Political and Commercial Interests as Influences in the Development of the Doctrine of the Freedom of the High Seas

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Introduction

The doctrine of the freedom of the high seas has been described as the most fundamental doctrine of the law of the sea.[1] It has even been referred to as a general or fundamental principle of international law.[2] The doctrine was codified in the 1958 Geneva Convention on the High Seas and is now encapsulated in Part VII of Law of the Sea Convention of 1982 (LOSC) albeit not as an absolute freedom.

This 'freedom' however, was not always held to be sacrosanct amongst civilised nations as a study of European history will reveal.[3] Indeed when *Mare Liberum* was anonymously published in 1608,[4] it espoused a view not widely held in the European community.[5] At varying times Spain, Portugal, England and the Scandinavian countries, had all sought to impose their sovereignty over parts of the seas.[6] It has been said that the doctrine of the freedom of the seas came into the world somewhat as a bombshell.[7]

An understanding of how the concept of the freedom of the seas developed, from the time of ancient Roman domination of the Mediterranean Sea, through to the Age of Exploration and Discovery in Europe, to industrialisation and

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1 T Clingan *The Law of the Sea: Ocean Law and Policy* San Francisco Austin & Winfield 1994 10.

2 WE Butler 'Grotius and the Law of the Sea' in H Bull (Ed) *Hugo Grotius and International Relations* Oxford Clarendon Paperbacks 1992 212.

3 LM Macrae 'Customary International Law and The United Nations' Law of the Sea Treaty' 13 (1983) *California Western International Law Journal*. See generally pages 183- 197 for a discussion on the debate between nations.

4 H Grotius *The Freedom of the Seas* - translated by R V D Magoffin, J B Scott (Ed) New York Oxford University Press 1916 V (hereinafter Magoffin, *supra* n.4)

5 WSM Knight *The Life and Works of Hugo Grotius* London Sweet & Maxwell 1925 106.

6 JC Wang *Handbook on Ocean Law and Politics* Connecticut Greenwood Press 1992 43.

7 Knight, *supra* n.5 at 107.

commercialisation in the twentieth century; is essential to fully comprehend how the laws applicable to the seas came to be codified in the twentieth century. It will then be understood that the history of the laws relating to the sea is dominated by a conflict between Governments' desires to exercise their sovereignty over the sea and the idea of freedom of the seas.[8]

Early Developments

All ancient maritime communities experienced difficulty with pirates hindering, if not completely preventing, maritime commerce.[9] Early city states including Crete, Rhodes, Greece, Carthage and Etruria, (modern Tuscany) gained supremacy of the seas by resorting to piracy.[10] Commercial prosperity was inherently reliant on the freedom to safely traverse the seas, a freedom guaranteed only by maritime supremacy and without this supremacy states died as quickly as they flourished.

There were early attempts to free the seas of pirates, making them safe for commercial vessels. Minos, the king of Crete, employed his Navy to clear the seas of pirates and gain supremacy over the Hellenic Sea.[11] Similarly, Corinth suppressed piracy to protect her commerce and the Rhodians achieved great success in banishing pirates from the seas, thus allowing their commerce to expand.[12] There is evidence of 'international' conventions or treaties expressly against piracy being established.[13] Once piracy became less prevalent, other elements of maritime law emerged as can be seen in a study of both Greek and Roman law.

Greece

There is some evidence of attempts to regulate maritime affairs by the ancient Greeks.[14] Unlike the Romans, the Greeks showed a deep affection for the sea and travelled widely.[15] The Greeks believed the acquisition of property in the sea was permissible not only in the territorial sea but to the regions beyond.[16] Indeed the policy of Athens, at the urging of Themistocles, was to assert sovereignty over the seas.[17] The Athenians however, refrained from exercising tyrannical power over the seas and encouraged commercial trade, perhaps more out of pragmatism than

8 DP O'Connell *International Law of the Sea* Vol 1 Oxford Clarendon Press 1982 1.
9 C Phillipson *The International Law and Custom of Ancient Greece* London: Macmillan & Co 1911 371.
10 Phillipson, *supra* n.9 at 372.
11 *Ibid* at 373.
12 *Ibid* at 374.
13 *Ibid.*
14 Phillipson, *supra* n.9 See generally Chapter XXVII. The Greeks had tribunals similar to modern courts of Admiralty and disputes arising out of maritime contracts were submitted to specially appointed Judges.
15 Phillipson, *supra* n.9 at 368.
16 Macrae, *supra* n.3 at 183.
17 Phillipson, *supra* n.9 at 377.

anything else.[18]

The earliest recorded laws asserting jurisdiction over maritime areas are the laws of Rhodes.[19] By the later period of Greek history, Rhodes had become the chief naval power of the Aegean Sea. Several writers believe these laws regulated Greek and Latin commerce and were ultimately relied upon in the formation of Roman maritime law.[20]

Rome

The idea that the sea and its coasts were the common property of all men can be traced to the texts of the Roman jurist Marcianus.[21] His texts contain the first recorded written pronouncement on the legal status of the sea. Marcianus lived in the second century AD and given his position in a class of Roman jurists who could make official pronouncements with the effect of law, it follows his theory that men had a right to the free use of the sea, was a law of the empire.[22] Marcianus had declared that the seas and the fish were *communis omnium naturali jure*, meaning they were common or open to all men by operation of natural law.[23]

This law was codified into Roman law in the Code or Digest of Justinian written in 529 AD.[24] However, while the legal status of the seas was 'common property' and in practice citizens enjoyed free use of the seas, in reality the Romans effectively controlled seas within their empire.[25]

During the height of their empire the Romans enjoyed complete physical control over the Mediterranean Seas. All coastal city states in the Mediterranean were part of the Roman empire and for all practical purposes the Mediterranean Sea was a 'Roman Lake'.[26] For this reason, the Roman approach to the seas may be more appropriately categorised as an expression of public policy rather than an accepted tenet of international law.[27] Certainly there were no other powers with sufficient strength to challenge the Roman supremacy of the seas, which justifies the conclusion that Roman practice lacked in international character.

