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Portugal and the Development of the Law of the Sea in Western Europe

Robin Churchill
Emeritus Professor of International Law, University of Dundee, Dundee, UK
R.R.Churchill@dundee.ac.uk

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Abstract

This article examines Portugal's role in the development of the law of the sea in Western Europe between the fifteenth and seventeenth centuries. It argues that the Portuguese voyages of discovery in the fifteenth century, which led to a near century-long Portuguese monopoly of the lucrative spice trade between the East Indies and Europe, were the catalyst for that development. When the Dutch East India Company challenged Portugal's monopoly at the beginning of the seventeenth century, it commissioned Grotius to justify its position, which he did in his most famous work, *Mare Liberum*. From the ensuing 'battle of the books' between Grotius and his critics, including the Portuguese scholar, Seraphim de Freitas, the regimes of the territorial sea and high seas were eventually forged and later codified in the 1958 Geneva Conventions on the law of the sea.

Keywords

'Battle of the books' – colonialism – Freitas – Grotius – history of the law of the sea – Portuguese voyages of discovery – Selden

Introduction

As someone who has been engaged with the international law of the sea for more than 50 years, I very much welcome the appearance of the *Portuguese*

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Yearbook on the Law of the Sea. While it is not the first yearbook on the law of the sea – the Netherlands Institute for the Law of the Sea produced a *Documentary Yearbook: International Organisations and the Law of the Sea* between 1985 and 2002 and the Italian Associazione di Consulenza in Diritto Internazionale del Mare launched the *Yearbook on the Law of the Sea* in 2021[1] – this new journal is, to the best of my knowledge, the first national yearbook on the law of the sea (at least in English). That Portugal is the nation concerned seems particularly appropriate, given what I consider to be its catalytic role in the development of the law of the sea in Western Europe (as I argue below) and its long tradition in seafaring and fishing and, more recently, its involvement in marine scientific research, renewable energy from the sea and coastal tourism.

I am greatly honoured to have been invited to contribute to this inaugural issue of the *Yearbook*. The subject of my contribution is Portugal's role in the development of the law of the sea in Western Europe, particularly between the fifteenth and seventeenth centuries. I begin with the thesis, which I admit is not particularly original, that before the making of the law of the sea on a global basis during the twentieth century, regional law of the seas arose in any area of the world where a number of independent polities existed whose citizens were engaged in maritime activities other than immediately off their own coasts and between which polities some kind of understanding or agreement existed as to how those activities should be conducted. Examples of such early, embryonic law of the seas at the regional level include those that applied between the city States of the Levant, Mesopotamia and Anatolia around the middle of the second millennium BCE[2] and that which had flourished between the polities bordering and using the Indian Ocean for several centuries before the arrival of the Portuguese there in 1498 CE.[3]

My concern in this paper is with the law of the sea that began to develop in Western Europe from the early sixteenth century CE. By that time, there were a number of countries in Western Europe whose borders were very largely settled and drawn much as they are today and that were subject to rule by a national government free from foreign domination: in the language of

1 For details, see <https://ascomare.com/ylos/>.

2 On which, see E. Denk, 'An Amodernist Approach to International Law: The Law of the Sea in the Armana Letters' in J. Hartmann and U. Khaliq (eds), *The Achievements of International Law* (Oxford: Hart, 2021) 21–47.

3 See further C. H. Alexandrowicz, *The Law of Nations in Global History* (Oxford: Oxford University Press, 2017) chaps 6–8; R. P. Anand, *Origin and Development of the Law of the Sea* (The Hague: Martinus Nijhoff, 1983) 5–6, 12–34 passim; R. P. Anand, *Law of the Sea in Historical Perspective* (2006) available at <https://www.publicinternationallaw.in/sites/default/files/articles/LectureIV-article.pdf>

present-day international law, we would say that they fulfilled the Montevideo criteria for Statehood. Such countries with coastlines included Denmark-Norway,[4] England,[5] France, Portugal, Scotland, Spain and Sweden. By the end of the sixteenth century they were joined by the Netherlands, which by then had liberated itself from Spanish rule. The citizens of all these countries were becoming increasingly involved in seaborne trade and fishing.

