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Mare Liberum vs. *Mare Clausum*: Grotius, Freitas, and Selden's Debate on Dominion over the Seas

Mónica Brito Vieira

Why would you withhold water from my lips?
The use of water is a common right.
Nor sun nor air nor water's gentle flow
Are private things by natural design.
The gifts I seek are public property.

Ovid

When in 1603 the Dutch East India Company seized a Portuguese carack as a prize, this was not in itself a notable episode in the annals of colonial history. With the growing efforts of the Dutch to challenge the monopoly of the Portuguese in the use of the sea route to the East Indies, such incidents were beginning to become commonplace. What marked out this particular incident, however, was the fact that it prompted the publication, in 1609, of an anonymous treatise under the suggestive title of *Mare Liberum*.¹ The author behind the work was Hugo Grotius, by that time an enthusiastic supporter of the idea of an aristocratic and imperialist Dutch republic.²

I would like to thank Professor Quentin Skinner, from whose advice this article greatly profited.

¹ In April of that same year plenipotentiaries representing Philip III of Spain (II of Portugal) concluded a Twelve Year Truce with the United Provinces. The East India Company was thereby granted freedom to trade in the Iberian overseas possessions, the right to navigate in the adjacent seas remaining, however, dependent on commission from the Spanish king. The Portuguese magistrates, who had been prevented from taking part in the negotiations, were shocked by the concessions made by the Spaniards.

² Except for chapter 12, which was published in 1609 as *Mare Liberum* at the express request of the Zeeland Chamber of the East India Company, Grotius's treatise remained in manuscript. Only in 1864 was it discovered and integrally published under the title of *De iure praedae*

In the Iberian Peninsula, which had been targeted by the corrosive arguments put forth in *Mare Liberum*, the Spanish Inquisition included the book in its index of forbidden works in 1612. Thirteen years later, however, a book entitled *De iusto imperio Lusitanorum Asiatico* was published in reply to the “Incognito’s” attack by Serafim de Freitas, a Portuguese friar teaching at the Faculty of Law of Valladolid. This late publication in 1625 of a response to Grotius is explained by Philip III’s engagement in a policy of peace and good relations with the United Provinces. Eleven more years elapsed before John Selden’s long-awaited treatise in defense of exclusive fishing rights in English waters appeared.

Selden’s *Mare Clausum* (1636), for many a “deeply Grotian work,”³ has been, among all the replies to Grotius, the one which has exercised the greatest hold over scholars. By contrast Freitas has hardly been noticed at all in the Anglophone literature.⁴ But nothing seems to justify this omission. Freitas’s treatise is an earlier, fuller, more systematic and perhaps historically more significant discussion of Grotius’s *Mare Liberum*. The purpose of this article is to add this missing dimension of the debate, while pointing out that Freitas anticipated many of the terms of the discussion later picked up by Selden. It is likely that Selden never had access to Freitas’s treatise. Therefore, in this article, I am not advancing any claim to a direct influence of Freitas’s treatise on dominion over the high seas upon Selden’s work, which, despite the argumentative similarities, concentrates on the question of fishing rights in the North Sea. As Grotius never responded to either author, the time has come to overcome this silence by bringing together Grotius’s and Freitas’s arguments, as well as indicating some of the more significant late Scholastic and juristic sources to which they are indebted. Though Grotius did not reply to Freitas, there is evidence that he came to know about the latter’s work, for as early as April 1617, in a letter addressed to his brother, Grotius states that someone had written in Salamanca a refutation of his *Mare Liberum*. Despite the misleading reference to Salamanca, this reply could well be Freitas’s, as, in February 1627, Grotius writes yet another letter stating that he had read Freitas’s *De iusto imperio*.⁵

Among these sources, two works, Francisco de Vitoria’s famous lectures on the Indies (1539) and Ferdinando Vázquez y Menchaca’s *Controversiarum illustrium usuque frequentium libri tres* (1564) are of particular significance. Plain numbers would serve to substantiate this claim, as in Grotius’s *De iure praedae* 68 references are made to Vitoria and 74 to Vázquez, whose names are

commentarius. Grotius, however, used to refer to it as *De Indis*, probably to show his indebtedness to Francisco de Vitoria’s lectures *De Indis* (1539).

³ Richard Tuck, *Philosophy and Government 1572-1651* (Cambridge, 1993), 213.

⁴ See James Muldon, “Who Owns the Sea,” *Fictions of the Sea*, ed. Bernhard Klein (Aldershot, 2002), 22-24.

