction of his bodily needs.[42] According to the testimonies of the ancient writers and poets,[43] certain places, sites or objects remain unappropriated or common to all. These include specifically also places of public worship, air, and running water.[44] Taking these tenets of Roman public law as a foundation, Grotius postulated that certain spaces remain unappropriated and cannot be made the property of individuals or sovereign states. Common utilization must therefore remain intact,[45] and each individual

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42 Grotius, *Mare Liberum* (1609) pp. 14-15 and (1916) pp. 23-24; “Enactments of Justinian” in: *Corpus Juris Civilis. The Civil Law,* vol. 1., translated by S.P. Scott, 17 vols, New York: AMS Publishers, 1973, Title 1, Concerning the Division of Things *(De Rerum Divisione)* pp. 33-42. See also Borschberg, “Grotius, East India Trade” (1999) p. 237. See also Grotius, *Mare Liberum* (1609) pp. 16-17 and (1916) p. 25.

43 Grotius, *Mare Liberum* (1609) p. 17 and (1916) p. 28.

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

45 Grotius, *Mare Liberum* (1609) pp. 48-49 and (1916) p. 57.

or sovereign may enjoy such spaces.[46] Among these unappropriated spaces and tangibles Grotius specifically also includes pelagic spaces.[47]

Three, private property, which is an institution created by man, may not be enjoyed by individuals without observing certain conditions that are anchored in nature or Creation. Nature wills that there be no wastage of its bounty, and also that people should not appropriate more than they can use for themselves.[48] The Dutch humanist explained that the Portuguese monopolize trade to the exclusion of others, deliberately drive up prices and thus also engage in profiteering.[49] Such behaviour is clearly directed against the very design of nature and divine providence. 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 such appropriation injures others. People can suffer harm or injury not just through the infliction of physical pain or injury, but also through denying them their rightful benefits and the bounty of nature. Thus, profiteering and the denial of common benefits not only violate the order and design of creation, but significantly also infringe the very principles of Christian charity.

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46 Ibid., (1609) p. 20 and (1916) pp. 28-29, including specifically Grotius' references and footnotes; also *Enactments of Justinian* (1973) II.i., pr, p. 33: (quaedam enim naturali iure communia sunt omnium, ... quaedam universitatis, quaedam nullius …) "Some things are by natural law common to all persons, some are public, some belong to a corporate body, some to no one. …"

47 Ibid., II.i.1, p. 33: (Et quidem naturali iure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris.) "By natural law the following things belong to all men, namely: air, running water, the sea, and for this reason the shores of the sea."

48 This, incidentally is a core argument brought foreword by John Locke in his famous *Second Treatise on Government.* See John Locke, *Two Treatises of Government,* edited and introduced by Peter Laslette, Cambridge: Cambridge University Press, 1988, pp. 285 et seq., but esp. §31, p. 290.

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

Four, what nature has bestowed to all cannot be alienated through the actions of man.[50] This is a very important principle developed by the commentators of Thomas Aquinas in sixteenth century Spain.[51] Grotius conceded here in *Mare Liberum* as well as in his other treatises that there are some noteworthy exceptions. These include avenging one's enemies and the waging of a just (public) war.[52] Booty of war and punitive prize-taking encompass tangibles as well as intangibles,[53] and include specifically also nature's gifts to man, unhindered access to market places as well as political authority. Grotius' Scholastic predecessors established (in line with the principles of Christian charity) that the value of goods alienated in the process of just warfare, retaliation and punishment must be commensurate with, and directly proportional to, the specific injury suffered and avenged.[54]

Five, every person may defend himself and his interests.[55] In the absence of (effective or unbiased) arbitration, recourse to violence is permissible. The injured party may take action to avenge injury and to restore what has been unduly denied or impeded.[56]

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

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

52 This reception and its historic relevance are explained in António Vasconcelos de Saldanha, *Iustum Imperium, dos tratados como fundamento do Império dos Portugueses no Oriente: estudo de história do direito internacional e do direito português,* Lisbon: Fundação Oriente, 1997, pp. 202 et seq.

53 *Enactments of Justinian* (1973) II.ii.1-2, p. 43; compare this also with Borschberg, "Commentarius" (1992) p. 468.

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

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

56 Borschberg, *Commentarius in Theses* (1994) pp. 258-261.

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 such interaction.[57]
2) Nature wills 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,[58] with a corresponding prohibition that no one may engage in acts of profiteering and permit wastage of nature's bounty. [59]
4) Nature has given spontaneously the fruits of its bounty to all mankind.[60] Correspondingly, no one may alienate or destroy what nature has spontaneously given. Nature's spontaneous gifts include tangibles as well as intangibles.[61]

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[57] 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) pp. 372-373 esp. note 80. – Concerning the impediment of the ius communicandi, see also Borschberg, "Grotius, East India Trade" (1999) p. 232.

[58] Grotius, *Mare Liberum* (1609) p. 52 and (1916) esp. p. 61: "Nature had given all things to all men."

[59] Ibid. (1609) pp. 59, 60, 61 and (1916) pp. 69, 70, 71.

[60] Ibid. (1609) p. 52 and (1916) p. 61.

[61] Ibid. (1609) p. 52 and (1916) esp. p. 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 *Enactments of Justinian* (1973) II.ii, p. 65.