The catalyst for the gradual development of the law of the sea in Western Europe from the sixteenth century onwards was, I will argue, the Portuguese voyages of discovery of the fifteenth and early sixteenth centuries, now commemorated in the *Padrão dos Descobrimentos* (Monument of the Discoveries), which stands on the north bank of the River Tagus, a few kilometres downstream from the centre of Lisbon. I briefly chronicle those voyages in the next section of this paper, before going on in the following two sections to show how they led indirectly to the 'battle of the books' of the early seventeenth century, from which the modern law of the sea gradually emerged.

The Portuguese Voyages of Discovery

The Portuguese voyages of discovery – along the African coast and into the Indian Ocean and, originally accidentally, westwards to what is now Brazil – were not the first voyages by Europeans to search for lands beyond their continent. The most extensive of the pre-Portuguese voyages were those of the Vikings. They established a short-lived settlement on what is now Newfoundland around 1000 CE and a settlement on Greenland that lasted from the early eleventh to the mid-fifteenth century. However, the Portuguese were the first Europeans to travel beyond the North Atlantic and to do so in a sustained and long-lasting way by establishing colonies in Brazil and in parts of Africa and Asia (the latter surviving until the second half of the twentieth century). That led to other West European countries following in their wake, resulting in the European colonisation of large parts of the non-European world.

In many ways it is surprising that it was the Portuguese that began this development. Portugal has few natural harbours, and in the early fifteenth century, when the its voyages of discovery were beginning, it was poor, relative to many other West European nations, and without an extensive maritime tradition – it had comparatively few seafarers (fewer than in some

4 Norway was ruled by Denmark until 1814, and then entered a union with Sweden until 1905.
5 England annexed Wales in 1535. England and Scotland entered a union as Great Britain in 1707.

parts of northern Europe) and a limited fishing industry.[6] What prompted the Portuguese to voyage far beyond their shores – 'to track the oceans none had sailed before', to quote from Luis de Camões' great epic poem, *The Lusiads*, in the translation by Bacon[7] – appears to have been a mixture of motives: religious (to convert the heathen to Christianity), economic (the rumours of the availability of gold on the coast of Guinea), strategic and political.[8] Also important were royal encouragement and patronage, especially from Dom João I (king from 1385–1433) and one his younger sons, Infante Dom Henrique, better known, at least in English, as Prince Henry the Navigator (1394–1460) and later from Dom João II (who reigned from 1481–1495). A further significant factor was the Portuguese development of the caravel during the fifteenth century for the purpose of exploration in distant waters. The caravel was a highly manoeuvrable and fast ship, being able to sail closer to the wind than any existing vessel.

Beginning with the capture from the Muslims of the town of Ceuta, situated at the northern tip of Morocco, in 1415, the Portuguese gradually worked their way southwards along the Atlantic seaboard of Africa. By 1460 they had reached what is now Sierra Leone and had begun colonising the Cape Verde archipelago. They reached the mouth of the Congo River in 1484. Four years later, an expedition led by Bartolomeu Dias became the first Europeans to round the Cape of Good Hope and sail into the Indian Ocean. A decade later, Vasco da Gama completed the discovery of the sea route from Europe to India, landing in what is now the Indian state of Kerala in 1498. In doing so, he and his crew became the first Europeans to travel to India directly by sea and thereby opened a direct sea route from Europe to Asia. He had been specifically tasked to do this by Dom João II with the aim of breaking Venice's then monopoly in the supply of spices from the East Indies to the rest of Europe: spices were at that time, along with silver and gold, the most valuable commodities being traded. The Venetians obtained their spices from merchants in Egypt and Syria, to where Muslim traders had brought them by sea from the Indian Ocean.[9] By using 'brute force', the Portuguese successfully broke the Venetian monopoly with 'complete ruthlessness and astonishing speed'.[10] By 1515, less than 20 years after Vasco da Gama had first reached India, the Portuguese had established a monopoly of their own over the spice trade between the East Indies and