It is recognised that there was no need for Rome to exert an omnipresent force in the seas for her citizens to enjoy freedom of movement in the Mediterranean, nor were there any concerns regarding overfishing which might necessitate restricted access to resources.[28] Further, the documented Roman dislike for the

18 Macrae, *supra* n.3 at 183.
19 PT Fenn 'Justinian and the Freedom of the Sea' 19 (1925) *American Journal of International Law* 717.
20 For discussion see: Phillipson, *supra* n 8 at 379; Fenn, *supra* n.19 at 717; Macrae, *supra* n.3 at 184.
21 Fenn, *supra* n.19 at 716 and Wang, *supra* n.6 at 42.
22 *Ibid.*
23 Clingan, *supra* n.1 at 11.
24 *Ibid* at 10.
25 Macrae, *supra* n.3 at 185.
26 Clingan, *supra* n.1 at 11.
27 *Ibid.*
28 *Ibid.*

seas[29] may suggest that it was sufficient for them to control the seas and keep trade routes safe, without becoming overly involved in management. This leads one to the conclusion that the Roman policy of 'common seas' emerged simply because of their sheer dominance over the seas and not because it was the particular policy of the Emperor.

Italian City States

The collapse of the Roman empire triggered a struggle for control over the lands and seas previously part of its domain. The maritime states clashed over the control of trade routes and fishing areas.[30] By 1400 Venice had become a centre of trade and commerce, with approximately 3000 ships afloat.[31] Venice made a claim to sovereignty over the Adriatic Sea and levied tributes on vessels entering the sea.[32] Genoa asserted dominion over the Ligurian Sea, which she enjoyed up to the seventeenth century.[33] Access to resources and the wealth new lands offered, was obtained through the physical exertion of force and control of the trade routes. Sovereigns intent on increasing their power came to regard supremacy over the seas as a critical requirement in achieving their aims.[34] It is at this time that we see the emergence of claims of sovereignty over the seas as a trend that remained well into the 1700s.

European Maritime History

Ideas of dominion over the sea were swept up with the developing sentiments of nationalism and sovereignty in Europe during the Age of Discovery. Sovereigns championed differing approaches to rights of navigation, fishing and trade according to their country's political requirements.[35] Denmark claimed jurisdiction over the Baltic, Norway exerted control over the sea routes to Iceland and Greenland, Sweden claimed the Gulf of Bothnia, and the English claimed the English Channel and parts of the North Sea.[36] An examination of European history during this period of exploration and discovery provides an insight to how the doctrine of the freedom of the seas emerged.

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29 Fenn, *supra* n.19 at 369.

30 *Ibid.*

31 G Gilmore & C Black *The Law of Admiralty* 2nd edn New York Foundation Press 1975 5.

32 Wang, *supra* n.6 at 41-42.

33 *Ibid.*

34 GP Smith 'The Politics of Law Making: Problems of International Maritime Regulation, *Innocent Passage v. Free Transit*' 37 University of Pittsburgh Law Review (1976) at 491.

35 See generally : D S Berkowitz *John Selden's Formative Years: Politics and Society in Early 17th Century England,* Washington DC Folger Books 1988 at 51-54 and D P O'Connell *International Law* Vol 1 London Stevens & Sons 1970 at 455-456.

36 Wang, *supra* n.6 at 42.

Maritime Supremacy of Spain and Portugal

During the fifteenth century Spain and Portugal enjoyed the support of the Pope in carving up the New World between them.[37] These two countries were undoubtedly the masters of the sea in the 1400s and 1500s. In 1494 Pope Alexander VI intervened to mediate between conflicting Spanish and Portuguese claims over lands in the New World.[38] A line of demarcation (the Pope's line) was drawn through Brazil diving lands east/west between the two powerful sea-faring nations.[39] This agreement was confirmed by the Treaty of Tordesillas in 1494, the language of which strongly implied the two nations owned the surrounding seas.

State practice suggests both Spain and Portugal believed they possessed exclusive navigation rights and trade privileges over an enormous expanse of the earth's oceans. For example, to reach her lands in the New World, Spain was granted a right of innocent passage through Portuguese seas, provided Spanish ships took direct courses to the desired region and did not deviate from that course, excepting for bad weather.[40]

Spanish and Portuguese Decline

This exclusive control of the seas surrounding the new lands in Africa, the Pacific and South America, but more importantly the denial of access to trade routes, led to challenges by other emerging maritime nations. In particular, the English and the Dutch sought a share of the trade profits to be had in the New World [41] and they challenged the policy of closed seas. Further, a burgeoning Protestant movement in north-west Europe (Provinces of the Netherlands, England, Scotland) caused citizens to question the validity of the Pope's 1494 declaration.[42] Also of relevance was the struggle for independence by the Dutch and their defeat of the Spanish armada in 1588.[43]

Although united under one crown,[44] the Spanish and Portuguese had become over extended by their possessions in the New World and could not continue to

37 Clingan, *supra* n.1 at 11 and Smith, *supra* n.34 at 491 In 1455, Pope Nicholas V in his bull *Romanus Pontifex*, gave to Portugal exclusive and permanent rights to West African lands discovered by Prince Henry the Navigator. In a series of bulls from 1493, Pope Alexander VI granted to Spain in essence all land in the New World discovered in her name.

