

**Mare Liberum**

Hugo Grotius (Delft, 10 April 1583 – Rostock, 28 August 1645) worked as a jurist in the United Provinces (now the Netherlands) and laid the foundations for international law. His most famous work is the 1625 volume *De jure belli ac pacis libri tres* (*Of laws of war and peace*) where he presented his theory, of just war and argued that all nations are bound by the principles of natural law.

The following article is extracted by another famous work of his, *Mare Liberum* (*Free Seas*) (1633). He formulated the new principle that the sea was to be considered international territory and all nations were free to use it for trade. Grotius, by claiming 'free seas', provided suitable ideological justification for the Dutch breaking up of various trade monopolies through its formidable naval power (and then establishing its own monopoly). It does appear clear that Grotius' argument has to be considered within the broader Historical context of Anglo-Dutch competition and rivalry has been the most important cause for the four Anglo-Dutch wars.

The argument selected here is in line with the classics published in the foregoing issues of *Crossroads: Conflict and Trade* by Solomon Polachek (1980), *Of the Jealousy of Trade* by David Hume (1758), *Customs Duties as a Chief Means of Establishing and Protecting the Internal Manufacturing Power* by Friedrich List (1885), a selection from *An Inquiry into the Nature and Causes of the Wealth of nations* by Adam Smith (1786), and *Observations on the Effects of the Corn Laws, and of a Rise or Fall in the Price of Corn on the Agriculture and General Wealth of the Country* (1814) by Thomas R. Malthus.

Such contributions are intended to shed light also on the modern debate over the role of international trade, international trade policies, and international economic relations within the broader range of international affairs.

*THE FREEDOM OF THE SEAS,  
OR  
THE RIGHT WHICH BELONGS TO THE DUTCH  
TO TAKE PART IN THE EAST INDIAN TRADE*

**CHAPTER V**

NEITHER THE INDIAN OCEAN NOR THE RIGHT OF NAVIGATION  
THEREON BELONGS TO THE PORTUGUESE BY TITLE OF OCCUPATION

[...] Therefore the sea can in no way become the private property of any one, because nature not only allows but enjoins its common use. Neither can the shore become the private property of any one. The following qualification, however, must be made. If any part of these things is by nature susceptible of occupation, it may become the property of the one who occupies it only so far as such occupation does not affect its common use. This qualification is deservedly recognized. For in such a case both conditions vanish through which it might eventuate, as we have said, that all of it would pass into private ownership.

Since therefore, to cite Pomponius, building is one kind of occupation, it is permissible to build upon the shore, if this can be done without inconvenience to other people; that is to say (I here follow Scaevola) if such building can be done without hindrance to public or common use of the shore. And whoever shall have constructed a building under the aforesaid circumstances will become the owner of the ground upon which said building is; because this ground is neither the property of any one else, nor is it

necessary to common use. It becomes therefore the property of the occupier, but his ownership lasts no longer than his occupation lasts, inasmuch as the sea seems by nature to resist ownership. For just as a wild animal, if it shall have escaped and thus recovered its natural liberty, is no longer the property of its captor, so also the sea may recover its possession of the shore.

We have now shown that whatever by occupation can become private property can also become public property, that is, the private property of a whole nation. And so Celsus considered the shore included within the limits of the Roman Empire to be the property of the Roman people. There is not therefore the least reason for surprise that the Roman people through their emperors or praetors was able to grant to its subjects the right of occupying the shore. This public occupation, however, no less than private occupation, was subject to the restriction that it should not infringe on international rights. Therefore the Roman people could not forbid any one from having access to the seashore, and from spreading his fishing nets there to dry, and from doing other things which all men long ago decided were always permissible.

The nature of the sea, however, differs from that of the shore, because the sea, except for a very restricted space, can neither easily be built upon, nor inclosed; if the contrary were true yet this could hardly happen without hindrance to the general use. Nevertheless, if any small portion of the sea can be thus occupied, the occupation is recognized. The famous hyperbole of Horace must be quoted here: "The fishes note the narrowing of the waters by piers of rock laid in their depths."

Now Celsus holds that piles driven into the sea belong to the man who

drove them. But such an act is not permissible if the use of the sea be thereby impaired. And Ulpian says that whoever builds a breakwater must see to it that it is not prejudicial to the interests of any one; for if this construction is likely to work an injury to any one, the injunction 'Nothing may be built on public property' would apply. Labeo, however, holds that in case any such construction should be made in the sea, the following injunction is to be enforced: 'Nothing may be built in the sea whereby the harbor, the roadstead, or the channel be rendered less safe for navigation'.

Now the same principle which applies to navigation applies also to fishing, namely, that it remains free and open to all. Nevertheless there shall be no prejudice if any one shall by fencing off with stakes an inlet of the sea make a fish pond for himself, and so establish a private preserve. Thus Lucullus once brought the water of the sea to his villa by cutting a tunnel through a mountain near Naples. I suspect too that the seawater reservoirs for fish mentioned by Varro and Columella were of this sort. And Martial had the same thing in mind when he says of the Formian villa of Apollinaris: 'Whenever Nereus feels the power of Aeolus, the table safe in its own resources laughs at the gale'. Ambrose also has something to say on the same subject: 'You bring the very sea into your estates that you may not lack for fish'. In the light of all this the meaning of Paulus is clear when he says that if any one has a private right over the sea, the rule *uti possidetis* applies. This rule however is applicable only to private suits, and not to public ones, among which are also to be included those suits which can be brought under the common law of nations. But here the question is one which concerns the right

of use arising in a private suit, but not in a public or common one. For according to the authority of Marcianus whatever has been occupied and can be occupied is no longer subject to the law of nations as the sea is. Let us take an example. If any one had prevented Lucullus or Apollinaris from fishing in the private fish ponds which they had made by inclosing a small portion of the sea, according to the opinion of Paulus they would have the right of bringing an injunction, not merely an action for damages based on private ownership.