6 See C. R. Boxer, *The Portuguese Seaborne Empire 1415–1825* (London: Hutchinson, 1969) 13–14.

7 As quoted in L. White, *Translating Camões: A Personal Record* (Lisbon: Universidade Católica Editore, 2012) 32.

8 Boxer, note 6, 17–18.

9 Boxer, note 6, 46.

10 *Ibid.*

Europe. Although never completely effective, that monopoly was to last for almost a century, during which time the demand for spices in Europe roughly doubled, with prices increasing two- or threefold.[11]

The Portuguese voyages of discovery, and the exploitation and colonisation of the discovered lands that followed, received Papal blessing. In three Papal Bulls, *Dum Diversas* (1452), *Romanus Pontifex* (1455) and *Inter Cetera* (1456), Popes Nicholas V and Callixtus III, respectively, authorised Portugal to conquer non-Christians and to capture their goods and territories, and declared that Portugal had a monopoly of navigation, trade and fishing along the coast of West Africa and any lands to be discovered to the south and as far east as the Indies: all other nations were prohibited from infringing that monopoly.[12]

As well as voyaging and making discoveries eastwards, the Portuguese also travelled westwards. In 1500, an expedition led by Pedro Alvares Cabral had set out for the Indian Ocean. He accidentally sailed too far south-west into the South Atlantic and eventually encountered land, which he claimed for Portugal. This turned out to be in what is now the Brazilian state of Bahia. Cabral and his crew thus became the first Europeans to discover Brazil, which eventually became a Portuguese colony.

Dividing the Spoils: Papal Bulls and Iberian Treaties[13]

In April 1492, King Ferdinand of Aragon and Queen Isabella of Castile, whose marriage in 1469 had led to the de facto unification of Spain, commissioned Christopher Columbus to discover a sea passage to the Indies by sailing westwards, thus avoiding the route controlled by the Portuguese around the Cape of Good Hope. Columbus reached what is now the Bahamas in October 1492, becoming the first European to land in the American hemisphere since the Vikings some 500 years earlier. Within a few years, Spaniards had reached the mainland, and by the early sixteenth century, Spanish colonisation of the Americas had begun in earnest.

Well before that, however, in May 1493, only six months after Columbus had made landfall in the Caribbean, Pope Alexander VI issued the Bull, *Inter Caetera*.[14] This Bull assigned to Spain all lands discovered or to be discovered to the west of a line drawn 100 leagues west and south from the Azores and

11 *Ibid.*, 59.

12 *Ibid.*, 20–23.

13 Much of the information in this section is based on the Wikipedia entries for the Bulls and Treaties mentioned below.

14 The Bull is reproduced in (1973) 4–5 *Annales d'études internationales* 309.

the Cape Verde archipelago, which the Portuguese had begun to colonise from around 1440 and 1456, respectively. A second Bull of the same date, *Eximiae Devotionis*, granted to Spain the same privileges as those granted by earlier Bulls to Portugal (as detailed above). The Bulls applied only to the Atlantic Ocean and did not specify whether lands to the east of the Papal line belonged to Portugal. In fact, that issue had already been settled by the Treaty of Alcáçovas of 1479. The Treaty recognised Spain's claim to the Canary Islands (which Castile had gradually begun to colonise from the early fifteenth century) and Portugal's claims to the coast of West Africa, Madeira (discovered by Portuguese mariners in 1419), the Azores and Cape Verde.

In practice, Portugal and Spain ignored the Papal Bulls of 1493 and instead concluded the Treaty of Tordesillas the following year.[15] The Treaty moved the Pope's dividing line westwards to the meridian 370 leagues west of the Cape Verde islands, corresponding roughly to 42º West, and explicitly allocated all lands east of that line (other than the Canary Islands) to Portugal. One consequence was that the eastern half of Brazil, which at that time had not yet been discovered, fell on Portugal's side of the line. In 1529, Portugal and Spain concluded a further treaty, the Treaty of Zaragoza, which decreed the anti-meridian of the Tordesillas Treaty line as the dividing line between the two countries' spheres of influence in the Asia/Pacific region.

The Treaties of Alcáçovas, Tordesillas and Zaragoza, encapsulating the ideology that European countries could claim lands outside Europe without regard to the consent or wishes of the indigenous inhabitants, are an important landmark in the history of colonialism.