38 Wang, *supra* n.6 at 42.

39 O'Connell, *supra* n.8 at 2.

40 Clingan, *supra* n.1 at 11. It has been suggested that this practice may also be the origin of the now codified right of inoccent passage in the LOSC.

41 Wang, *supra* n.6 at 42.

42 Clingan , *supra* n.1 at 12.

43 S Van Valkenburg and FG Eych 'History of the Netherlands' *Colliers Encyclpoedia* Vol 17 USA Crowell Collier and Macmillian Inc 1976 323.

44 HV Livermoore, 'Portugal' Vol 19 Colliers Encyclopedia, supra n.43 at 282. Philip II was recognised as Philip I of Portugal in 1580 in return for a guarantee that Portuguese national institutions would be preserved.

physically enforce their exclusive rights over the seas.[45] This inability marked the decline of their position of influence and supremacy in the maritime affairs.

The New Movement

Clearly commercial interests were behind the challenges to the closed seas regime which operated in Europe for most of the sixteenth century. This regime was replaced by an argument that the seas were free and open to all men. It has been suggested that support for the open seas policy was motivated largely by economic considerations as it was much cheaper to guarantee freedom of use and access, than to assert ownership and protect widely dispersed interests.[46]

The development of the concept of the freedom of the seas during this period is very interesting as it reveals that it was used very much as a political tool by Governments to further their economic interests.

England under Elizabeth I

Queen Elizabeth I inherited a policy of 'liberty of fishing' when she ascended to the English throne in 1558. In 1403 King Henry IV of England reached the first of many agreements with the King of France, then Charles VI, on the freedom of herring fishing in the channel separating the two countries.[47] Indeed, the freedom to fish the seas was so commonly recognised in England during the fifteenth century, that it could rightly be regarded as a part of English international policy and custom.[48] It is clear that Elizabeth I continued to support this national policy of freedom of the seas. Under her reign, fishermen in the seas off the English coast did not require licences nor did they have any levy or tribute extracted by the crown.[49]

Just prior to her death in 1602, Elizabeth I confirmed the principle of the freedom of the seas in responding to Spanish protests against the expeditions of Sir Francis Drake.[50] Further, during negotiations with Denmark in the same year, Elizabeth I is quoted as stating: " The property of the seas in some small distance from the coast may yield some oversight and jurisdiction, but that fishing and navigation should not be forbidden by the prince holding the coast" [51]

It has been suggested that Elizabeth I maintained this policy more to ensure freedom of trade and fishing for her nation than out of any philanthropic motivation.[52] There is ample evidence to support the argument that this principle was supported by the crown for political reasons. Freedom of trade, navigation and fishing

45 Clingan, *supra* n.1 at 12.
46 Wang, *supra* n.6 at 43.
47 *Ibid.*
48 Smith, *supra* n.34 at 491.
49 *Ibid* at 491-492.
50 Butler *supra* n.2 at 211.
51 O'Connell, *supra* n.8 at 3.
52 Butler, *supra* n.2 at 211 and Smith, *supra* n.34 at 492.

were important to all sea-faring nations, particularly as the Spanish and Portuguese began asserting monopolies over the seas.[53] The North Sea was important to many nations including France, Holland, Denmark, England and Spain as a valuable source of commercial fishing. In addition to the economic benefits of a thriving fishing industry, the vessels and their crews significantly bolstered the royal naval forces of their respective countries.[54] Also of note, it has been stated that the national policy of England at the time was to leave the sea boundaries undefined and somewhat vague so that costly wars and embarrassing defeats were avoided every time territorial sovereignty was threatened.[55]

England under James I

James VI of Scotland succeeded Elizabeth I to the throne of England in 1603 as James I of England. James I brought with him to the English throne, Scottish traditions and laws. Among these was the notion of *landkenning*. According to this tradition, the King of Scotland was deemed to possess whatever lay within the range of vision of a ship within sight of the coast. [56]

This tradition can be traced to the twelth century when Scottish kings laid claim to all coastal waters off Scotland and the herring they contained. [57] By 1609 James I had closed all of the seas of England, Ireland and Scotland to foreign fishermen.[58] Those wishing to fish in the closed seas were subject to taxes or levies. The decision to close the seas can be seen as a political one, England saw the Dutch fishermen off their coast as a threat to the nation's wealth and power.[59]

The Dutch Position

During the 1500s, the Provinces of the Netherlands were engaged in a political struggle for independence. Philip II had ruled the Provinces since his accession to the Spanish throne in 1556, via an increasingly unpopular Catholic regent.[60] A vocal Protestant movement with the desire for liberty, led to a Declaration of Independence in 1581 by the northern Provinces.[61] Central to the struggle for independence was the desire for access to the lucrative trade the New World offered. The British assisted the Dutch in their fight against the Spanish who were finally forced to