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.[62]

Grotius asserted that the cause of the Hollanders against the Portuguese and their (Spanish) King was an honourable one. He underscored rhetorically the good will and preparedness of his peoples to be judged and submit to a majority opinion.[63] He appealed to his readers (whom he invokes as "[Y]e Princes, your good faith, ye Peoples, whoever and wherever ye may be")[64] to judge the Hollanders' case. Grotius underscored both the good will as well as the willingness of the Dutch Republic ("a state, not … illegally founded, but … a government based upon law")[65] and its people to submit to a majority opinion.[66] This verdict, he firmly believed, would not conform to the ambitions and pursuits of the Iberian monarch.[67]

The central message of *Mare Liberum* may thus be summarized as follows: Trade is both *natural* and *good*. The Hollanders may travel to the trading emporia of the Indies and do so by maritime navigation. Alas, they suffer grave injury in the pursuit of their natural right on two important counts:

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

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

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

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

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

67 Ibid. (1609) p. 65 and (1916) p. 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."

first, because the Portuguese claim for themselves spaces that cannot be appropriated (i.e. the oceans), and second because they monopolize trade to the disadvantage of others in Europe and Asia. The Portuguese charge excessive prices for the goods they procured in Asia. The Hollanders did not deny the Portuguese their right to trade in the East Indies, but simply want to share in the rich bounty. Because they are prevented from trading in Asia,[68] and in the absence of effective arbitration (to which the Hollanders doubtlessly would subject themselves, if arbitration were indeed available) they resort to self-defence and become judges in their own case. The Hollanders avenge the wrongs committed against them by the Portuguese.[69] These injuries are not featured here in Grotius' hastily reworked treatise *Mare Liberum*, but presented at length in chapter 11 of *De Jure Praedae.*[70]

How does this square with the ostensible agenda staked out by the full title of *Mare Liberum*? Grotius underscored the centrality of access to market places and the freedom of navigation on the high seas as an efficient but ostensibly propagandistic means of undermining Iberian *policies* of obstruction and commercial exclusion.[71] His pleas for the unimpeded access to emporia and the freedom of navigation were subsequently collapsed into a set of arguments

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[68] Note the observation of Knight, "Grotius in England" (1919) p. 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."

[69] Grotius, *Mare Liberum* (1609) pp. 62-63 and (1916) pp. 72-73; Borschberg, "De Pace" (1996) p. 281.

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

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

that address the competitive political and economic nature of starkly contrasting colonial systems.

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

This insight leads to part two of the present paper which explores select points of criticism of *Mare Liberum* raised almost immediately after its publication in 1609. Three points of interest merit further exploration here.

One, criticism can be directed specifically at the arguments Grotius dredged from the writings of the Spanish Late Scholastics. Not surprisingly Vitoria plays a noteworthy role in this context. Specifically, he repeats themes of Vitoria's historically influential *Two Relections on the Indies* (Lyon, 1557).[72] Considerations developed by the Salamanca theologian in the context of the American conquest were broadly projected into the Asian scenario. When the Dutch humanist dismissed, with deference to Vitoria, the temporal supremacy of the pope, or rejected the argument that the peoples of Asia are insane or mentally retarded (a classically Spanish debate concerning the natives in the Americas),[73] nay when he denounced European colonial authorities of stripping native rulers of their public authority because they are "infidels" and live in a

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[72] 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,* Edición crítica y versión castellana, edited and translated by Fr. Luís G. Alonso Getino, Madrid: Imprenta la Rafa-Abtao, 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.

[73] A point which Grotius also briefly touches on his this treatise, See Grotius, *Mare Liberum* (1609) p. 7 and (1916) pp. 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,

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"state of sin" or moral depravity,[74] it is not entirely certain whether he was simply adding flesh and perhaps even a bit of sensationalism to his discourse on unimpeded market access. As Grotius himself conceded toward the end of chapter 2 of *Mare Liberum,* there was consensus, particularly in Spain, that such views are unjust and unholy.[75] So why revive this argument other than for rhetorical ends? Why did he find it necessary to flog a proverbially dead horse?

This material falls into the category of what could be conveniently dubbed as ballast arguments: Grotius simply reiterated what was already broadly accepted among the intelligentsia of the Iberian Peninsula. Far more interesting are perhaps the arguments he *did not* take on board from the relections of Vitoria, and indeed, from other Spanish authors he is known to have consulted, such as Covarrubias y Leyva. One such topic (conveniently) shunned by the Dutch humanist) is the universal authority of the Holy Roman Emperor.[76] It is insufficiently transparent why Grotius deftly avoided this topic altogether, but it may very well have to do with the fact that, at least nominally, the United Provinces remained an integral part of the Holy Roman Empire until

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especially those of Spain, to be unjust and unholy." One should also note Grotius' reference to Ferdinando Vázquez in this specific context.

74 See also ibid. (1609) p. 11 and (1916) pp. 19-20 (Quotation of Cajetanus' Commentary to the Summa Theologiae of Thomas Aquinas, *Summa Theologiae,* 2a-2ae, qu. 4, art. 66, art. 8. The problem is also discussed by Diego de Covarrubias y Leyva, *Opera Omnia quae hactenus extant,* 2 vols., Frankfurt/M.: Ex Officina Nicolai Bassaei, Impensis Sigismundi Feierabend, 1573, vol. 1, *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) p. 366.

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

76 Francisco de Vitoria, *De Indis Recenter Inventis et De Jure Belli Hispanorum in Barbaros; Vorlesungen über die kürzlich entdeckten Inder und das Recht der Spanier zum Kriege gegen die Barbaren, 1539,* edited by Walter Schätzel and introduced by Paul Hadrossek, Tübingen: J. C. B. Mohr, 1952, II, §§1 et seq., pp. 48 et seq. (Latin text). Covarrubias y Leyva, *Opera Omnia* (1573) vol. 1, *Regula Peccatum,* §9.5, pp. 501-504.

the Peace of Westphalia in 1648. However, of considerable interest to the present exposé is the not uncommon view among sixteenth and even some seventeenth century writers that the universal authority of the Holy Roman Emperor also extended across pelagic spaces. This is evidenced, for example, by the treatise of Julius Pacius à Beriga published in 1619.[77]

It should not escape attention that Grotius invoked the *ius communicandi* or right of free communication already mentioned by Vitoria.[78] A denial of this right, the good professor from Salamanca argued, offer sufficient grounds for commencing a just (public) war, but with some important limitations.[79] Vitoria's position was firmly anchored in a discourse that explored the right to preach Christianity and enter into contact with the indigenous peoples of the New World.[80] Grotius' "contribution" (if this is even the appropriate expression) was to amplify the underlying intentions and program of Vitoria. As a result, market access and trade are significantly upgraded in Grotius' new perspective and discourse.