⁵ See Hugo Grotius, *Epistolae* (Amsterdam, 1687), 796, n.144.

also recurrent in Freitas's *De iusto imperio*. As to Selden, who opposes Vitoria in *Mare Clausum*, and devotes the whole of its chapter xxvi, book I, to the direct refutation of Grotius's and Vázquez's theses, he had most probably contact with Vázquez's ideas through Johannes Gryphiander's treatise *De insulis tractatus* (1624). Although both Grotius and Freitas draw heavily on Vitoria's discussion of the just and unjust titles by which jurisdiction (*dominium iurisdictionis*) or even property rights (*dominium rerum*) could be gained over the Americas, they disagree as to the cogency of many of Vitoria's arguments. If Grotius willingly incorporates the heart of Vitoria's teachings into his own defense of the freedom of the seas, Freitas feels compelled to question some of Vitoria's conclusions on the basis of counter-arguments initially posed by the eminent Jesuit theologian Luis de Molina. This contrast is even more severe when it comes to the second of Philip II's counselors, for whereas Grotius finds in Vázquez the perfect intellectual foundation for his defense of the Dutch claim to freedom of navigation and trade, Freitas and Selden take this radical humanist jurist as one of their main adversaries.

The specter of Vázquez's arguments for the freedom of the seas is indeed strongly present in *Mare Liberum*. In the *Controversies* Vázquez had argued that before the invention, under the secondary law of nations, of any kind of *dominium*, servitude, or jurisdiction, all *res* were in a state of natural liberty. For him, this liberty is to be understood in the sense of physical unboundedness (or *laxitas*) of objects or, in the case of man, of mental freedom (or *libertas*), a free faculty unregulated either by reason or right. Any limitation of natural liberty, Vázquez maintains, comes only justified where it results in an increase in utility, the principle ruling all positive settlements. As such, though with regard to natural law and the primeval law of peoples all things were in common, the establishment of private property in the fields and rivers is entirely justifiable, as it results in a global enhancement of utility. In Vázquez's account, such individual property rights are acquired by prescription, a process whereby a continued *de facto* occupation generates a *de iure* situation.⁶ This process, does not, however, extend to the sea. No one can acquire by prescription an exclusive right or servitude in the oceans and open waters, Vázquez explains, because over them there is not nor can there ever be any right but that of common use. The reason why the primeval law of nations, dictating an unrestrained natural liberty or *laxitas*, remains, in the case of the sea intact is that no benefit but only injury could result from its enclosure.⁷

Inspired by Vázquez, Grotius, too, argues that the sea was never under servitude, and that no servitude over it can be prescribed. However, this Vásquian

⁶ Ferdinando Vázquez y Menchaca, *Controversiarum illiustrium usuque frequentium libri tres* (Frankfurt, 1572), Book II, ch. li, 130, nn. 14-16.

⁷ *Ibid.*, ch. lxxxix, 236, n. 39. See Annabel Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge, 1997), 165-204.

claim appears within a whole series of arguments substantiated, at least partially, by elaborate references to Vitoria. The structure of Grotius's *Mare Liberum* itself seems to be broadly modeled after Vitoria's questions in *De Indis*. At the beginning of *Mare Liberum*, Grotius argues in effect that the Dutch would be justified in waging a war against the Portuguese if irrefutable arguments could be advanced in defense of four main claims: that the access to the East Indies is open to all nations by command of the law of nations; that infidels cannot be divested of public or private rights of ownership merely because they are infidels, be it on the grounds of discovery, papal grant or war; that neither the sea itself, nor the right of navigation can become the exclusive possession of a particular party, whether through seizure, papal grant, prescription or custom; and finally that the right to carry on trade with another nation cannot be the exclusive possession of a particular party on any grounds at all.

Point by point, Freitas refutes the reasons adduced by Grotius in defense of this set of claims. Before turning to the famous discussion of whether the sea can be owned, however, let us first concentrate on Grotius and Freitas's heated disagreement over the first two propositions.⁸

In accordance with the scheme he set for himself, Grotius starts by arguing that under the primary law of nations, whose principles are both universal and immutable, it is permissible for any nation to trade with any other nation whatsoever. Grotius resorts here to Vázquez's (and primarily Bartolus's) distinction between the primary and secondary law of nations. The former refers to the *honestum* (commanding liberty and the external world to be common to all men), whereas the latter refers to the *utile* (servitudes, wars, kingdoms, empire, jurisdiction, contracts).⁹ The grounds for advancing Grotius's argument will be clearer if we go back to the Prolegomena of his *De iure praedae*. Indebted to medieval voluntarists, for whom the basis of the rightness of actions was to be founded not in the conformity with nature but in the absolute will of God, Grotius takes as his first rule that "What God has shown to be His will, that is law [*iuris*]."¹⁰ But since in Grotius's understanding the will of God is made manifest in creation, it is necessary that we examine the external world before we decide what is right by nature. That observation having been carried out, we shall conclude that God endowed different regions of the world with specific and only partial productive potentials. God's purpose, Grotius infers, must thus have been to prevent autarky and its pernicious effects, notably unsociability and the disintegration of the bounds of human friendliness. From this presump-

⁸ Since Grotius's claim that the right to carry out trade with any other nation cannot be the exclusive possession of any party (point iv) is founded on his refusal to accept the same grounds adduced in point iii, I have chosen not to handle this point separately. See Grotius, *De iure praedae commentarius*, tr. G. L. Williams (2 vols.; Oxford, 1950), I, ch. xii, 216.