53 Smith, *supra* n.34 at 492-493.
54 *Ibid.*
55 *Ibid* at 492.
56 O'Connell, *supra* n.8 at 3.
57 Smith, *supra* n.34 at 492.
58 Butler, *supra* n.2 at 210.
59 Smith, *supra* n.34 at 495.
60 JJ Van Nostrand, Vol 18 Colliers Encyclopedia, *supra* n.43 at 683. Philip II had ruled the Netherlands via his half-sister. Her intolerance for the Protestant movement increased resistance against Spanish rule.
61 S Van Valkenburg *Colliers Encyclopedia, supra* n.43.

withdraw troops in 1595.[62]

Due to the 'joined crowns' of Spain and Portugal, the Dutch were also technically at war with the Portuguese. The Dutch took advantage of Spain's weakening power and took over Portuguese possessions in the East Indies[63] and in 1598 the Dutch established colonies on the island of Mauritius, Java and Moluccas.[64] In 1602, the Dutch East India Company was formed and came into immediate conflict with the Portuguese in the East Indies. The Portuguese sought to excluded the Dutch from trade in the Indian ocean and the Dutch argued that the seas were free to all men.[65]

The catalyst which brought the closed seas /open seas debate to a head was the capture of a Portuguese galleon in the straits of Malacca by a Captain of the Dutch East India Company. Hugo Grotius, at that time a young Dutch lawyer and something of a child prodigy,[66] was briefed to write a defence for the Company based upon the law of prize.[67]

De Jure Praeda

De Jure Praeda (The Law of Prize) was written by Grotius to defend the capture of the Portuguese galleon,[68] however it was not used by the Dutch East India Company or published.[69] A few years later in 1608, Chapter XII of *De Jure Praeda,* was anonymously published.[70] At that time the Dutch were in negotiations with Spain and Portugal over Dutch independence. Central to these negotiations were the rights to commerce and trade in the Indies, which both Spain and Portugal refused to entertain.[71] It has been suggested that Chapter XII, now known as *Mare Liberum,* was published at the suggestion of the Dutch East India Company to support their claims for freedom of the seas.[72] Certainly, the Grotian advocacy of freedom of the

62 *Ibid.*
63 Wang, *supra* n.6 at 43.
64 Magoffin, *supra* n.4 at VII.
65 *Ibid.*
66 Bull (Ed), *supra* n.2 at 67. Born Hugo de Groot in 1583, Grotius attended University at age 11 and had written a book by age 14.
67 Magoffin, *supra* n.4 at VII.
68 Bull (Ed), *supra* n.2 at 70.
69 Kinght, *supra* n.5 at 83. It has been suggested that the Dutch East India Company may have decided that silence and activity was a better vindication of its right to prize than the publication of a controversial work.
70 Magoffin, *supra* n.4 at VIII. Some authors have cited 1609 as the year *Mare Liberum* was written (Clingan, *supra* n.1 at 12) however, it is generally accepted that the work was published 1608-09, having been written a few years earlier. See O'Connell, *supra* n.8 at 10; Magoffin this note; F.Ito, 'Defense of Hugo Grotius for his *Mare Liberum*' 20 Japanese Annual of International Law (1976) 1; and G.W.Johnson *Memoirs of John Selden* (London: Orr and Smith 1835) 52 which states De Jure Praeda was written in 1604.
71 F Ito, 'The Thoughts of Hugo Grotius in the *Mare Liberum*' 18 Japanese Annual of International Law (1974) 1.
72 Magoffin, *supra* n.4 at VIII.

seas and the liberty of the Dutch to trade in the East Indies, fitted entirely within the political and economic objectives of the Dutch.[73]

Mare Liberum

The importance of Grotius' contribution to the law of the sea cannot be overstated. *Mare Liberum* was the first organised set of arguments on the doctrine of the freedom of the sea.[74] Although the Grotian doctrine has been weakened by twentieth century developments, its impact upon modern law is incalculable.[75]

Chapter XII was originally entitled 'The Freedom of the Sea or the Right which belongs to the Dutch to take part in the East Indian Trade.' Grotius intended to demonstrate that "the subjects of the United Netherlands have the right to sail to the East Indies... and to engage in trade with the people there."[76]

The Right of Every Nation to Travel Freely

Grotius based his whole argument upon an 'unimpeachable axiom of the law of nations,' namely that 'every nation is free to travel to every other nation and to trade with it.'[77] In keeping with the custom of his time, Grotius based his argument on religion, natural law, and the writings of ancient philosophers and lawyers.[78] For example, Grotius argued that it was God's will that "some nations excel at one art and others in another" and to deny the freedom of travel is to "do violence to nature herself."[79] To support this argument Grotius quoted Pliny, by stating "whatever has been produced anywhere should be seen to have been destined for all." [80] Grotius stated that even if (emphasis added) the Portuguese were sovereigns in those parts of the world the Dutch wished to visit, they would be doing the Dutch an injury to forbid access to those places and from trading there.[81]

Rejection of Portuguese Claims

Notwithstanding the above statement, Grotius methodically addressed and rejected Portuguese sovereignty based upon title by discovery, occupation, papal dominion or custom.[82] Central to Grotius' argument was the theory that the seas cannot be owned by anyone as they were either:

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73 R Higgins, 'International Law in the United Nations Period' in Bull (Ed) *supra* n.2 at 279.
74 Clingan, *supra* n.1 at 12.
75 Macrae, *supra* n.16 at 186.
76 Magoffin, *supra* n.4 at 7.
77 *Ibid.*
78 Clingan, *supra* n.1 at 18.
79 *Ibid.*
80 *Ibid.*
81 Magoffin, *supra* n.4 at 10.
82 Macrae, *supra* n.3 at 186-187.