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[77] Julius Pacius à Beriga, *Iulii Pacii a Beriga I.C. Regii Consiliarii et Iuris ex prima sede in illustri Valentina Academia Professoris De Dominio Maris Hadriatici disceptatio,* Lyon: Bartholomaeus Vicentus, 1619, pp. 15 et seq.

[78] 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 Ramón Hernández Martín, *Francisco de Vitoria y su "Relección sobre los Indios". Los derechos de los hombres y de los pueblos. Homenaje al Fundador del Derecho Internacional de Gentes en el 50 Aniversario de la Declaración Universal de los Derechos Humanos, 1948-1998,* Madrid: Edibesa, 1998.

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

[80] A point also touched upon in *Mare Liberum* (1609) p. 12 and (1916) pp. 20-21.

Indeed, Vitoria's *ius communicandi* is a concept that is not easily grasped by contemporary scholarship. Domingo de Soto did not espouse the validity of such a (natural) right, nay, not even in the original context raised by Vitoria, namely the preaching of the Gospel. [81] In his *Relection* of 1534 (that actually predates Vitoria's own discourse on the subject of the "Indies") de Soto argued that, if the Amerindians refuse to listen to the Word of God, they could not be compelled to do so under any circumstances.[82] De Soto, thus, clearly did not advocate a *ius communicandi* along the intellectual parameters staked out by his contemporary and colleague Vitoria.

Given that there are only two references to de Soto's *De Justitia et Jure* in Grotius' *De Jure Praedae,* one of which features as a marginal insertion to the manuscript,[83] it is unlikely that Grotius was familiar with the different positions among the Salmantino doctors at that point in his life. In fact, as late as 1617, he conceded (with rhetorical pose, no doubt) that he had "hardly read any of the Dominicans".[84] It is against the backdrop of this and evidence

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[81] According to Vitoria in his *Relectio de Indis*, part II, esp. §§12, pp. 78, 80, the natives may be compelled to listen to the word of God, but they cannot 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.

[82] De Soto's little-known Relection (re-reading) *De Dominio* (On Dominium) was held at the end of the academic year 1535. For the full text, see: Domingo de Soto, *Relección de Dominio*, critical introduction, Latin text and translation into Spanish by Jaime Brufau Prats, Granada: University of Granada Press, 1964.

[83] 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.

[84] See BW 567, p. 611, "Dominicanorum vix legi quemquam."

extracted from Vázquez, Covarrubias[85] and Rodrigo Juárez (Rodericus Zuaresius)[86] that one should understand the Dutch humanist's boastful claim to have "invoke[d] the very laws of Spain itself". [87] 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 those he carefully studied fewer still.

As anyone who has combed the learned work of Freitas will be able to testify, [88] the issues surrounding the concept of the just war and the denial of free trade most certainly do not end here. The Iberian professor was well aware that, outside the European cultural sphere, the concept of market access was wanting. He points to the example of China as a country that does not abide by this principle. Although Freitas hastily criticized the punishments dished out by the Chinese authorities, even to those who have been shipwrecked along the

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

86 Rodericus Juárez (Latinized: Zuarius), *Consilia duo de usu maris et navibus transvehendis,* contained with: Benvenuto Straccha (Stracchus), *Tractatus de Mercatura et Mercatore*, Lyon, 1558. The 1916 edition of Grotius' *Mare Liberum* (1916) p. 44 erroneously equates the author Zuarius with Philip Zuerius of Antwerp.

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

88 Freitas, *De Justo Imperio* (1625). According to his published letters, Grotius was well aware that a reply to *Mare Liberum* had been written in Spain. He later admits to having read Freitas' printed work. Despite the customary Baroque pose of flattery, it does appear that Grotius was sufficiently impressed by Freitas' work, 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: 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 Herrschaft der Portugiesen in Asien. Freitas gegen Grotius im Kampf um die Freiheit der Meere,* doctoral dissertation in Law, University of Kiel, 1976.

coast, it is clear that he did not condemn the principle of barring access to peaceful trade, even if he readily acknowledged that both trade and navigation are conceded by the law of nations *(ius gentium).*[89] 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 people, can prevent others from exercising it. Following the reasoning of Vitoria (and those who follow him), any attempt to impede trade is thus a cause for a just war.[90] In resorting to the right of self-defence the Dutch (and also some Asian princes, such as the King of Johor*)* were deemed to wage a just war on the Portuguese, and in this effort even forged alliances with other similarly injured parties. In this context, Grotius maintained in *De Jure Praedae* that the Dutch and the Johoreans were justified in entering into such a compact of trade, mutual assistance, and co-operation.[91] But may Christians ally with non-Christians to wage a war against another Christian party, if the latter is clearly in violation of natural rights or Divine Revelation?[92] At this juncture Freitas assumed a conservative stance and denied that under such circumstances, a war may be deemed legitimate.[93] This is not only the position of the Roman Catholic

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89 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.

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

91 Borschberg, *Grotius, East India Trade* (1999) pp. 230 et seq.; Richard Tuck, *The Rights of War and Peace. Political Thought and the International Order from Grotius to Kant,* Oxford: Oxford University Press, 1999, pp. 92-94.

92 But allying with non-Christians against other non-Christians seems perfectly acceptable to the Salmantinos, and indeed, the Iberian crown lawyers.

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

scholars at the time, but also of many Protestant thinkers as well.[94] As the present author has argued elsewhere, Grotius did recognize this as a serious problem and addressed it in some of his other writings, including the full manuscript of *De Jure Praedae*, the fragment *De Societate Publica cum Infidelibus* and meaningfully also in *De Jure Belli ac Pacis*.[95]

Two, Grotius was not always loyal to the sources he quoted from. He is known to have either quoted selectively, out of context, extracted clusters of quotations from other printed sources, [96] 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 found in *Mare Liberum*.[97] One particular passage is the young Dutchman's reference to the Leiden-based jurisconsult Hugo Doneau (Donellus) who, as Freitas duefully underscored, was boldly quoted in a sense exactly contrary to the original![98] In another instance he changed the original word "canal" to "particular sea".[99] The two terms can hardly be considered synonyms.