⁹ See Vázquez, *Controversiarum*, Book II, ch. lxxxix, 235, nn. 24-27, also Book I, Preface, 12, n. 117-18 and ch. xli, especially 109, n. 37; and Book II, ch. li, 130, n. 11.

¹⁰ Hugo Grotius, *De iure praedae*, I, ch. ii, Prolegomena, 8.

tion of God's reasons, he extracts the corollary that commercial exchange and the means to foster it must remain open to all. To this Grotius adds, drawing on Vitoria, that to forbid others from sharing in those things which are common property under the law of nations, especially the right to travel and trade in other countries, is a violation of the sacrosanct law of hospitality, which serves as a just ground for war.¹¹

Freitas disagrees strongly. First of all, he believes the law of nations to be but one. But even those who, like Grotius, insist on its division into primary and secondary, must, Freitas insists, equally distinguish between an original state of innocence, to which belong those things commanded by natural reason for the good of human nature, and a corrupted one, to which belong such things as servitudes and the division of property. Therefore, navigation, just as commerce, both of which are means to ease the scarcity of goods in the corrupted world, fall under the secondary and thus mutable law of nations, not under the primary, as Grotius, following Vázquez, wrongly claims.¹²

To confirm his position Freitas draws a parallel between primary and secondary law of nations and preceptive and permissive natural law. Following Francisco Suárez, he stresses that there are two distinct sorts of natural *ius*, the first containing necessary and thus immutable principles of good conduct and the second comprising variable principles. Freitas expressly alludes to Suárez as the main influence on his conception of natural *ius*, though he is also visibly indebted to St. Thomas Aquinas's terminology. In *Mare Clausum* Selden, too, argues that right can be considered either in its obligatory/preceptive aspect or in its permissive/concessive one. Permissive, unlike preceptive, natural law is, he stresses, mutable, and, as such, creates a space within which fact can generate right.¹³ Even if one concedes that in the original state of uncorrupted nature navigation and commerce were practiced, Freitas then adds, one could not reasonably argue that both of these activities come under the natural law because it prescribes them. On the contrary they only fall under it by means of permission, negation, or concession.¹⁴

Long before Selden, Freitas concludes accordingly that under permissive (natural) law any prince is free to prevent foreigners from entering, dwelling, and trading on his lands, as well as to forbid his subjects to trade with foreigners, if he deems it necessary. Perplexed by Grotius's inconsistencies, Freitas

¹¹ See Francisco de Vitoria, *De Indis*, qu.3, art.1, *Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge, 1991), 278-81.

¹² See Frei Serafim de Freitas, *De iusto imperio Lusitanorum Asiatico*, tr. Miguel Pinto de Meneses (2 vols.; Lisbon, 1983), II, ch. i, especially 5-9, nn. 13-24.

¹³ For Selden's complex division of the law, see Selden, *Mare Clausum*, tr. Marchamont Nedham (London 1652), Book I, ch. iii, 12-16.

¹⁴ On Vitoria's and Suárez's contributions to the development of the concept of permissive natural law see Brian Tierney, "Permissive Natural Law and Property: Gratian to Kant," *JHI*, 62 (2001), 381-99.

draws the reader's attention to the fact that the "Incognito" himself acknowledges this point, for he constantly reminds us that the Portuguese had to obtain permission to trade and dwell overseas from the native rulers and moreover paid them tributes for that purpose. But no one, Freitas remarks, should have to ask another's permission to pursue those activities one is supposedly free to pursue by natural right.

From the above discussion Freitas infers that Grotius is constantly turning a blind eye to the impact of time and circumstances upon those matters falling under the concessive law of nature. This is particularly evident when it comes to Grotius's analysis of the law of hospitality and of whether the refusal of anything that by the law of nature is every man's right may be made a just cause for war. Freitas overturns Grotius's conclusion by using exactly the arguments that Molina had deployed against Vitoria.¹⁵ He thus holds that Grotius should have distinguished between three radically different circumstances: first, mere inoffensive passage; second, urgent and serious need of passage and use of things; and third, unqualified freedom to travel across another's land.

In the first case law commands passage to be free and thus the denial of this liberty may indeed serve as the ground for a just war. In the second case the law of charity determines that a foreigner cannot rightly be debarred from the use of things even when property is already divided and the owner of the thing is unwilling. Conversely, in the third case the state or the prince no less than a private *dominus* can legitimately forbid all foreigners the use of the country's public possessions, as well as any commercial exchange, without doing them any injury that could justify war. To exemplify his point and once again under Molina's influence, Freitas adds that a country can refuse trade, harbor facilities, and residence to foreigners whenever it foresees that these will dangerously increase their power. It is certainly true that when a prince grants some foreigners access to his possessions as well as the right to pursue trade on his lands, he cannot deprive them of these rights without a cause. But this by no means interferes with his unimpaired right to refuse, without any explanation whatsoever, similar access to other visitors. An identical emphasis will be put by Selden upon the need to take circumstances into account when defining what is right. Nothing in the law of charity, Selden stresses in *Mare Clausum*, opposes (public) dominion over the waters unless one dares to affirm that the laws of friendship may overthrow private ownership.¹⁶

Let us now turn to the discussion of the second point of Grotius's argument, whether the infidels are true masters of their private and public possessions. This question had been the first one addressed by Vitoria in *De Indis*, as it laid the groundwork for his discussion of the titles whereby the Spaniards

¹⁵ See Molina, *De justitia et jure* (Mainz, 1614), Book I, treatise ii, *disputatio* 105, 427-30.