Challenges from Northern Europe and the Battle of the Books

By the end of the sixteenth century, some Northern European powers, England and the Netherlands especially, were becoming increasingly hostile to the claims of Portugal and Spain to much, if not most, of the non-European world. They saw no reason why they, too, should not have a share of the riches of lands beyond Europe, especially the spices of the East Indies. The Dutch were the first and more aggressive in pursuing that aim.[16] Their primary vehicle for doing so was the Dutch East India Company (Vereenighde Oost-Indische Compagnie (VOC)), founded in 1602 for the specific purpose of developing Dutch trade with the East Indies. The Company was endowed with quasi-governmental

15 The Treaty is reproduced in (1973) 4–5 *Annales d'études internationales* 317.
16 Boxer, note 6, 109–111.

powers for this purpose, including the powers to use force and found colonies.[17] From the moment of its inception, the VOC robustly set about challenging the monopoly over East Indies spices that Portugal had enjoyed for almost a century and was not afraid of using force to do so. In 1603, Dutch seamen in the employ of the VOC captured a Portuguese merchant ship, the *Santa Catharina*, which was laden with spices and other treasures, in the Straits of Singapore. They sailed it to the Netherlands, where it was taken before a Dutch court, condemned as prize and sold, the proceeds going to the VOC.[18] However, a number of shareholders in the VOC had doubts about the legality of this action. To resolve the matter, the VOC commissioned a rising star of the Dutch legal profession, Huigh de Groot (1583–1645), better known by the Latinised version of his name, Hugo Grotius, to write what we would today call a legal opinion on the matter.[19] Grotius's opinion, *De jure praedae* (*On the Law of Prize*), was written in 1604–5 but was never published in his lifetime. Only when it was found by chance with a collection of Grotius's papers in 1864 was it eventually published.[20] However, a section of *De jure praedae* was published separately, as *Mare Liberum*, in 1609,[21] its publication having being delayed in order not to jeopardize ongoing negotiations over an armistice in the hostilities between the Netherlands and Spain.[22] Its publication was also anonymised in order to protect Grotius's position as public prosecutor at the Court of Appeal in The Hague.[23]

In *Mare Liberum* Grotius argued that the sea, being so vast, was incapable of being reduced into possession and therefore was common to all and fitted for use by all.[24] It thus followed that everyone had the right to navigate and fish on the sea,[25] although Grotius did accept that very small areas next to the shore could be enclosed and used, for example, to create a fish pond.[26] The

17 Anand (1983), note 3, 77.

18 J. Vervliet, 'Introduction' in R. Feenstra (ed.), *Hugo Grotius Mare Liberum 1609–2009* (Leiden: Brill, 2009) XI.

19 *Ibid.*, XIII. See also Anand (1983), note 3, 77–78.

20 T. Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges' (2000) 286 *Recueil des Cours* 39–243, at 63.

21 *Mare Liberum sive de Iure quod Batavis competit ad Indicana Commercia Dissertatio* (*The Free Sea or a Dissertation on the Right which the Dutch have to carry on Indian Trade*). For a modern edition of *Mare Liberum*, with an English translation, see Feenstra, note 18.

22 Vervliet, note 18, IX. The Netherlands came under Spanish rule in the early sixteenth century, but declared itself independent in 1581, leading to protracted hostilities with Spain.

23 Ibid., X.

24 *Mare Liberum*, 20. Page numbers refer to Feenstra's edition, note 18.

25 *Ibid.*, 35–36.