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

[95] Borschberg, "Grotius, East India Trade" (1999) p. 234, esp. note 54.

[96] 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 very evidently extracted in that very sequence from Covarrubias, *In Regula Peccatum,* part II, §11.

[97] W. S. M. Knight, "Seraphim de Freitas: Critic of Mare Liberum", *Transactions of the Grotius Society,* 11 (1925) p. 8.

[98] Grotius, *Mare Liberum* (1609) p. 21 and (1916) p. 30; Freitas, *Über die Rechtmässige* (1976) p. 238. Hugo Donellus, *Commentariorum de iure civili Libri viginti octo,* Frankfurt/M.: Claude de Marne, 1596, p. 230.

[99] Knight, "Seraphim" (1925) p. 7.

Selectively quoting from acknowledged sources poses a different set of problems. For example, Grotius defers to the authority of Ferdinando Vázquez on several counts, such as in chapter 7 of *Mare Liberum.* Here the Castilian jurisconsult was used to argue 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)[100] and Grotius cited this passage while discussing the claim: "Neither the Sea nor the right of navigation thereon belongs to the Portuguese by title of prescription or custom." Perhaps deliberately, perhaps inadvertently, the Dutch humanist lets his readers opine 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* may be surprised to discover that the Castilian jurisconsult whom Grotius exalted as the "Pride of Spain," "one of the most learned Spaniards" and "that Glory of Spain" [101] was not at all consistent in his views on navigation.[102] Quite to the contrary, Vázquez' frequently cited collection of legal cases and advisories contains several lengthy sections that assert exactly

[100] Grotius, *Mare Liberum* (1609) p. 44 and (1916) p. 52.

[101] Ibid. (1609) p. 43 and (1916) p. 52; *De Jure Praedae* (1964) p. 249; *De Jure Belli*, Proleg. §55.

[102] Ferdinando Vázquez de Menchaca, *Conversiarum illustrium aliarumque usu frequentium libri tres/ Controversias fundamentales y otras de mas frecuente uso:* remprese por acuerdo de la Universidad de Valladolid, transcript and translation into Spanish by Fidel Rodríguez Alcalde, 4 vols., Valladolid: Cuesta, 1931-1934, 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 supecta 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 ipsum jus naturae, aut gentium primaevum, quod mutari non posse diximus).

the opposite of the "free seas".[103] Not unlike Grotius, Vázquez invoked 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 undesirable, unnatural and most certainly against Providence and Revelation. It is against the light of this and related evidence that the Dutch humanist extolled the inherent and undeniable perils associated with overseas trade as a great human achievement and thoroughly courageous enterprise. He invoked the authority of Aristotle (alas, hardly a reliable source of Divine Revelation) to assert 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."[104] 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 *Second Treatise on Government* - or is it, as the formidable Iberian authorities Vázquez and Freitas contended, 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 part of nature's perfect design is of central significance - precisely because of its implications on the right of maritime navigation - but it is also a question that finds sparse consensus among the luminaries of the sixteenth and seventeenth century. It should not surprise that Grotius and Vázquez did not at all share the same view, and Freitas broadly sided with his Castilian counterpart. Indeed, Freitas makes it actually quite clear - and this marks a sharp contrast to Grotius - that he does

[103] Ibid., 2.20. §13 navigare contra naturam est; §14: Navigare periculosissimum est; §19: Navigare est ire contra leges naturae.

[104] Grotius, *Mare Liberum* (1609) p. 54 and (1916) p. 63.

not hold Vázquez in high esteem, but tends to regard him more as a politician than a true scholar of jurisprudence.

Three, Grotius treated the sea as space that by the law of nature cannot be appropriated by any person, any people, and implicitly also any sovereign.[105] The tenets underpinning this stance can be retrieved in chapter 5 of the *Mare Liberum*, the section of the treatise in other words that specifically evoked a refutation by William Welwood.

First, it shall be seen how this position fits into the broader framework of *Mare Liberum*. Grotius stipulated that the Dutch in exercising their right of free trade and interaction must implicitly also possess a right to access ports in the Indies via pelagic spaces. This is because he deemed the oceans as unappropriatable space, remaining in their primordial state bestowed unto man by nature. The Dutch humanist contended that the seas must therefore be freely navigable to all peoples, Christians and non-Christians alike, for what nature has given to all mankind cannot be alienated by man. This argument is directed at Spanish and Portuguese claims to have appropriated exclusive title to the vast pelagic spaces of the Atlantic, Pacific and Indian Oceans. The legal grounds upon which the Iberian powers based their claims are of course well-known, and include significantly rights of ownership by first discovery *(res nullius)*,[106] papal donation,[107] prescription as well as custom and continuous

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[105] Ibid. (1609) p. 26 and (1916) p. 34.