¹⁶ See *Mare Clausum*, Book I, ch. xxiii, 148.

could be empowered to bring native lands under Christian rule. The conclusion there reached by Vitoria is plainly accepted by both contenders. Trained in the canon law tradition, which had long conceded the right of ownership to infidels, Freitas makes no attempt to deny that before the arrival of the Europeans the natives possessed true dominion both in public and private affairs and so they could not be dispossessed of it without good cause.¹⁷ For authors familiar with Vitoria's arguments, as our contenders were, the acceptance of this conclusion presupposed, moreover, agreement with the proposition that neither sinners, unbelievers, nor even men by nature less intelligent could be denied their true dominion.¹⁸

But we should not be misled by this brief truce. Grotius and Freitas return to complete disagreement when they turn to the legitimacy of founding dominion over the East Indies on a right of discovery. Grotius, following Vitoria's track, insists that such a title is illegitimate. Discovery (*inuentio*), he argues, etymologically means "to take possession of" (*occupare*), and this is an unjust title for at least three reasons: first, because the Portuguese never actually seized or enclosed the East Indian territories; secondly, because discovery imparts no legal right where things were not ownerless prior to the discovery; and lastly, because they were not the first to discover those territories.

Freitas tries to prove all of these arguments unsound. To discover (*inuenire*), he argues, can have different meanings. It can either mean *prevestigare* and thus would not imply any actual seizure or, as the "Incognito" claims, occupation (*occupatio*). In either case, it fits the Portuguese enterprise. For they were not only the first to open the sea route to the East Indies; but they had also acquired the (exclusive) right to sail across those seas, whether by reason of the papal grant or by the cumulative reason of prescription or custom. Freitas devotes one full chapter of his treatise to proving these assertions. He nevertheless concedes that from discovery one cannot infer the absolute right acquired by the Portuguese over those parts of the world. This would seem to give his case away if he did not have a trump card to play, but he thinks he has, and moves to discuss how far the worldly powers of the pope extend.

Neither Grotius nor Freitas could neglect a discussion in which the confrontation between the Protestant and the Catholic worlds reaches its peak. Grotius had stressed that the dominion of the Portuguese over the East Indies would be groundless, if founded on the apportionment of the world made by Pope Alexander VI. Intended to ensure peace between the Spanish and the Portuguese, the settlement could not affect nor oblige any third country.¹⁹ Even if

¹⁷ Freitas, *De iusto imperio*, II, ch. ix, 112-14, nn. 1-7.

¹⁸ For details on this question, see Vitoria, *De Indis*, qu.1, 239-52.

¹⁹ Grotius is referring to the famous Alexandrine bulls culminating in the ratification of the Treaty of Tordesillas in June 1494, whereby the line of demarcation between Portugal's and Spain's spheres of influence was settled. See Grotius, *De iure praedae*, Book I, ch. xii, 222-23.

the pope had intended and had the power to make such a donation, it would not follow, Grotius observes, that the Portuguese had become the owners of the Orient. The title of donation had still to be complemented by the title of actual possession. And anyhow the donation would be void, not only because it referred to the property of others, but also because the pope was not the temporal lord of the whole world.

Throughout the discussion of this second title, Vitoria is a guiding author for Grotius.²⁰ How, then, does Freitas reply to an attack on the temporal powers of the pope that ultimately seems to come from his own side of the battlefield?

On the question of whether the pope has plenary jurisdiction in temporals, Freitas explains, two main opinions may be found among Catholic jurisconsults and theologians. Some argue that Christ did not have, nor wanted to have, nor has ever exercised temporal dominion and therefore did not entrust it to the pope, not even *in potentia*.²¹ But others claim that Christ possessed temporal dominion and thus that this power exists similarly in the Roman Pontiff, who is Christ's vicar, not *in actu*, as it happens with the spiritual power, but *in habitu* or *potentia*.²² Moreover, they assert that although the pope commonly exercises this power through the emperor or kings, he occasionally exerts it *per se*, and so transforms that *potentia* into act.

Despite confessing his sympathy for the second thesis, Freitas believes that to the present discussion it is more relevant to emphasize that neither party would doubt that the pope can indirectly use power in temporal affairs insofar as they concern spiritual ends. Whether this preference is a matter of conviction, or only prudential, is not easy to evaluate. The plain facts are that the Portuguese censors objected to the little attention given in the initial version of *De iusto imperio* to the secular powers of the pope, and in response Freitas rewrote chapter 6 of his treatise, devoting it entirely to the discussion of the power of the pope in temporal matters. Freitas admits, however, that Grotius is right in claiming that the pope could not simply pass this power onto secular princes, for such a power would be annexed to the sovereign pontificate.

