

**CORNELIUS VAN BYNKERSHOEK:
HIS ROLE IN THE HISTORY
OF INTERNATIONAL LAW**

International Law in Japanese Perspective

VOLUME 4

Series Editor

Shigeru Oda

CORNELIUS VAN BYNKERSHOEK:
HIS ROLE IN THE HISTORY
OF INTERNATIONAL LAW

by

Kinji Akashi



KLUWER LAW INTERNATIONAL
THE HAGUE / LONDON / BOSTON

A C.I.P. Catalogue record for this book is available from the Library of Congress.

ISBN 90-411-0599-9

Published by Kluwer Law International
P.O. Box 85889, 2508 CN The Hague, The Netherlands.

Sold and distributed in North, Central and South America
by Kluwer Law International,
675 Massachusetts Avenue, Cambridge, MA 02139, U.S.A.

In all other countries, sold and distributed
by Kluwer Law International,
P.O. Box 85889, 2508 CN The Hague, The Netherlands.

This publication is partly accommodated by the
grant of Niigata University of International and
Information Studies, Japan.

Printed on acid-free paper

All Rights Reserved

© 1998 Kluwer Law International
Kluwer Law International incorporates the publishing programmes of
Graham & Trotman Ltd, Kluwer Law and Taxation Publishers,
and Martinus Nijhoff Publishers.

No part of the material protected by this copyright notice may be reproduced or
utilized in any form or by any means, electronic or mechanical,
including photocopying, recording, or by any information storage and
retrieval system, without written permission from the copyright owner.

Printed and bound in Great Britain by Arrowhead Books, Reading

To Kees and Carla Roelofsen

Contents

ACKNOWLEDGEMENTS	xi
INTRODUCTION: THE PURPOSE OF THIS STUDY AND SOME REMARKS ON METHOD AND TERMS	1
PRELIMINARY CONSIDERATION: BYNERSHOEK'S GENERALLY ACCEPTED POSITION IN THE HISTORY OF INTERNATIONAL LAW	10
PART ONE: THEORY <i>PER SE</i> BYNKERSHOEK'S THEORY OF <i>JUS GENTIUM</i>	
1. The Definition of <i>Jus Gentium</i>	19
Introduction to the Chapter	19
1.1. <i>De Dominio Maris Dissertatio</i>	19
1.2. <i>De Foro Legatorum</i>	21
1.2.A The Definition of <i>Jus Gentium</i> in <i>DFL</i>	21
1.2.B The Relationships Among <i>Jura</i> in <i>DFL</i>	24
1.3. <i>Quaestionum Juris Publici</i>	27
1.3.A The Definition of <i>Jus Gentium</i> in <i>QJP</i>	27
1.3.B The Relationships Among <i>Jura</i> in <i>QJP</i>	28
Concluding Remarks on the Chapter	31
2. The Source of <i>Jus Gentium</i> : Bynkershoek's Concept of <i>Usus</i> , <i>Consuetudo</i> and <i>Mores</i>	34
Introduction to the Chapter	34
2.1. The Concept of <i>Usus</i> , <i>Consuetudo</i> and <i>Mores</i> in <i>DMD</i>	35
2.2. The Concept of <i>Usus</i> , <i>Consuetudo</i> and <i>Mores</i> in <i>DFL</i>	36
2.3. The Concept of <i>Usus</i> , <i>Consuetudo</i> and <i>Mores</i> in <i>QJP</i>	39
Concluding Remarks on the Chapter	41
3. The Source of <i>Jus Gentium</i> : Bynkershoek's Concept of "Agreement"	43
Introduction to the Chapter	43
3.1. The Concept of "Agreement"	43
3.1.A The Concept of "Agreement" in <i>DMD</i>	43
3.1.B The Concept of "Agreement" in <i>DFL</i>	45
3.1.C The Concept of "Agreement" in <i>QJP</i>	47

3.2. The Source of Binding Force	49
3.2.A The Source of Binding Force in <i>DMD</i>	49
3.2.B The Source of Binding Force in <i>DFL</i>	50
3.2.C The Source of Binding Force in <i>QJP</i>	51
Concluding Remarks on the Chapter	52
4 The Subject of <i>Jus Gentium</i>	54
Introduction to the Chapter	54
4.1. The Concept of the Subject of <i>Jus Gentium</i>	55
4.1.A The Concept of the Subject of <i>Jus Gentium</i> in <i>DMD</i>	55
4.1.B The Concept of the Subject of <i>Jus Gentium</i> in <i>DFL</i>	56
4.1.C The Concept of the Subject of <i>Jus Gentium</i> in <i>QJP</i>	57
4.2. The Concept of “Sovereignty”	59
4.2.A The Concept of “Sovereignty” in <i>DMD</i>	60
4.2.B The Concept of “Sovereignty” in <i>DFL</i>	60
4.2.C The Concept of “Sovereignty” in <i>QJP</i>	61
4.3. Miscellaneous Issues Relevant to the Subject of <i>Jus Gentium</i> in <i>QJP</i>	65
Concluding Remarks on the Chapter	68
5. Bynkershoek’s Concept of <i>Ratio</i>	71
Introduction to the Chapter	71
5.1. The Concept of <i>Ratio</i> in <i>DMD</i>	72
5.2. The Concept of <i>Ratio</i> in <i>DFL</i>	72
5.3. The Concept of <i>Ratio</i> in <i>QJP</i>	74
Concluding Remarks on the Chapter	78
Concluding Remarks on Part 1	81