- *Res Nullius* - the property of no one,
- *Res Communis* - a common possession, or
- *Res Publica* - public property[83]

Grotius likened the sea to the air and stated "that which cannot be occupied cannot be owned."[84] He referred to the oceans as "that expanse of water which antiquity described as immense, infinite, bounded only by the heavens."[85] He stated "that which cannot be occupied in the restricted sense of being physically seized and enclosed, staked out and exclusively occupied, or that which has never been so occupied, cannot be the property of anyone because all property has arisen from occupation. Such property is common to all men." [86]

Grotius concluded that the Portuguese could not claim they had occupied the sea by merely sailing over it first for this would lead to the men who first circumnavigated the globe claiming the whole ocean.[87] He also stated that the Portuguese could not even defend their actions by showing either artificial or natural boundaries.[88]

In essence, Grotius argues that because the sea is so limitless it cannot become the possession of anyone and it is adapted for the use of all. In support of his argument Grotius cited Placentinus, stating " the sea is a thing so clearly common to all that it cannot be the property of anyone save God alone."[89] Arguing that the common use should remain in perpetuity, Grotius, referring this time to Cicero, states "the common right to all things that nature has produced for the common use of man is to be maintained."[90]

The physical nature of the oceans makes the laws of custom, conquest, prescription and possession, which governed the acquisition of, and dominion over the land, inapplicable to the oceans.[91] Portuguese claims to sovereignty over the oceans surrounding the New World based upon conquest or custom were therefore rejected. Grotius addressed the claims to sovereignty through Papal Declarations, stating that it was inconceivable that the Pope wanted to give two nations one-third of the world each.[92] In any case, the Pope's concern is limited to spiritual matters and does not extend to material gains.[93]

Grotius' two main arguments: that the seas are so limitless that they cannot be

83 Magoffin, *supra* n.4 at 22.
84 *Ibid* at 28.
85 *Ibid* at 37.
86 Knight, *supra* n.5 at 103.
87 Magoffin, *supra* n.4 at 39.
88 *Ibid.*
89 Macrae, *supra* n.3 at 189.
90 Magoffin , *supra* n.4 at 27.
91 Macrae, *supra* n.3 at 191.
92 *Ibid* at 187.
93 Knight, *supra* n.5 at 105.

occupied or owned, and that common use ought to be maintained in perpetuity because nature determined this, (hence the resources of the seas are inexhaustible) have not withstood the developments of the last two centuries without some modification, as will become evident later in this paper.

The English Response

Mare Liberum was written principally to refute the claims of the Spanish and Portuguese to trade in the New World. However, it displeased other nations seeking to extend sovereignty seawards, particularly England.[94] As previously mentioned, by 1609 James I had effectively closed the North Seas fishing areas to foreign fishermen. The English response to *Mare Liberum* was centred mainly on fishing and the right to close expanses of seas to protect their interests in adjacent fisheries.

Direct Conflict with the Dutch

Following the Treaty of Antwerp in 1609, the Dutch gained access to trade in the East and soon began to assert monopolies of their own.[95] The Dutch East India Company soon came into conflict with the English East India Company. It has been suggested that the Dutch had always harboured aspirations to maritime supremacy, but to defeat the claims of Spain and Portugal, it was necessary to formulate an argument for the freedom of the seas.[96]

Dutch Mission to England 1613 – Grotius shifts Ground.

In 1613 the Dutch East India Company sent a mission to England to discuss the claims of the English East India Company in the East Indies.[97] Grotius was included as an extra member on the Dutch mission.[98] During discussions, the English accused the Dutch of adopting the position the Dutch themselves had objected to in 1608, namely the Spanish and Portuguese policy of exclusion.[99] Further, the English argued they had a right to trade with all other nations and to travel to the East Indies and freely engage in commerce.[100]

In responding the Dutch, and indeed Grotius, performed a remarkable about face. However, it must be remembered that as *Mare Liberum* was published anonymously, Grotius had not been identified as the author and exponent of the doctrine of the freedom of the seas. Grotius argued that the issue before the two nations was not one of natural law, but one of the validity of contracts and treatise with the

94 Clingnan, *supra* n.1 at 18.
95 Johnson, *supra* n.70 at 53.
96 *Ibid* at 52.
97 Knight, *supra* n.5 at 140.
98 *Ibid.* It appears that Grotius was included as a fouth or extra member to the mission.
99 Johnson, *supra* n.70 at 53.
100 Knight, *supra* n.5 at 140.

native princes which gave the Dutch monopolies in the spice trade.[101] One would be justified in viewing Grotius as simply a lawyer modifying his arguments to suit the political desires of his client - the Dutch East India Company. In this light, *Mare Liberum* can truly be seen as the work of a brilliant lawyer, writing on instructions and not the inspired thoughts of a philosopher. Hence it can be argued that the doctrine of the freedom of the seas emerged as the product of political and economic objectives. The brief departure from the doctrine by the Dutch during negotiations with the English did not hinder its development, nor prevent the Dutch from continuing to champion its cause as it suited their purposes.