But contrary to what Grotius might have expected, this concession does not prevent Freitas from inferring that the pope's apostolic duty to propagate the Gospel throughout the world gives him the right to entrust the pursuit of that task to those who are in the best position to carry it out successfully. Furthermore, since the pope has the power to order temporal matters for the convenience of spiritual ones, he may, as Vitoria had advocated, concede to his cho-

²⁰ Particularly insofar as he claims that since Christ did not have temporal dominion, much less does the pope, who is but his vicar, have a claim to it. See Vitoria, *De Indis*, qu.2, art. 2, 258-64.

²¹ Freitas attributes this first position to Domingo de Soto and Francisco de Vitoria, amongst others. Freitas, *De iusto imperio*, II, ch. vi, 67, n. 60 and 70, n. 66.

²² Freitas controversially includes Aquinas in this group of theologians. *Ibid.*, ch. vi, 70, n. 66, and ch. xii, 150, n. 3.

sen delegates exclusive rights to travel, trade, and preach whenever he finds this arrangement to be in the best interests of the Christian religion. Why then had different popes entrusted these missions to the Iberian kings and not others? Among various reasons put down by Freitas, at least six are worth mentioning. The first is that these kings were the most powerful and thus could cope with the huge expenses the expeditions involved. The second is that the sailing skills of the Iberians were unrivaled. The next is that, if there were an indiscriminate rush to the Indies from the Christian princes, they could get in each other's way and start to quarrel. The fourth reason is that the Iberian princes were the first to undertake voyages of discovery at their own expense. Fifthly, he notes that there was a customary demand of safe-conduct to sail in the waters surrounding the Portuguese empire, a circumstance that for him comes to attest that the Portuguese had acquired an exclusive right to these waters by means of prescription understood as old custom. Finally he adds that the pope had asked other princes to join the Iberian kings in their expeditions, but that they had refused.

Let us now turn to the crucial question of whether Alexander VI's bulls of donation bind the Dutch. Freitas believes that they do. Philip I of Spain, earl of Flanders, succeeded Ferdinand of Spain, who had concluded a treaty acknowledged by papal arbitrage with John II of Portugal. Since the United Provinces were but a part of Flanders and the earl of Flanders was bound by this pact, so was the United Provinces State-General; for rebellion against Spain could be no excuse for the non-observance of active and passive rights. And all this for a rather simple reason that Grotius could not refuse to accept: natural law requires men to perform their covenants, subjects being thus bound by covenants concluded by their princes.²³

There still remains a possible title of dominion over the Indies based on war. Grotius had underlined that such a title, even if it were just, could not generate ownership before actual seizure. Moreover, the Portuguese, who had obtained rights of trade from the East Indians, with whom they maintained friendly commercial relations, could not claim to be engaged in war with them.

Agreeing with Vitoria, Freitas recognizes that the pope does not have spiritual jurisdiction beyond the borders of Christendom, and, furthermore, that a war waged against natives on grounds of their infidelity or sins against natural reason or refusal to accept the Christian faith could never be just. For Freitas, however, whether the infidels may be forced against their will to listen to preaching remains an open question. As his position hardens, the initial convergence of opinion with Vitoria seems to waver. This is primarily because he argues that

²³ Grotius does, indeed, argue that covenants established by a sufficient sign of the will were binding in the original condition of man, for already then the breach of covenant harmed others, thereby violating the lexically prior principle of utility. See Grotius, *De iure praedae*, ch. ii, Prolegomena, 18-20.

even if infidels are not directly subject to the Roman Pontiff, they are by divine law forced to submit to him in order to receive faith and baptism, the means by which they can become members of Christ's flock. But he goes further and insists that even before baptism unbelievers can be said to be indirectly subject to the pope, who has the right of opposing, by force if necessary, those who obstruct his delegates in the propagation of the Gospel or force their converted subjects to go back to idolatry. Within these conditions, he concludes, the Portuguese, by the bull of Alexander VI, may rightly wage war against the Indians. I should stress that Freitas's conclusions are not, in practical terms, any different from Vitoria's. Nonetheless, he takes Vitoria's argument too far when claiming that unbelievers, even before having been baptized and converted, are indirectly subject to the pope.