26 *Ibid.*, 23.

bulk of *Mare Liberum*, amounting to ten of its thirteen chapters, is concerned with disproving Portugal's claims, or what Grotius took to be Portugal's claims, to (1) dominion over the East Indies (chapters II-IV); (2) ownership of the sea routes to the East Indies or the exclusive right of navigation along such routes (chapters V-VII); and (3) the exclusive right to trade with the East Indies (chapters IX-XII). As to the first of those claims, Grotius argued that Portugal could not acquire dominion through discovery: possession was also necessary. However, the East Indies were still in the possession of local rulers. Nor could Portugal have acquired dominion through Papal donation – Grotius here is referring to Pope Alexander VI's Bull, *Inter Caetera* (see above) – because the Pope could not give what he did not possess; or through war, because Portugal had not been engaged in war nor would it have had any just cause to do so. Turning to Portugal's second possible claim, ownership of the sea routes to the East Indies or the exclusive right of navigation along those routes, it followed from Grotius's view of the legal nature of the sea referred to above that Portugal could not claim such ownership or right through possession, by Papal donation or by prescription, which had no application to things incapable of possession, such as the sea. Grotius then broke off his discussion of Portugal's claims with a chapter (Chapter VIII) in which he asserted that under 'the law of nations' all people had the right to trade freely, especially because there was a mutual interest in those who had a shortage of resources being able to obtain their needs from those who had a surplus.[27] The right to trade freely was 'not a corporeal object, susceptible of seizure',[28] and therefore Portugal could not acquire such a right in respect of trade with the East Indies through occupation, Papal donation or prescription, nor could Portugal appeal to any equity to prohibit such trade by others. That led Grotius to his conclusion that '[b]oth law and equity require that (East) Indian trade be as free to us [i.e. the Dutch] as to anyone else'.[29]

Although *Mare Liberum* is often portrayed as a seminal work, and by some as *the* seminal work, in the development of the law of the sea, it should be seen for what it was – primarily a piece of advocacy, albeit a skilled and learned one, to serve the interests of Grotius's client, the VOC. In the words of Knight, *Mare Liberum* 'is the plea of an advocate from first to last … Its conclusions are based on facts and arguments generally most partially selected and marshalled, and these are frequently presented with a much too unrestrained rhetoric. It is, moreover, often so abstract and academic as to have but little relation to

27 *Ibid.*, 52–54. See also 1–2.
28 *Ibid.*, 55.
29 *Ibid.*, 62.

the actual facts and conditions of real life.'[30] That Grotius was primarily an advocate of Dutch interests is also shown by his role as a prominent member of a Dutch delegation sent to negotiate with the English in 1613–15 over the access of the English East India Company to the spice trade in the East Indies. Grotius denied that that Company could have the same freedom of navigation and commerce that he had argued in *Mare Liberum* the VOC had, and was disconcerted to have his own work quoted back at him by the English to support their position.[31]

Furthermore, contrary to the impression sometimes given, Grotius was not the first Western European to write on the law of the sea. Earlier writers on the subject included the Italians, Bartolus of Sassofrato (1314–57)[32] and his pupil Baldus of Ubaldis (1327–1400);[33] the Spaniards, Alfonso de Castro (1495–1558),[34] Fernando Vazquez de Menchaca (1512–69)[35] and Rodericus Zuarius (Rodrigo Suárez);[36]and the Anglo-Italian, Alberico Gentilis (1552–1608).[37] The three Spanish writers argued that the sea was incapable of occupation and therefore was free for use by all. Bartolus, Baldus and Gentilis, however, took the opposite position and argued that the sea adjacent to the coast of a State was capable of occupation by that State, although the views of those writers differed as to the nature of States' rights in such a zone and how far it extended from land.[38] Grotius was not only aware of these writers but refers to all of them in *Mare Liberum*,[39] especially Vazquez, whom Grotius describes as 'the pride of Spain'[40] and from whom he quotes extensively on the question of prescription.

30 W. S. M. Knight, 'Seraphin (sic) de Freitas: Critic of *Mare Liberum*' (1925) 11 *Transactions of the Grotius Society* 1–9, at 4.

31 D. J. Bederman, 'The Sea' in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2013) 359–379, at 367; Vervliet, note 18, XX.

32 Bartolus of Sassofrato, *Commentaria* (1596).

33 Baldus, *Digestum novum commentaria* (1568) and *Consiliorum sive responsorum volumen* (1575).

34 A de Castro, *De potestate legis poenalis libri duo* (1550).

35 F. Vazquez de Manchaca, *Controversiarum illustrium aliarumque usi frequentium libri tres* (1563).

36 R. Zuarius, *Consilia duo de usu maris et navibus transvehendis* (1595). I have not been able to discover the dates of birth and death of Zuarius, but he appears to have lived during the second half of the sixteenth century and possibly the early part of the seventeenth century.