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

[107] Ibid. (1609) pp. 7-9, 36-38, 56 and (1916) pp. 15-17, 45-46, 66. - Grotius only refers expressly to the bulls of donation dating from 1494 and issued by Pope Alexander VI. He is evidently not aware that within the context of the Portuguese *Estado da India,* the donation of Nicholas V, dating from 1455, is of much greater significance. In my opinion this in itself can be taken as yet another clear proof that Grotius was not deeply familiar with the legal literature from the Portuguese side, and had at best carefully studied some Spanish sources such as for example Vitoria and Covarrubias y Leyva who of course both discuss the

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use.[108] Foreign parties could only ply their maritime routes or trespass the high seas claimed by the Iberian powers if they were 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 limited to the subjects of Spain and Portugal respectively.[109]

Citing passages from Roman law and the ancients, Grotius argued that by nature the high seas remained both open and common to all. By definition, the sea extends to the level of the highest (winter) tide,[110] for which reason the beach is also rendered a common space. Such common spaces cannot be appropriated by any individual, people or sovereign, and implicitly the same holds true for maritime routes across the high seas. A sign of ownership, the Dutch humanist observed, is when the claimant can occupy and physically defend his claim to proprietorship. Grotius questioned: Even if it were permitted to appropriate the vast open ocean, how could any person, let alone a sovereign, defend it? It is on such grounds that *Mare Liberum* rejected all Iberian claims to dominion and ownership of the seas as simply unfeasible and unreasonable.[111]

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Alexandrine bulls. It is indeed questionable as to how deeply familiar Grotius really was with the writings of Ferdinando Vázquez de Menchaca at the time of writing *De Jure Praedae,* or even at the time of revising one of its chapters as *Mare Liberum.* Further research on Grotius' reading notes and on the autograph manuscript owned by Leiden University will hopefully shed new light on this question.

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

109 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 one of the immediate reasons behind the move.

110 *Enactments of Justinian* (1973) II.i.3, p. 34, (Est autem litus maris, quatenus hibernus fluctus maximus excurrit.) "The shore of the sea extends to the point attained by the highest tide in winter."

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

In advancing his case for access to markets in the East via oceanic waters, Grotius valiantly defended free access and free trade for his compatriots. But he was treading on proverbial thin ice, and the Dutch humanist appears to have been 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 state practice in Europe at the time, and would not be readily accepted.[112]

This can be evidenced by the treatise *Dominio del Mar Adriatico* which has been rightly or wrongly attributed to the famed Venetian cleric and state historian Paolo Sarpi.[113] On the basis of papal donations (many issued in the historical context of the Crusades), imperial edicts and popular festivities, including a special discussion on the law of war and its effects, the author of *De Dominio Adriatico* constructed his case for the Republic of Venice that is

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[112] Concerning Genoese claims to sovereignty in the Mediterranean, see: Pietro Baptista Burgus, *De Dominio Serenissimae Genuensis Reipublicae in Mari Ligustico,* Rome: Dominicus Marcianus, 1641, esp. p. 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) "suum 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* over oceanic spaces other than the Ligurian and Aegean Sea are found on pp. 234-236.

[113] 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 in Paulo Sarpi, *Il Dominio del Mare Adriatico,* introduced and edited by Roberto Cessi, Padua: Giampolo Tolomei Editore, 1945, p. xxxiii, and especially also the sources and information he provides ibid., in note 2. For the historic context of the treatise, see also Gaetano Cozzi, *Paolo Sarpi Tra Venezia e L'Europa,* Turin: Einaudi, 1979, pp. 268 et seq.

grounded on custom and prescription.[114] He was not particularly interested in delving into the subject of natural rights, but extrapolated that over the centuries the dispatch of navies against pirates had given the Venetian Republic real and effective control over the Adriatic.[115] Cardinal Gasparo Contarini and the treatise *De Dominio Adriatico* saw Venetian Republican liberty and the control of the Adriatic as intrinsically inseparable.[116] Another treatise, published by Pacius in 1619, differentiated between three types of maritime *dominium*: 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 what jurisdiction over pelagic spaces is concerned, that belongs to the prince.[117] Still, Pacius underscored that Venice was 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 and punishing delinquents, issuing regulations pertaining to maritime navigation, and imposing tolls on ships plying Venetian waters.[118] In modern terminology

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[114] Cessi's introduction in: Sarpi, *Il Dominio* (1945) p. xxxiv, "… possessione per antichità di tempo e longhissima e consuetudine immemorabile."

[115] Paulo Sarpi, *Dominio del Mar Adriatico Della Serenissima Republica di Venetia,* Venice: Roberto Meietti, 1685, II, p. 12. A similar point is also made by Gasparo Contarini, *De Magistratibus et Republica Venetorum Libri Quinque,* Venice, Apud Io. Bapt. Ciottum Senensem sub Signo Minervae, 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.

[116] 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 protection. The author wishes to thank Dr. Eric Wilson (Melbourne) for reminding of this important distinction in Grotius.

[117] Pacius, *De Dominio* (1619) p. 9.

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

one would say that the Venetians were simply exercising sovereign control over the Adriatic and parts of the Eastern Mediterranean.

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 *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 United Provinces, did Venice not find itself addressed or even threatened by the very argument of *Mare Liberum*?

The author of *De Dominio Adriatico* regarded the Adriatic as the great exception, rather than the norm.[119] Besides, closer scrutiny of *Mare Liberum* reveals a starkly different vocabulary employed when discussing the Portuguese on the one hand, and the Venetians and Genoese on the other. It is clear that when the Dutch humanist wrote of those vast pelagic spaces, he had the Portuguese and Spanish maritime policies of exclusion in mind, but he became significantly more accommodating when mentioning bays and gulfs. When writing about the latter, Grotius argued far more deftly and diplomatically. The following excerpt from *Mare Liberum* illustrates that the maritime interests of Genoa, and especially also Venice,[120] are not the target of his scornful pen:[121]

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[119] On this also see Cessi's introduction in Sarpi, *Il Dominio* (1945) p. xxxiv.

[120] Also, Grotius does not utter a single word about 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 not only to the Dutch, but also the English. Extensive Dutch commercial interests in the Baltic may help explain the Dutch humanist's silence. 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: Wilhelm G. Grewe, (ed.) *Fontes Historiae Iuris Gentium. Sources Relating to the History of the Law of Nations*, 3 vols., Berlin-New York: Walter de Gruyter, 1988-1992, vol. II, p. 157.

"[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 how Venetian *dominium* of the Adriatic and Genoese control of the Ligurian Sea were not treated by Grotius as points of serious controversy.[122] Admittedly, the Dutch humanist was far more willing to accommodate the control of confined maritime spaces (bays, gulfs) later in *De Jure Belli ac Pacis* than he was in *Mare Liberum.*[123] Taken from this vantage point, Grotius saw eye to eye with the author of *De Dominio Adriatico*, even though at the surface their thinking may appear far apart. This insight may also serve to explain why *Mare Liberum* was ignored in the latter.