However persuasive Freitas may find this and his previous arguments, he still has to fight one last decisive battle with Grotius over whether dominion over the sea may be acquired by occupancy or prescription. In agreement with Vitoria and the mainstream of the Salamanca School,²⁴ Grotius believes that by the law of nations the sea is *res nullius*, that is, the common property of all, so that no one may be lawfully barred from traveling across it. In this matter the sea is to be set apart from other things (such as wild beasts, fish, and birds) that are also *res nullius* but have not been assigned for common use and, as such, can be subject to private possession by those who happen to catch them. To substantiate a point previously voiced by Vázquez, Grotius gives us a historical account of the origins and limits of property, as well as of the evolution of the concept of property itself.²⁵ The first steps in this account are to be closely followed by Selden. However, in his narration of how the world was divided between the sons of Noah, Selden stresses the role played by covenants, either tacit (occupation) or explicit (distribution), in the coming into being of private ownership.²⁶ In doing so, he is engaging in a dispute with the Grotius of *Mare Liberum*. Grotius's account of the origins and development of property in *De iure belli ac pacis* differs significantly from the one outlined in his *De iure praedae*. This change, notably the visible role attributed to agreements in the transition from the original use-right to private ownership, can well result from

²⁴ See Vitoria, *De Indis*, qu. 3, art. 1, 279.

²⁵ Vázquez had argued that immoveable objects are especially in common, since dominion in moveables springs from the primeval right of nature itself and is secured by our labor. See, for instance, Vázquez, *Controversiarum*, Book II, Chapter lvii, 149, n.23.

²⁶ Contrary to what Grotius implies in *Mare Liberum*, Selden holds that no right to privately exclude others from the common use could "naturally" flow from the original right to use. Exclusive property rights can therefore only be founded on a covenant, whereby the ancient right of common use is renounced. Citing Grotius's references in *De iure belli ac pacis* (1625) to a compact that must have been passed in the very beginning of private dominion, Selden suggests that Grotius's mature view not only conflicts with that which he embraced in *Mare Liberum*, but also allows for agreements to divide the oceans and exclude the right of common use to be binding. Selden, *Mare Clausum*, Book I, ch. iv, 23.

a greater emphasis now put on justice, in its Aristotelian sense of recognizing another's claim on us, rather than on utility.²⁷

The Latin term *dominium* ("ownership" or "property"), Grotius argues, though often taken as a synonym for private property, had not always had this meaning. In the Golden Age ruled by the primary law of nations all things were common to all, and only a use-right or a right to acquire the things necessary for life, sanctioned by the first and second precepts of natural law, existed.²⁸ Present-day distinctions in ownership are therefore the result of an evolutionary process, running from *possessio* to *usus*, and from this to *dominium*, that took place under the guidance of nature itself and ended up being acknowledged by positive law. All rights of dominion, Grotius implies, echoing Vázquez, have their origin in fact, and are ultimately legitimized by God's manifest will that all His creation should preserve itself in being.

Some things, when used, cannot be reused (e.g., food) or at least cannot be reused without reduction of their value (e.g., clothing). In both cases the exercise of the universal use-right is equivalent to the *de facto* creation of private property through a physical act of attachment or *occupatio*.²⁹ As this process continues, even immovable things, such as fields, are apportioned or become subject to private ownership. This constitutes an entirely new form of occupation, no longer requiring physical seizure, but only the definition of bounds, which Selden believes to be perfectly applicable to the sea. Selden argues that if one accepts that the earth is bounded by the sea, there is no reason to think that the thing containing should not be bounded by the thing contained, for the sea certainly has its bounds on the shore. Moreover, (imaginary) lines drawn with the help of such instruments as the sea-man's compass can, in Selden's view, be used for bounding the sea.³⁰ Fields, among other immovable things, cannot remain unbounded because, as Grotius (and Vázquez before him) holds, their indiscriminate use would go against expediency.³¹ The rationale is that even if the use of land does not consist in direct consumption, once fields are systematically cultivated this use is bound up with purposes of consumption. Furthermore, as the amounts of usable land are limited, (individual) utility justifies their apportionment. This claim subverts the famous Lockean proviso "as much and as good for others." In so doing, it brings to light two fundamental

²⁷ See Grotius, *De iure belli ac pacis libri tres*, tr. F. W. Kelsey (2 vols.; Oxford, 1925), II, Book II, ch. ii, 189, n. 5.

²⁸ The first and second precepts of the law of nature state: "First, that *It shall be permissible to defend [one's own] life and to shun that which threatens to prove injurious*; secondly, that *It shall be permissible to acquire for oneself, and to retain, those things that are useful for life*." Grotius, *De iure praedae*, I, ch. ii, Prolegomena, 10.

²⁹ Grotius uses Seneca's famous example of the equestrian rows of seats to show that though the actual allocation of property may be conventional, its existence does not rest on any formal agreement. See Grotius, *De iure praedae*, I, ch. xii, 229.

³⁰ See Selden, *Mare Clausum*, Book I, ch. xxii, 136-41.