William Wellwood

In 1613 William Wellwood, a Scottish lawyer who was arguably motivated by a desire to please his Scottish King, responded to the doctrine of the freedom of the seas, with particular reference to fishing issues.[102] Wellwood was the first author to clearly enunciate the principle that inhabitants of a country have a primary and exclusive right to the fisheries along their coasts.[103] His paper was entitled *An Abridgement of all Sea Laws.* Wellwood based his argument on theological grounds stating that God's command to man to 'subdue the earth and rule the fish' could only be complied with by subduing the waters also.[104] He argued that the *Mare Liberum* policy would leave England's fisheries at the mercy of every comer.[105]

John Selden and The Closed Seas Policy

By 1618 the Dutch were exerting their influence in the rich North Sea fisheries in such a manner as to displease the English king. In response to the Dutch conduct and their claims that the seas were free and open to all, James I is reported to have declared: " the King is angry and doth not expect to be taught the laws of nations by them or their Grotius."[106]

In early 1619 James I considered a legal defence to England's stance on the closed/open seas debate. At that time John Selden, a renowned lawyer, was under a 'cloud of disgrace' for the publication of his work 'The History of Tythes'.[107] Understandably when Selden was requested to write a reply to *Mare Liberum*, he was keen to please his sovereign and produced a draft within a very short period of

101 Johnson, *supra* n.70 at 53. Grotius changed his previous argument that natural laws were 'unimpeachable' as during the visit to England he stated that such laws were'indefinite'.
102 Knight, *supra* n.5 at 109.
103 *Ibid.*
104 O'Connell, *supra* n.8 at 10.
105 O'Connell, 'Internationa Law' *supra* n.35 at 455.
106 Johnson, *supra* n.70 at 54.
107 *Ibid* at 207. The work had challenged the existing class system and Selden had written the King an apology to placate him.

time.[108] History records that James I was about to sign the work off for publication when he recalled a part dealing with the North Seas which may have upset his brother-king in Denmark. James I was indebted to the Danish monarch and wished to borrow more money, so the work was returned to Selden for amendment.[109] After hastily amending the draft, Selden returned it to James I, however here there appears to be some confusion and it seems Selden's paper remained in the hands of the Lord High Admiral, the Duke of Buckingham, indefinitely. In any case it was not published until some 16 years later.[110]

No doubt of some concern to James I was the religious division in Europe. The King wished to push England's claims for access to, and sovereignty over the seas, without alienating the Dutch, the only other strong Protestant maritime power in Europe and one which shared England's hostility to the Catholic monopolies in the New World.[111] James I was also keen to maintain the historical claims of English dominance in the North Seas. The decision whether to publish a contrary argument to *Mare Liberum* or not can therefore be seen as a political decision, with many foreign policy and economic factors to be considered.

The English conflict with the Dutch in the North Sea did not resolve itself and by 1635 the issue had expanded to include not only the question of fishing rights, but one of actual dominion over the seas.[112] The Dutch had by this time nearly monopolised the North Seas fisheries and were insisting on their rights to take herring right up to England's shores.[113] Selden's work was brought to the attention of the English king, then Charles I, and was published in 1635.[114]

Mare Clausum

Originally entitled 'The Closed Sea or Two books concerning the Dominion of the Seas' Selden's argument was based upon two principles. Firstly, it is demonstrated "that the sea by the law of nature and nations is not common to mankind but is capable of private dominion or property equally with the land." Secondly, "the king of Great Britain is the lord of the sea as an inseparable and perpetual appendage to the British empire."[115]

Selden argued that customary practice of nations showed a consistent pattern of behaviour of dominion over the oceans.[116] In this respect, Selden stated the clearest proof of acceptance of dominion as the proper regime for the ocean could

108 *Ibid* at 54. Selden was approached by the Lord High Admiral of England, Lord Buckingham in the spring of 1619 and had produced a draft by summer of the same year.
109 *Ibid* at 54 and 207.
110 *Ibid* at 207.
111 *Ibid* at 52.
112 Knight, *supra* n.5 at 110. The English demanded that foreign ships dip their flags to English flag ships in a sign of deference to the sovereignty of the English.
113 Johnson, *supra* n.70 at 208.
114 *Ibid.*
115 Johnson, *supra* n.70 at 209.
116 Clingan, *supra* n. 1 at 19.

be found in the universal custom of treating the oceans as capable of appropriation.[117] Thus he concluded, the proposition that the law of nature states that the seas are common to all, is not supported by customary practice.[118]

It was Selden's contention, that God's intention that the earth be divided was with respect to the seas as well as the land.[119] He argued that the physical nature of the ocean did not preclude occupation and therefore ownership. "Oceans are not unbounded, every ocean has shores or islands by which they can be measured" and nautical science enables artificial limits to be fixed in open seas.[120]

Perhaps knowing that his sovereign would be pleased by any work that extended his power and dominion, Selden declared "the very shores or parts of the neighbouring sovereigns on the other side of the sea are the bounds of maritime dominions of Britain, to the southwards and eastwards, but in the open and vast ocean to the north and west - they are to be placed at the fartherest extent of the most spacious seas which are possessed by the English, Scots and Irish."[121]

Defence and Acceptance of *Mare Liberum*

Grotius

Interestingly Grotius did not respond to *Mare Clausum* when it was published in 1635.[122] By that time he was a political outcast in the employ of the king of Sweden. It is of no little significance that the interests of his Swedish monarch in the Baltic Sea were well served by the Selden's arguments for closed seas.