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

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121 Grotius, *Mare Liberum* (1609) pp. 49-50 and (1916) p. 58.

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

123 See for example the occupation of gulfs and bays in Grotius' *De Jure Belli* 2.3.8. and of coastal waters in ibid. 2.3.102 and 2.3.13.2. These concessions are clearly made from considerations of practical politics and established custom, but in defence of his earlier, theoretical interpretation in *Mare Liberum,* he also argues that one can also conceive of maritime space that cannot be occupied, see: *De Jure Belli,* 2.2.3 and ibid., 2.3.10.3.

Welwood,[124] Freitas or John Selden to underscore this point.[125] The concrete objections historically brought forward against the treatise *Mare Liberum* are of course well known. Welwood upheld the principle of 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 proposed, as had already some Medieval Italian jurisconsults, that a notional boundary of 100 leagues from the coastline apply for establishing territorial waters (other than bays, straits, etc.). But in his *Defence of Chapter Five of the Mare Liberum,* Grotius rejected outright 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?" [126]

While Welwood was quite prepared to keep the 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 elaborated that no part of the world should be placed beyond 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

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[124] 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. Concerning the Welwood-Grotius debate, see also Ittersum, *Mare Liberum* (2006) pp. 243-249.

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

[126] Grotius, "Defensio Capitis" (1928) p. 202.

least because it is both desirable and necessary to preserve order along the main maritime trading routes and also to keep pirates at bay.

Evidence plucked by Grotius from the *Institutes/ Enactments of Justinian* were meant to highlight that "air and water" generally speaking, and with this statement implicitly also the sea, are common to all by nature.[127] In their replies, Welwood and Freitas retorted that references to the communality of water only refer to fresh running water. If the seas were indeed free and open to "all" in ancient Rome, Freitas explained, 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.[128] The Roman jurisconsults employed the expression "no one" in the sense of "no one individual",[129] but this is clearly not valid for a prince or sovereign who represents the interests of the people and body politic at large.[130]

In his *Defence of Chapter Five of the Mare Liberum* Grotius categorically rebuffed the two-pronged argument concerning "fresh running water" and "patrimony". Not only did he render passages that identify "running water and the sea" as two distinct but identifiable cases of natural, common property,[131] he equally dismissed the view that the freedom of navigation had its origins in Roman public policy. Freedom of navigation and free market

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[127] Grotius, *Mare Liberum* (1609) pp. 22-23 and (1916) p. 31. Some provisions of Roman law, as Grotius acknowledge, permit the occupation of the shore. This was not permitted because the shores were public property, but because Rome sought to ensure that the principles of natural law were not violated; see also *Enactments of Justinian* (1973) II.i.1., p. 33.

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

[129] As is for example made in the provision of *Enactments of Justinian* (1973) II.i.6., p. 34.

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

[131] See *Enactments of Justinian* (1973) II.i.1., p. 33.

access from across the sea was clearly a *natural* right,[132] and Grotius underscored the conclusion: "[T]hose who, borne from abroad, navigate on the sea, do not do this on another's property by the right of servitude, but on something that is common to all by the right of liberty." [133] The Dutch humanist later explained:

> "[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 pinpointed inconsistencies of *Mare Liberum* in treating the sea as a possession or even a quasi-possession. On the one hand, Grotius advocated that the freedom of the seas extend to the shores at the level of the highest (winter) tide; from this he deduced 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 the Dutch humanist also imposed certain limitations that accommodate commercial and political realities. Grotius openly conceded: His argument was not about "Goa or

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[132] 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*. Influenced by the explanation of §11 (See *Enactments of Justinian* [1973], II.i.11, p. 35), Grotius equates the *ius gentium* or law of natures 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.

[133] Grotius, "Defensio Capitis" (1928) p. 158.

Malacca", ports in other words that were held as colonies proper by the Portuguese *Estado da Índia*.[134] For Grotius, the issue was the open sea,[135] not the coastal waters, bays, gulfs, ports, or estuaries.[136] 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 could not possibly control the whole of the South Atlantic and the Indian Oceans. These seas are so vast, even a sizeable Portuguese *armada* would inevitably fail in its effort to monitor and exercise effective control over their pelagic space.[137]

In criticizing British maritime hegemony during the late nineteenth century, the German historian Heinrich von Treitschke cited those immortal words from Friedrich Schiller's *Die Braut von Messina oder die Feindlichen Brüder* (The Bride of Messina or the Inimical Brothers):[138] "Auf den Wellen is

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[134] Knight, "Grotius in England" (1919) esp. pp. 7, 10-11.

[135] Grotius, "Defensio Capitis" (1928) p. 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 different, therefore is established in this part between land and sea."

[136] See also Grotius, *Mare Liberum,* (1609) pp. 22-23 and (1916) p. 31: "The nature of the sea, however, differs from that of the shore, because the sea, exception 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."

[137] Ibid. (1609) p. 6 and (1916) p. 12.

[138] Translation from German, P.B. Schiller's play reads as follows and is most appropriate in the context of the present article: "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

(Continued on next page)

alles Welle, Auf dem Meer ist kein Eigenthum" that is "On the sea everything is in flux, on the sea there is no property."[139] This image is not far removed from Grotius' own ideas on the freedom of the high seas, albeit a freedom that effectively 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 propagating this outlook. It was happily espoused by his political superiors and of course by a powerful faction among the merchant community in the early seventeenth century Netherlands. The unfolding of VOC history after its formation in 1602 lends ample evidence to this.

Part III. Did Grotius change his mind?

Section three of the present paper examines some individual points of contention. The central question here: Did Grotius change his mind?

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

Let us first turn to the issue of prohibiting what nature has supposedly given to all mankind, namely the *ius communicandi* or the "right of free trade".