³¹ See Vázquez, *Controversiarum*, Book II, ch. li, 130, nn. 13-16.

and somewhat radical themes of the *De iure praedae*: the expansion of utility, sanctioned by God's will, to the realm of nature, and the resulting reduction of the *honestum* to a function of the *utile*.³² The process by which dominion over external things is acquired is common to individuals and states, so that public and strictly private property have similar origins. This last argument, as Tuck writes, is linked to the influential assertion that states cannot possess rights not already enjoyed by individuals.³³

Contrary to what happens with the land or rivers, the sea must be left *sui iuris* for two main Vásquian reasons. First, because property has its origin in occupancy, and the sea could never be occupied or subject to servitude. Second, since not even reasons of public utility could justify the parceling-out of the sea, which, being inexhaustible, suffices without inconvenience for general use by all. In a direct challenge to the Iberian empire, Grotius claims that to describe acts of navigation as occupancy is absurd, for it is all too obvious that "a ship sailing over the sea no more leaves behind itself a legal right than it leaves a permanent track."³⁴ To this he adds that (papal) donation has no weight in regard to things *extra commercium nostrum*.³⁵

To support his claim he argues that the air, running water, the shore, and the sea were already described by Roman jurists as common to all under the natural law, or as public under the law of nations, by which they could only mean "common" in the modern sense of the word. Still, he concedes that if any part of the sea is susceptible of occupancy, then that part becomes the property of the person occupying it, so long as it does not impede the common use.

Both Freitas and Selden believe that Grotius's last concession is all they need to defend exclusive rights of quasi-occupation, jurisdiction, protection, and taxation over those seas adjacent to a prince's territories or an emperor's overseas possessions. The use of the expression "quasi-occupation" is meaningful, as throughout chapter xi, Freitas concedes that, properly speaking, the sea cannot be occupied or possessed as the land is. For whereas the land "can be occupied with feet," the sea can only be "occupied" by acts of navigating or fishing.³⁶ Even though Freitas acknowledges that Vitoria was right in maintaining that no emperor can *de facto* or *de iure* sensibly claim to be master of the whole world, he reminds us that the Roman emperors had often proclaimed and acted so that theirs was the right over (parts of) the sea, as well as the right to impose the interdict *Uti possidetis*, when hindered from exercising the former

³² See Grotius, *De iure praedae*, I, ch. ii, Prolegomena, 8-42.

³³ *Ibid.*, ch. xii, 271. Our last point is exemplified by Grotius's treatment of the right to punish or exact restitution in chapter viii, 91-92. See also its similarity with Locke's "very strange doctrine" discussed in Tuck, *Philosophy and Government*, 177.

³⁴ Grotius, *De iure praedae*, I, ch. xii, 240.

³⁵ Things *extra commercium nostrum* are those which are not in *boni nostris*, that is, things not capable of being possessed or even quasi-possessed, nor alienated.

³⁶ See Freitas, *De iusto imperio*, II, ch. xi, 138, n. 15.

right. Thus, he concludes, the vastness of the sea has never been an obstacle to the occupation of parts of it, the extension of this dominion depending not on natural *ius* but only on the ruler's actual power. Moreover, Freitas, like Selden after him, stresses that there is undeniable historical evidence that some nations have had exclusive rights over certain seas, such as the Venetians over the Adriatic. Selden devotes several chapters of his *Mare Clausum* to prove that Scripture, as well as the customs and constitutions of many civilized kingdoms and commonwealths, continuously allowed for public and private dominion over the sea.³⁷ As for the claim that the sea, just as the air or running water, cannot be occupied, both insist on the distinction, recurrent in Roman law, between the elements themselves (in this case, water), which cannot be occupied, and their beds, which can. Freitas exemplifies this with the case of the air that is above our private property and can become ours in virtue of a quasi-occupation. From this, he claims, proceeds the right to erect a building in that plot of ground that is ours.³⁸

Similarly, when discussing whether the sea is inexhaustible, Freitas argues that water must be differentiated from running water. Only running water, that is, water that can be used (for instance, to drink) without causing harm to anyone else, is common under the natural *ius*. Conversely, the use of a river or of the sea, which consists in navigation and fishing, can belong exclusively to one people, for if it were indiscriminate, it would certainly be, *pace* Grotius, pernicious to that dominant people. By saying that in some respects the riches of the seas can be plundered, Freitas agrees with Selden, who was to agree that the plenty of sea is lessened “no otherwise then that of Mines of Metal, Quarries of stone, or of Gardens, when their treasures and fruits are taken away.”³⁹

Freitas's overt disagreement with Grotius reaches its climax when it comes to the exegesis of some texts of the *Digest*. Take Ulpian on Book VIII of the *Digest* as an example.⁴⁰ For Grotius, Ulpian provides unequivocal support to his claim that no servitude can be imposed upon the sea, either by private individuals or peoples. Accordingly, Grotius remarks that when answering that “the actual object concerned—namely, the sea—could not be subjected to a servitude, since it was by natural dispensation open to all,”⁴¹ Ulpian makes it clear that any voluntary agreement whereby a right to a servitude on the sea is established obliges, to be sure, the contracting parties, but produces no effect whatsoever upon third ones, whose use-right thus remains as unimpaired as before. Confronted with this interpretation, Freitas accuses Grotius of truncating

³⁷ See Selden, *Mare Clausum*, Book I, chs. v-xx, 24-123.