37 A. Gentilis, *De iure belli* (1598).

38 Further on these writers, see Bederman note 31, 364–365; and D. M. Johnston, *The International Law of Fisheries* (New Haven, CT: Yale University Press, 1965) 161–4.

39 For further details, see Feenstra, note 18, LIX–LXIV and 165–169.

40 *Mare Liberum*, 43.

Grotius's arguments in *Mare Liberum* did not go unchallenged by some of his peers. The best-known critic of Grotius's views is perhaps the Englishman, John Selden (1584–1654). His scholarly and lengthy reply to Grotius, *Mare Clausum seu de dominio maris libri duo* (*The Closed Sea or Two Books about the Dominion of the Sea*), was published in 1635.[41] In that work, Selden began by agreeing with Grotius that the sea had originally belonged to all. But he went on to argue, on the basis of British history, maritime law and English common law, that it was possible for a State, as England and Scotland had done, to claim dominion over an area of the sea adjacent to its coast, the extent of which was left vague, where it could regulate both navigation and fishing. *Mare Clausum* had been commissioned by King James I of England (and VI of Scotland) in 1619 to provide him with legal support for his proclamation requiring any foreign vessels fishing in the waters off the coasts of England and Scotland to obtain a licence. However, publication of *Mare Clausum* was delayed because James did not want to offend his brother-in-law, King Christian IV of Denmark-Norway. The book was eventually published after James's death at the request of his son and successor, Charles I.[42] Like *Mare Liberum*, *Mare Clausum* was a piece of advocacy and has been criticised for the selectivity of its sources, the strained interpretation of much of its evidence and its misquotations.[43]

Another British critic of Grotius was the Scot, William Welwood (1578–1622). In *An Abridgement of All Sea-Lawes*,[44] published in 1613 as a response to *Mare Liberum* (particularly the latter's fifth chapter), Welwood claimed that the fluidity of the oceans was no bar to its occupation, and that it could be, and in some cases had been, occupied, although he did not say how far from land such occupation might extend. He argued that freedom of navigation in the 'main sea or great ocean' was beyond controversy, but that fishing could be regulated by the adjacent coastal State if fish stocks became exhausted.[45] Unlike *Mare Clausum* (and *Mare Liberum*), Welwood's work does not appear to have been a piece of commissioned advocacy, although it certainly reflected

41 An English translation of *Mare Clausum* is available online at <https://quod.lib.umich.edu/e/eebo/A59088.0001.001?rgn=main;view=fulltext>. For a recent study of *Mare Clausum* and its reception in the Europe of its day, see M. J. van Ittersum, 'Debating the Free Sea in London, Paris, The Hague and Venice: The Publication of John Selden's *Mare Clausum* (1635) and its Diplomatic Reception in Western Europe' (2021) 47(8) *History of European Ideas* 1193–1210.

42 Vervliet, note 18, XXVI–XXVIII. Further on the background to the publication of *Mare Clausum*, see van Ittersum, note 41, 1196–1197.

43 Anand (1983), note 3, 106–107.

44 For an online text, see <https://quod.lib.umich.edu/e/eebo/A14929.0001.001/1:5?rgn=div1;view=fulltext>.

45 See further Anand (1983), note 3, 100–101. See also Vervliet, note 18, XXI–XXII.

the views of the then king of Scotland, James VI (James I of England). Grotius responded to Welwood in *Defensio capitis quinti maris liberi* (*Defence of the Free Sea in Five Chapters*). Written in 1615, it was not published in Grotius's lifetime and only saw the light of day when the text was discovered by chance in some papers of Grotius in 1872.[46] The *Defensio* is essentially a recapitulation of *Mare Liberum*, but adds more discussion on the freedom of fishing.[47]