(Continued from previous page)

Loose, /Dreht das Glück seine Kugel um, /Auf den Wellen ist Alles Welle, / Auf dem Meer ist kein Eigenthum."

[139] Heinrich von Treitschke, *Vorlesungen gehalten and der Universität zu Berlin,* edited by Max Cornecesius, 2 vols., Leipzig: S. Hirzel, 1898, vol. II, p. 572.

It shall be recalled that Grotius advanced 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."[140] In other words, the Portuguese did not have the legal capacity to deny access to emporia and the pursuit of "free trade" in ports under their direct sovereignty, let alone those that did not fall under their control. This was later elevated to a general principle in *Mare Liberum*:[141] "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 placed in perspective in chapter 11 of *Mare Liberum*: While it is possible to curtail "free trade", a sovereign may not be arbitrary or even selective in barring access to ports or emporia under his control. Any prohibition of access must be categorical, across the board. In the words of Grotius: "it is not sufficient that some be coerced, but it is indispensable that *all* be coerced."[142] The situation envisaged 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.[143] In theory the latter is workable, but in reality it is not a viable option.

The English delegates at the Indies Conferences thought that, in the end, Dutch practices of exclusion differed insubstantially from Portuguese policies, a verdict that Grotius promptly rebuffed. Was the Dutch humanist first advocating unhindered access by the Dutch to the East Indies when they were

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[140] Grotius, *Mare Liberum* (1609) p. 4 and (1916) p. 10.

[141] Ibid. (1609) pp. 56 and (1916) p. 66.

[142] Ibid. (1609) p. 58 and (1916) p. 68. Emphasis is mine, P.B.

[143] Knight, *Grotius in England* (1919) p. 14.

hoping to establish themselves there? And after consolidating outposts, factories and forts, did Grotius not seek to exclude real and potential competitors from trading in Asia's great emporia? Did the famous Dutch humanist change his mind about "free trade"?

The answer is clearly negative. Grotius legitimized Dutch exclusion policies by invoking the one and only condition upon which exclusion may be deemed legitimate: by excluding *everyone,* and that would of course include the Asian traders as well. The treaties signed between the Dutch and the Asian princes were valid but *exclusive* contracts.[144] The Portuguese, by contrast, were selective in their exclusion policies, and Asian traders continued to blissfully engage in commerce as they had done before the arrival of the European colonial powers. Portuguese contracts with Asian sovereigns, were, according to the Dutch humanist, not exclusive in nature. This is not quite accurate, for the Portuguese did sign treaties that, after about 1600, began to contain clauses that specifically single out the Dutch, the English or the French.[145] But this too corroborates Grotius' earlier position, for either one excludes all or nobody. The VOC, of course, excluded all real and potential competitors, and bound princes in Asia to abide by their contracts with the Dutch – no matter how dubious the conditions might have been under which these contracts were

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[144] Borschberg, "Grotius, East India Trade" (1999) p. 246.

[145] Several of these are contained in the monumental publication by Julio Firminio Judice Biker, *Collecção de tratados e concertos de pazes que o Estado da Índia Portugeza fez com os reis e senhores com quem teve relações nas partes da Ásia e Africa Oriente, desde o princípio da conquista até ao fin do século XVIII,* 10 vols., Lisbon: Imprensa Nacional, 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.

procured.[146] Grotius was painfully aware of the grave implications such treaties, exacted by arm-twisting and force, would invariably bear on the liberty of 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:[147] "…[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 retort, this 'all or nothing' clause is tantamount to creating a monopoly, and we have already familiarized ourselves with Grotius' take on monopolies in *Mare Liberum*.[148] He criticized the Portuguese 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 for the Dutch humanist monopolies were legitimate and justified in one single instance: if the party claiming the monopoly did not engage in hoarding and profiteering. At the Indies Conferences, Grotius drove home two points: Dutch prices are justified because of the high costs incurred from "protecting" native Asian princes from Iberian encroachment.[149] But the cost of lending protection to trade, as Grotius also added, should not be excessive.[150]

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[146] G.N. Clark and W.J.M. van Eysinga, *The Colonial Conferences between England and the Netherlands,* Part II, Leiden: E. J. Brill, 1951, pp. 73, 126.

[147] Grotius, *Mare Liberum* (1609) p. 62 and (1916) p. 72.

[148] Grotius, *Mare Liberum* (1609) p. 61 and (1916) p. 71.

[149] G.N. Clark and W.J.M. van Eysinga, *The Colonial Conferences between England and the Netherlands in 1613 and 1615,* Part I, Leiden: E. J. Brill, 1940, p. 207; *The Colonial* II (1951) p. 118.

[150] Grotius, *De Jure Belli* (1925/1964) p. 200.

This position, in turn, leads to two scenarios: one, 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 sustaining 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 position was as unbelievable then as it appears to the modern reader.

Two, Grotius clearly distinguished 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 specific locations. Exclusion was thus limited to certain ports and places under contract.[151] With this argument Grotius almost certainly sought to thwart the accusation that other parties were unjustly excluded from sharing in the bounty and wealth. 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 painfully aware that the key spices nutmeg, mace and cloves grew only in a few places and not everywhere in Asia. This would have left the “other European parties” engaged in the spice trade, such as the English, with little more than dealings in the pepper trade. But commerce in this spice was not where the highest profits were reaped!

Epilogue

[151] Borschberg, “Grotius, East India Trade” (1999) p. 247.

It would appear that *Mare Liberum* has been widely misunderstood in its intention and rhetorical objective. It addresses navigation on the high seas, not in coastal waters, gulfs, bays or estuaries. It focuses on Spanish and specifically Portuguese policies of obstruction, not on Genoese and Venetian claims to maritime *dominium* or *imperium*. It's about the crimes committed by the Portuguese against nature and Creation: they seriously offend in that they seek to impede commerce and communication at large between the Dutch traders and the Asian princes and their 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 simply go to waste.