PART TWO: METHOD

BYNERSHOEK’S OPINION AND THE DUTCH PRACTICE

Introduction to Part 2	89
Preliminary Consideration	90
A. Bynkershoek’s Methodology	90
B. Bynkershoek’s Attitude towards Law and Politics	92
C. Bynkershoek’s Attitude towards the <i>Bellum Justum</i> Doctrine	94
1 Dutch Policy on Neutral Commerce in the 17th Century: A Review of Bynkershoek’s Theory	96
Introduction and Preliminary Considerations	96
A. Introduction to the Chapter	96
B. Preliminary Consideration: Bynkershoek’s Argumentation	97
1.1. The Situation up to the Middle of the 17th Century	98
1.1.A The Rules Applied to Prize Cases	98
1.1.B Dutch Attitude Towards Neutral Commerce	101
1.2 Acceptance of the “Free Ships, Free Goods” Doctrine	102
1.2.A Acceptance Through Treaties	102

1.2.B. English Adoption of the “Free Ships, Free Goods” Doctrine	104
1.2.C. Dutch Policy Appearing in the <i>Placaten</i>	106
1.3. The Development of the Doctrine: The Situation up to the Early 18th Century	107
1.3.A The Development of the “Free Ships, Free Goods” Doctrine	107
1.3.B Deviation: Dutch Practice Following Other Doctrines	108
1.4. Dutch Policy on Neutral Commerce in the Light of its Strength of Economy and Naval Force	109
Concluding Remarks on the Chapter	114
2. Dutch Policy on Contraband in the 17th Century: The Treatment of Naval Stores and Bynkershoek’s Theory	115
Introduction to the Chapter	115
2.1. Preliminary Consideration	115
2.2. Rudimentary Evolution of the Rules on Contraband	117
2.3. Treaty Provisions Regarding Naval Stores	119
2.4. The <i>Placaten</i> of the States-General Regarding Naval Stores	121
Concluding Remarks on the Chapter	123
Concluding Remarks on Part 2	125

PART THREE: GENEALOGY BYNKERSHOEK’S WORKS IN THE STREAM OF LEGAL THOUGHTS OF THE LAW OF NATIONS

Introduction to Part 3	133
1 Bynkershoek and Grotius	134
Introduction to the Chapter	134
1.1. Bynkershoek’s Reference to Grotius	135
1.1.A <i>DMD</i>	135
1.1.B <i>DFL</i>	136
1.1.C <i>QJP</i>	137
1.2. Grotius’ Concept of <i>Jus Gentium</i> and Bynkershoek	139
1.2.A Grotius’ Concept of <i>Jus Gentium</i>	139
1.2.B. Bynkershoek’s Concept of <i>Jus Gentium</i> in the Light of Grotius’	143
Concluding Remarks on the Chapter	145
2 Bynkershoek and Vattel	148
Introduction to the Chapter	148
2.1. Vattel’s Reference to Bynkershoek	149
2.2. The Definition and Sources of the Law of Nations	150
Concluding Remarks on the Chapter	154

3. Bynkershoek and Anglo-American Jurisprudence	155
Introduction to the Chapter	155
3.1. Anglo-American Text Writers and Bynkershoek	155
3.1.A Richard Wildman	156
3.1.B William O. Manning	156
3.1.C James Lorimer	157
3.1.D Henry Wheaton	161
3.1.E Theodore D. Woolsey	162
3.1.F James Kent	165
3.2. Anglo-American Courts and Bynkershoek	165
3.2.A The British High Court of Admiralty	166
3.2.B The United States Supreme Court	167
Concluding Remarks on the Chapter	170
Concluding Remarks on Part 3	172
Conclusion	174
1. Re-assessment: Bynkershoek as a Positivist	174
2. Re-thinking 'Positivism' in the History of International Law	176
3. Bynkershoek's Role in the History of International Law	178
Bibliography	180
Index	193