Grotius did however respond to Wellwood's attack on his *Mare Liberum* in a treatise commonly referred to as *Defensio.*[123] It is believed that this work was written sometime between 1613-1617 and remained unfinished and unpublished until it was discovered with the remaining unpublished chapters of *De Jure Praeda* in 1868.[124]

Later, in 1625 Grotius published *De Jure Balli as Pacis* in which he conceded that "the seas could be occupied by him who is in possession of the land on both sides." Grotius recognised small areas directly offshore could be claimed for purposes of protection.[125]

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117 Macrae, *supra* n.3 at 194.
118 Clingan, *supra* n.1 at 19.
119 *Ibid.*
120 *Ibid.*
121 Knight, *supra* n.5 at 111.
122 Grotius was imprisioned in 1619 within The Netherlands following an internal political upheaval. He later escaped in 1621 (in a chest of books) and went to work in the court of King Louis XIII of France before going to the Swedish court. See Bull (Ed) *supra* n.2 at 68.
123 Ito, 'Defense of Hugo Grotius' *supra* n.70 at 1. The work was entitled *Defensio Capitis quinti Mare Liberi oppugnati a Guilielmo Welwodo.*
124 *Ibid.* For a full discussion of this work see the Ito, *supra* n.70. As *Defensio* was not published until 1870, its effect on the development of the doctrine of the freedom of the seas is limited.
125 Macrae, *supra* n.3 at 191.

Developments in 1700s–1800s

The doctrine of the freedom of the seas was defended by Dutch publicists during the first half of the seventeenth century.[126] In 1637 fellow country-man Potanus, stated that the Grotian doctrine was valid outside the areas of coastal waters,[127] which indicates the concept of a territorial sea was gaining acceptance. It should be noted that the doctrine of *Mare Liberum* was criticised by nations other than England. In 1625 Seraphin de Freitas, a Portuguese monk, published a work criticising *Mare Liberum*. However, his work had limited impact partly because of its length and mostly because of Spain and Portugal's declining power and influence in the European community.[128]

Following the debates between Grotius and Selden, there was a lull in the dispute between closed and open seas policies. States were not yet powerful enough, nor did they have the technology which enabled them to exert control over vast expanses of open seas.[129]

In 1758, the resources of the sea were still thought to be inexhaustible. Vattel stated, "the use of the open sea, which consists in navigation and fishing is innocent and inexhaustible."[130] This statement was made in Vattel's examination of the doctrines of both Grotius and Selden. Vattel acknowledged that a state could become powerful enough to forbid foreign fishermen from fishing off its coastline, however he stated that such an act was not legally justified in international law. "For since such things, while common to all, are sufficient to supply the wants of each - who ever should, to the exclusion of all other participants, attempt to render himself sole proprietor of them, would unreasonably wrest the bounteous gifts of nature from the parties excluded."[131]

By the eighteenth century, the European world had accepted and embraced the principle of freedom of the seas to ensure freedom of commerce and links with overseas possessions and colonies.[132] Claims to vast areas of the seas had ceased and England herself had adopted the open seas policy with the succession of the Dutch house of Orange to the English throne in 1689.[133]

Application in Domestic Admiralty Cases in the Nineteenth Century

The application of the principle of the freedom of the seas can be seen in reported cases of the 1800's. In *The Louis*, a case involving the seizing of a French vessel (suspected of slave trading) by an English cutter; Sir William Scott recognised the

126 O'Connell, *supra* n. 8 at 10.
127 O'Connell 'Internation Law' *supra* n. 35 at 456.
128 Knight, *supra* n.5 at 108.
129 Macrae, *supra* n.3 at 195.
130 E Vattell *Law of Nations*. See: Macrae, *supra* n. 3 at 195.
131 *Ibid.*
132 Butler in Bull (Ed) *supra* n.2 at 216.
133 Butler in Bull (Ed) *supra* n.2 at 211.

principle that nations have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation.[134]

The principle was later upheld by the United States Supreme Court in *The Marianna Flora* in 1826.[135] The Court stated that 'upon the ocean, then, in time of peace, all possess an entire equality.'[136]

The Twentieth Century

The emergence of commercial shipping, increased naval power, dispersed economic and political interests throughout colonial empires and the increasing influence of the United States of America, ensured support for the principle of the freedom of the seas. By the 1900's the principle had become part of international customary law through general acceptance, court decisions and state practice. The codification of the principle in 1958 therefore did not create new oceanic regimes, it simply recognised existing state practice.

The concept of the freedom of the seas in the 1958 Geneva Convention of the High Seas has lost the simplicity of Grotius' absolute freedom.[137] This is evident by the definition of high seas in Article 1: "The term high seas means all parts of the sea that are not included in the territorial sea or in the internal waters of a state". It will be noted that Grotius had simply argued all the oceans were open seas, where every man was free to travel, navigate and fish.

Despite its complexity, the Convention did however preserve the fundamental freedoms argued for by Grotius, namely the right to fish and navigate freely in the high seas. It also recognised freedoms not contemplated by Grotius in the seventeenth century, such as the freedom to lay submarine cables and pipelines and the freedom to fly over the high seas.