A further, and perhaps less well-known, critic of Grotius was the Portuguese friar and lawyer, Franciscus Serafim de Freitas (1570–1633). Employed at the University of Valladolid as professor of canon law, Freitas was commissioned by King Felipe III of Spain to write a rebuttal of Grotius's arguments in *Mare Liberum*.[48] Felipe was also king of Portugal, as Felipe II (Portugal and Spain were in a union of crowns between 1580 and 1640), and it may well have been in that capacity that Felipe commissioned Freitas, as the latter's resulting work, published in 1625, was entitled *De Justo Imperio Lusitanorum Asiatico* (*On the Just Asian Empire of the Portuguese*).[49] In it, Freitas engaged in a point by point refutation of *Mare Liberum*, pointing out its numerous mistakes, in a far more systematic way than Selden.[50] While agreeing with Grotius that the sea was *res communis*, Freitas argued that the bed of the sea was susceptible of occupation and that in the water column a State could exercise rights of jurisdiction in respect of fisheries and navigation in a zone adjacent to its coast in order to avoid anarchy and the commission of crimes. The extent of such a zone depended on how far a coastal State could exercise effective control. Freitas also dealt with Portugal's claims in the East Indies. In summary, he justified them on the basis of the customary law of the Indian Ocean and the just war that Portugal was waging against Islam, and rejected Grotius's ideas of free trade.[51] In some respects, Freitas's views about the legal nature of the sea have

46 Vervliet, note 18, XXII. By contrast, Grotius did not respond to Selden. By the time *Mare Clausum* was published in 1635, Grotius was estranged from the Dutch authorities and was in the employ of the Swedish Crown, which considered the Baltic to be a Swedish sea: see Vervliet, note 18, XXVII–XXVIII.

47 Vervliet, note 18, XXIV; Anand (1983), note 3, 101–102.

48 *Ibid*., XXIV.

49 For an online version, see <https://commons.wikimedia.org/wiki/File:1625_Freitas_De_justo_imperio_lusitanorum_asiatico.png>. According to Vieira, publication had been delayed in order not to prejudice Felipe's attempts to establish good relations with the Dutch. When publication did eventually take place, it was during the reign of his successor, Felipe IV (and III of Portugal). See M. B. Vieira, '*Mare Liberum* vs. *Mare Clausum*: Grotius, Freitas and Selden's Debate on Dominion over the Seas' (2003) 64(3) *Journal of the History of Ideas* 361–377, at 362.

50 Alexandrowicz, note 3, chap. 8 (originally published as '*Freitas Versus Grotius*' (1959) 35 *British Yearbook of International Law* 162–182), 121.

51 This brief summary of Freitas's views is based on *ibid*., and Anand (1983) note 3, 103.

quite a modern ring, prefiguring mid-twentieth century debates about the legal nature of the seabed and the doctrine of the continental shelf; discussions at the Third UN Conference on the Law of the Sea about the nature and extent of coastal State jurisdiction beyond the territorial sea, which culminated in agreement on the regime of the exclusive economic zone; and twenty-first century concerns about the use of the sea for criminal activity (illegal fishing; trafficking in drugs, people and weapons; and piracy and armed robbery against ships).

Those few Anglophone writers who have commented in any detail on *De Justo* have been uniformly complimentary about its qualities. Thus, Alexandrowicz described it as having been written with 'scholarly care and precision' and a work of 'perfect legal erudition'.[52] In Kinght's view, *De Justo* 'is written with the minutest care. There is little or nothing in it of the advocate. From first to last it is grave record of the research of a patient and profound erudition'[53] and is executed 'with a remarkable skill in reasoning and an immense collection of historical facts'.[54] However, because of the decline in the sea power and empires of Portugal and Spain from the seventeenth century onwards, and the rise of Dutch and English (and eventually French) power, together with the fact that *De Justo* lacks the intellectual sparkle of *Mare Liberum* and is much longer and more detailed, Freitas's work lapsed into obscurity, at least in the Anglophone world, until partially rescued by modern commentators. Grotius, however, knew of *De Justo*, describing it in a letter of 1627 as '*scriptum est satis diligens*' ('written rather carefully') and worthy of a reply.[55] However, there is no record of such a reply ever having been written. In the same year as *De Justo* was published, Grotius published what is widely regarded as his finest work, *De Iure Belli ac Pacis, Libri Tres* (*Three Books on the Law of War and Peace*). In it, he modified the absolutist position on the freedom of the seas that he had taken in *Mare Liberum* and accepted that the waters of a bay or a strait bordered by a single State could be acquired by that State.[56]

52 Alexandrowicz, note 3, 121 and 122. In similar vein are Anand (1983), note 3, 102 and Vieira, note 49, 362 and 377.

53 Knight, note 30, 4.

54 *Ibid*., 8.