Mare Liberum makes a plea for the right 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 market access and trade. This reading of Grotius' treatise stands in sharp contrast to past interpretations, insofar as these have placed the freedom of navigation on the seas - and not the issues of unimpeded access and free 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 Estates General of 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 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 life span, Grotius is known to have influenced the 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 these provisions was interpreted by the VOC as an invitation to attack and punish the defaulting party, chiefly citing the principle *pacta sunt servanda,* i.e. "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 divisible nature of sovereignty in the writings of Grotius has captured the imagination of several researchers and is recognized by a growing number of scholars, including myself, to have significantly strengthened the legal foundations for European colonial rule in Asia and the New World.[152] All peoples are originally free; they are even free to irreversibly sign away their liberty of choice at the stroke of a pen!

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[152] 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 souverainté saisi par ses marques", *Bibliothèque d'Humanisme et Renaissance,* 62.3 (2000) esp. p. 615; Martin van Gelderen, "From Domingo de Soto to Hugo Grotius: theories of Monarchy and Civil Power in Spanish and Dutch Political Thought, 1555-1609", *Il Pensiero Politico. Revista di Storia delle Idee Politiche e Sociali,* 32.2 (1999) p. 202. the article is reprinted in: Graham Darby (ed.), *The Origins and Development of the Dutch Revolt,* London and New York: Routledge, 2001, pp. 151-170. The divisibility of sovereign authority also plays a significant role in Edward Keene, *Beyond the Anarchical Society,* Cambridge: Cambridge University Press, 2002.

For much of the 1900s Grotius has been celebrated as a "prince of peace", "champion of reconciliation", or early advocate of the "freedom of maritime navigation". Twentieth century scholars have also ascribed to the famed humanist certain intellectual faculties that could only be described as super-human.[153] These together with the beaming sense of enthusiasm expressed by Dutch luminaries of jurisprudence, especially Cornelis van Vollenhoven and Willem J. M. van Eysinga, have served to distort beyond recognition Grotius' standing among the architects of early modern colonial rule.[154] This skewed view of Grotius as the champion of the free seas is

[153] Cornelis van Vollenhoven, *Mr. C. van Vollenhoven's Verspreide Geschriften,* Haarlem and The Hague: Tjeenk Willink & Zoon and Martinus Nijhoff, vol. 1, 1934, p. 391, particularly on the humanity, "love" and "confidence" that is "radiated" by Grotius' classic work *De Jure Belli ac Pacis*. See also ibid., p. 388, where the seventeenth century Dutchman is credited for "practically [knowing] everything written by sacred or classical authors and … practically every event in ancient or biblical history."

Grotius did harvest the occasional unflattering comment from twentieth century luminaries, such as the German professor of law, Josef Kohler. In his inimitable bluntness, the Berlin-based jurisconsult opined that *De Jure Belli ac Pacis* was intellectually messy, unsystematic and utterly confused, in short a "total mess". In Kohler's own indicting words: "[M]it Gentilis teilt er [i.e. Grotius] das anekdotenhafte, unmethodische, tumultuarische Erzählen geschichtlicher und fabelhafter Kleinigkeiten und das Durcheinanderwerfen privat- und öffentlicher Erörterungen." With Grotius, so Kohler claims, the theory of natural law is rendered inflexible *(erstarrt)* and made unbearable through a suffocating jungle of quotations *(durch einen unerträglichen Zitatenwust).* His views on Grotius' freedom of the seas are in line with this candid assessment. See: Josef Kohler, *Grundlagen des Völkerrechts. Vergangenheit, Gegenwart, Zukunft,* Stuttgart: Ferdinand Enke, 1918, pp. 4, 5, 41. On the scholarly significance of Kohler's views, see: Hans Thieme, "Natürliches Privatrecht Spätscholastik", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,* Germanistische Abteilung, 70 (1953) pp. 230 et seq.

[154] 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 and the Reconstruction of Iraq", *Third World Quarterly,* vol. 26, nos. 4-5, (2005) esp. pp. 651-655.

captured, in a nutshell, by the following testimony of Christian Meurer in 1919 and verbally enriched by Anand in 1981:[155]

> "'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.'"

While that much enthused-about awakening did not occur until several hundred years later, that kiss from our upstart politician's forked silver tongue could only serve to engender troubled rest. In Europe and its respective colonial possessions, including the Dutch, the principle of *mare clausum* prevailed and in present times is experiencing something of a revival.

In today's age of globalization the issues of free trade and navigation are as important as in the sixteenth and seventeenth century. With the ratification 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.[156] The ongoing disputes cover the reach of territorial waters and economic zones, the protection of fishing stocks in coastal waters,[157] the need to combat piracy, the rights and obligations of neutral shipping, and the development of marine resources, including the exploitation

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[155] Ram Prakash Anand, "Maritime Practice in Southeast Asia until 1600 A.D. and the Modern Law of the Sea", *The International and Comparative Law Quarterly,* 30.2 (1981) p. 440.

[156] On this, see generally: Beesley, "Grotius and the New Law", *Ocean Yearbook* 18 (2004) esp. pp. 100 et seq.

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

of the deep-sea bed.[158] With the benefit of historical hindsight, Grotius was on select issues of maritime law and policy less modern in his thinking than some of his opponents, such as Freitas. For all his flaws, the Portuguese scholar actually foresaw the need for sovereign bodies to possess, or at least remain in effective control of, the sea bed and spaces filled by pelagic waters.[159] With the advancement of technology, it is now possible to exploit minerals from the seabed. Oil has been extracted offshore for many decades.[160] 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.

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[158] Many of the issues raised by Grotius, Freitas and Welwood are also pressing issues today demanding swift resolution, See Shigeru Oda, "Some Reflections on Recent Developments in the Law of the Sea", *Yale Journal of International Law,* 27 (2002) pp. 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) pp. 229-230.

[159] Freitas also argues for a similar "possession" of air-space. See ibid., p. 230.

[160] Oda, "Some Reflections" (2002) pp. 219, 221.

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