Indeed, if I shall have staked off such an inclosure in an inlet of the sea, just as in a branch of a river, and have fished there, especially if by doing so continuously for many years I shall have given proof of my intention to establish private ownership, I shall certainly prevent any one else from enjoying the same rights. I gather from Marcianus that this case is identical with that of the ownership of a lake, and it is true however long occupation lasts, as we have said above about the shore. But outside of an inlet this will not hold, for then the common use of the sea might be hindered.

Therefore if any one is prevented from fishing in front of my town house or country seat, it is a usurpation, but an illegal one, although Ulpian, who rather makes light of this usurpation, does say that if any one is so prevented he can bring an action for damages. The Emperor Leo, whose laws we do not use, contrary to the intent of the law, changed this, and declared that the entrances, or vestibules as it were, to the sea, were the private property of those who inhabited the shore, and that they had the right of fishing there. However he attached this condition, that the place should be occupied by certain jetty or pile constructions, such as the Greeks call *έποχαι*, thinking

doubtless that no one who was himself allowed to fish anywhere in the sea would grudge any one else a small portion of it. To be sure it would be an intolerable outrage for any one to snatch away, even if he could do so, from public use a large area of the sea; an act which is justly reprehended by the Holy Man, who says: 'The lords of the earth claim for themselves a wide expanse of sea by *jus mancipii*, and they regard the right of fishing as a servitude over which their right is the same as that over their slaves. That gulf, says one, belongs to me, and that gulf to some one else. They divide the very elements among themselves, these great men'!

Therefore the sea is one of those things which is not an article of merchandise, and which cannot become private property. Hence it follows, to speak strictly, that no part of the sea can be considered as the territory of any people whatsoever. Placentinus seems to have recognized this when he said: 'The sea is a thing so clearly common to all, that it cannot be the property of any one save God alone'. Johannes Faber also asserts that the sea has been left *sui juris*, and remains in the primitive condition where all things were common. If it were otherwise there would be no difference between the things which are 'common to all', and those which are strictly termed 'public'; no difference, that is, between the sea and a river. A nation can take possession of a river, as it is inclosed within their boundaries, with the sea, they cannot do so.

Now, public territory arises out of the occupation of nations, just as private property arises out of the occupation of individuals. This is recognized by Celsus, who has drawn a sharp distinction between the shores of the sea,

which the Roman people could occupy in such a way that its common use was not harmed, and the sea itself, which retained its primitive nature. In fact no law intimates a contrary view. Such laws as are cited by writers who are of the contrary opinion apply either to islands, which evidently could be occupied, or to harbors, which are not 'common', but 'public', that is, 'national'.

Now those who say that a certain sea belonged to the Roman people explain their statement to mean that the right of the Romans did not extend beyond protection and jurisdiction; this right they distinguish from ownership. Perchance they do not pay sufficient attention to the fact that although the Roman People were able to maintain fleets for the protection of navigation and to punish pirates captured on the sea, it was not done by private right, but by the common right which other free peoples also enjoy on the sea. We recognize, however, that certain peoples have agreed that pirates captured in this or in that part of the sea should come under the jurisdiction of this state or of that, and further that certain convenient limits of distinct jurisdiction have been apportioned on the sea. Now, this agreement does bind those who are parties to it, but it has no binding force on other nations, nor does it make the delimited area of the sea the private property of any one. It merely constitutes a personal right between contracting parties.

This distinction so conformable to natural reason is also confirmed by a reply once made by Ulpian. Upon being asked whether the owner of two maritime estates could on selling either of them impose on it such a servitude as the prohibition of fishing in a particular part of the sea, he replied that the thing in question, evidently the sea, could not be subjected to a servitude,

because it was by nature open to all persons; but that since a contract made in good faith demands that the condition of a sale be respected, the present possessors and those who succeed to their rights were bound to observe that condition. It is true that the jurist is speaking of private estates and of private law, but in speaking here of the territory of peoples and of public law the same reasoning applies, because from the point of view of the whole human race peoples are treated as individuals.

Similarly, revenues levied on maritime fisheries are held to belong to the Crown, but they do not bind the sea itself or the fisheries, but only the persons engaged in fishing. Wherefore subjects, for whom a state or a ruler is by common consent competent to make laws, will perhaps be compelled to bear such charges, but so far as other persons are concerned the right of fishing ought everywhere to be exempt from tolls, lest a servitude be imposed upon the sea, which is not susceptible to a servitude.

The case of the sea is not the same as that of a river, for as a river is the property of a nation, the right to fish in it can be passed or leased by the nation or by the ruler, in such a way (and the like is true with the ancients) that the lessee enjoys the operation of the injunction *de loco publico fruendo* by virtue of the clause 'He who has the right to lease has leased the exclusive right of enjoyment'. Such a condition cannot arise in respect to the sea. Finally those who count fishing among the properties of the Crown have not examined carefully enough the very passage which they cite to prove their contention, as Isernia and Alvotus have noticed.

It has therefore been demonstrated that neither a nation nor an

individual can establish any right of private ownership over the sea itself (I except inlets of the sea), inasmuch as its occupation is not permissible either by nature or on grounds of public utility. The discussion of this matter has been taken up for this reason, namely, that it may be seen that the Portuguese have not established private ownership over the sea by which people go to the East Indies. For the two reasons that stand in the way of ownership are in this case infinitely more powerful than in all others. That which in other cases seems difficult, is here absolutely impossible; and what in other cases we recognize as unjust is here most barbarous and inhuman. [...]