55 Anand (1983), note 3, 104.

56 Vervliet, note 18, XXV–XXVI.

Epilogue

By the end of the seventeenth century, the 'Battle of the Books', as the exchanges between Grotius and his critics have been dubbed, was over. From then on, it was accepted by writers, such Cornelius van Bynkershoek[57] and De Vattel,[58] and increasingly reflected in State practice, that States exercised control or dominion (the exact nature was not settled until the adoption of the Geneva Convention on the Territorial Sea in 1958[59]) over a belt of sea adjacent to their coasts, the breadth of which was uncertain and often contested until it was finally established in the UN Convention on the Law of the Sea in 1982,[60] known as the territorial sea (or more usually, until the middle of the twentieth century, as territorial waters); that other States enjoyed a right of innocent passage for their ships through the territorial waters/sea of other States; and that beyond the territorial waters/sea lay the high seas, an area free and open to use by all States. The military power of West European States, especially France and Great Britain, and their economic dominance, resulting principally from industrialisation and colonialism, led to this legal framework being imposed on non-European States. That framework of the law of the sea was eventually put into treaty form in the 1958 Conventions on the Territorial Sea and High Seas[61] and accepted by most European and a number of non-European States. It later found its way, although considerably refined and qualified, into the 1982 UN Convention on the Law of the Sea,[62] which, with the ending of decolonisation (Portugal's colonies in Africa and Asia being some of the last to achieve independence), was negotiated and became accepted on a truly universal basis.

Much of this present-day framework of the law of the sea might never have come into existence had it not been for the Portuguese voyages of discovery in the fifteenth century. They led to the establishment of Portugal's monopoly of the lucrative spice trade between the East Indies and Europe, which lasted for almost a century, and the growth of the Portuguese empire in Asia. That

57 In *De Dominio Maris Dissertatio* (1702).

58 In *Le Droit des Gens* (1758).

59 Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958, in force 10 September 1964) 516 *UNTS* 205. Art. 1 provides that a State has 'sovereignty' over its territorial sea. This provision is repeated in Art. 2(1) of the UN Convention on the Law of the Sea (see following note).

60 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1834 *UNTS* 397. See Art. 3.

61 Convention on the High Seas (Geneva, 29 April 1958, in force 30 September 1962) 450 *UNTS* 11.

62 See Parts II and VII.

monopoly was gradually challenged by other European powers, beginning with the Dutch. The actions of the Dutch East India Company led to the literary battles between Grotius and his critics, such as Selden, Welwood and Freitas, from which the regimes of the territorial sea and high seas were eventually forged.

In one aspect of the law of the sea, Portugal has in modern times again been in the vanguard. In 2006 it became the first State to establish a marine protected area, around a hydrothermal vent, on the continental shelf beyond 200 nautical miles, where the legal status of the superjacent water column was therefore high seas.[63] Portugal's action has prompted the creation of marine protected areas elsewhere, including in other parts of the north-east Atlantic Ocean, the Southern Ocean and the Mediterranean Sea, in areas where the legal status of the water column is high seas and the seabed is either the continental shelf beyond 200 nautical miles or the Area.[64]

63 On which, see M. C. Ribeiro, 'The "Rainbow": The first National Marine Protected Area proposed under the High Seas' (2010) 25(2) *International Journal of Marine and Coastal Law* 183–207.

64 See further R. Churchill, V. Lowe and A. Sander, *The Law of the Sea* (Manchester: Manchester University Press, 4th edition, 2022) 746–52; and Wen Duan, *The International Legal Regime relating to Marine Protected Areas in Areas beyond National Jurisdiction* (Leiden: Brill, 2022).