Conclusion

Increased Use of the Seas and Modification of the Principle of the Freedom of the Seas

The use of the seas has increased on a scale not imagined by Grotius and Selden in the seventeenth century. Marine fisheries today yield 80-90 million tonnes of fish and shellfish per year.[138] A staggering 95 percent of this yield is recovered from waters under national jurisdiction.[139] That is, from within declared exclusive

134 (1817) 2 Dodsons Admiralty Reports 210.
135 (1826) 11 Wheat 1.
136 *Ibid* at 42.
137 Butler in Bull (Ed) *supra* n.2 at 217.
138 Agenda 21, Chapter 17 'Protection of Oceans, all kinds of seas including enclosed and semi-enclosed seas and coastal areas and the protection, rational use and development of their living resources.' Paragraph 17.70.
139 *Ibid.*

economic zones (EEZ). The concept of the EEZ emerged in the early 1970's and officially became part of the United Nations Law of the Sea negotiations in 1972. [140] A 200 nautical mile EEZ is recognised in the 1982 LOSC and is reflected in the new definition of 'high seas'. Article 86 of the LOSC defines the 'high seas' as:

> "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state."

The emergence of the EEZ, which encompasses a 12 nautical mile territorial sea, has led to the appropriation of an inordinate amount of the worlds oceans which had been previously classified as 'high seas'. The effect is that Grotius' concept of the freedom of the seas, meaning freedom of fishing and navigation, has been severely curtailed in terms of the area and extent of application, by the economic interests of coastal states.

The Grotian principle has been further eroded by Part XI of the LOSC which places the sea-bed and sub-soil and its resources in the hands of everyone as the ' common heritage of mankind'. [141] The recovery of resources from the sea-bed is managed by the operation of the International Sea-Bed Authority.[142] Whilst no one state owns the resources under this scheme, neither is it an example of the traditional, absolute freedom Grotius advocated. However, an appreciation of the economic and political interests of the Dutch in the seventeenth century clearly shows that anything less than an absolute freedom to travel, trade and exploit both the oceans and colonies, would have been unacceptable to the Dutch. This is made evident by their unwillingness to share the 'inexhaustible' oceans or the colonies with the English.[143] Thus one can draw the conclusion that Grotian principle of absolute freedom of the seas emerged because it suited Dutch interests at the time. The modifications to the principle in the 1982 LOSC can also be seen in this light.

Australia's Position

Australia has a considerable stake in the new law of the sea and the maritime zones created under the convention. The Australian EEZ proclaimed in August 1994 is over 11 million square kilometres, making it one of the largest EEZ's in the world.[144] The EEZ Australia now claims is substantially the same as the Australian Fishing

140 C Joyner 'Exclusive Economic Zones and Antarctica' 21 (4) *Virginia Journal of International Law* (1981) at 696.
141 LOSC 1982 Article 136.
142 *Ibid* Part XI s.4.
143 Refer n.101.
144 L Zann, *Our Sea, Our Future, Major Findings of the State of the Marine Environment Report* (SOMER) Department of Environment, Sport and Territories 1995 at 2.

Zone of 200 nautical miles claimed pre the LOSC.[145] Australia has also declared a 200 nautical mile EEZ offshore the Australian Antarctic Territory.[146] This declaration is arguably inconsistent with provisions of the Antarctic Treaty which effectively freeze sovereignty in Antarctica and adjacent seas up to 60' South.[147]

Australia's actions suggest that the modification of the absolute freedom of the high seas suits her political and economic interests. Certainly as the world's largest island with a coastline of 36 700 kilometres[148] Australia has benefited from the creation of these maritime zones which provide a buffer to the outside world. The detailed negotiations which took place over the Timor Gap with Indonesia, indicates the importance of clearly defined boundaries to Australia. Further, the extension of Australia's EEZ north into the Torres Strait, virtually to the shores of Papua New Guinea, suggests the Australian approach to the law of the sea leans more towards Selden's closed seas doctrine.

Summary

Some authors argue that the Grotian spirit remains in the international law of the sea, despite its substantial modification.[149] Others have stated that the principle of the freedom of the seas allows the rich and powerful states to exploit the oceans resources[150] and support the reservation of areas for 'the common heritage of mankind' to prevent exploitation. Certainly, it could be argued that exploitation was the intention of the Dutch all along after freeing the seas of the Spanish and Portuguese monopolies.

It is clear however, that the doctrine was the product of political and commercial interests of the influential nations firstly in Europe and later the Americas, from the 1600's on. Their actions demonstrate the principle of the freedom of the seas was supported as it came to suit their interests. It must be remembered that when *Mare Liberum* was first published, it was not met with instant approval.[151] The gradual acceptance into international customary law and codification is directly linked to this period in maritime history. With this understanding, the trends in the twentieth century to modify the principle can be regarded in the proper context.

145 Australia declared a 200 nautical mile fishing zone under the Fisheries Amendment Act (Cth) 1978.

146 See section 10 of the *Maritime Legislation Amendment Act* (Cth) 1994 which amends the *Seas and Submerged Lands Act* (Cth) 1974 by inserting the concept of the EEZ and applying it to all Australian territories.

147 Antarctic Treaty 1959 Article IV.

148 R Raymond *Australia - The Greatest Island* Sydney Ure Smith 1979 at 17.

149 Butler in Bull (Ed) *supra* n.2 at 219.

150 BVA Roling 'Are Grotius' Ideas Obsolete in an Expanded World' in Bull (Ed) *supra* n.2 at 282.

151 See Knight, *supra* n.7.