³⁸ Freitas, *De iusto imperio*, II, ch. x, 129, n. 44. The same example is deployed by Selden in *Mare Clausum*, Book I, ch. xxi, 132-33.

³⁹ Selden, *Mare Clausum*, Book I, ch. xxii, 141.

⁴⁰ For Ulpian's words see Theodor Mommsen and Paul Krueger (eds.), *The Digest of Justinian* (4 vols.; Philadelphia, 1985), I, VIII.iv.13, 266.

⁴¹ Grotius, *De iure praedae*, I, ch.xii, 237.

Ulpian's quotation so as to force the Roman jurist to sanction his most favored conclusion. Yet Ulpian's true words were, Freitas retorts, that "*even though* by private law the sea could not be subjected to a servitude."⁴² From what, it can, *a contrario sensu*, be deduced that all he meant was that though by private law a servitude could not be imposed on the sea, it could certainly be so by a public law. To Grotius's suggestion that servitudes imposed by peoples still fall under private law, as peoples in relation to the whole of mankind occupy the position of private individuals, Freitas finds it not only contrary to reason and jurisprudence but also untenable in view of the need the Roman jurist felt to specify that he was referring to servitude by private law only. Ulpian's commentary is thus, Freitas concludes, to be deemed no different from those passages of the *Digest* in which Roman jurists prohibit individuals of imposing the servitude of aqueduct over the public way but still allow the prince to grant it.

After a meticulous interpretation of all those quotations previously used by Grotius to support the conclusion whereby the Roman jurisconsults took the sea to be common to all, Freitas, like Selden after him, believes himself entitled to assert exactly the contrary. For these jurists, he claims, not only rivers and harbors but also the sea and the seashore became, after their (quasi-)occupancy by the emperor, *res publicae*. The word "public," Freitas explains, means here "of the Roman people or commonwealth" and therefore the word "*omnibus*" means "to all Romans." By which it is to be understood that all these items were public, in the above sense, with regard to use but yet part of the patrimony of the emperor.⁴³

In this respect, the similarities between Freitas's and Selden's arguments are particularly striking. Both insist that the dominion of the sea was, in ancient Rome, a prerogative of the head of the Roman Empire. Both equally claim that there is ample evidence to prove that property in the sea was back then occasionally granted to particular men.⁴⁴ Both contend that when emperor Antonius claimed in his answer to Eudaemon that law had dominion over the sea, he, as the supreme legislator, could not but be asserting his own dominion over it.⁴⁵ Consequently, Freitas contentiously conjectures that when Roman jurists said that the occupation of the seashore or the sea should not be prejudicial, they referred exclusively to its impact upon their use by the Roman people. To this he adds that whenever they claimed that no one could rightly prevent anyone from sailing, they were denying that right to private individuals, not to anyone possessing royal rights.

⁴² Freitas, *De iusto imperio*, II, ch. xi, 134, n. 2, my translation, emphasis added.

⁴³ *Ibid.*, 135-44, nn. 6-31. Selden, too, argues that Roman jurists used the word "*publicum*" to designate those things which "passeth into the patrimonie of the people of Rome," among which they counted places such as the theater, the court, the (public) bath and, indeed, the sea. Selden, *Mare Clausum*, Book I, ch. xiv, 87-89.

⁴⁴ See Selden, *Mare Clausum*, Book I, ch. xv, 89-99.

⁴⁵ *Ibid.*, ch. xxv, 157-68.

Before concluding the discussion of whether the sea to the East Indies or the right to navigate it belongs to the Portuguese by title of occupation, Freitas recognizes that jurisdiction and ownership are two different things, so that strictly speaking no one can be said to “occupy” the sea by acts of navigating or fishing. This seems like a major concession, but he immediately adds that ownership of the sea can certainly be acquired by prescription or custom.

The ensuing discussion of prescription leads us directly to the heart of the process by which *de facto* occupation comes to be recognized *de iure* as a case of ownership and by which some artificial juridical constructions may be pronounced dead and new ones infused with life.

Grotius, resorting to Vásquian arguments, emphasizes that some things, notably the sea and the right to travel across it, cannot be prescribed. Prescription, he argues, is a creation of civil right. It is not applicable between nations, and far less can it have force in opposition to what is ordained by the primary law of nations. Moreover, not even civil law allows things forever *extra commercium* to prescribe. If not even public property can be privately acquired as a result of prescription, either because of its nature or because any citizen unfavorably affected by such prescription could object, more reason is there for possessions assigned to all mankind for common use to remain imprescriptible.

In fact, Grotius adds, he who makes use of common property is exercising a common (not a private) right and therefore has no more power than a usufructuary for the establishment of a prescriptive claim. And since for prescription to take place the agent and the passive party must differ, no acquisitive prescription of a common right may be declared by one particular nation. Moreover, the right to travel, being a mere facultative right, does not allow prescription at all.⁴⁶ As to immemorial prescription, it can only take place where the claimant, and no one else, save by his permission or clandestinely, has practiced that act, a condition the Portuguese cannot claim to fulfill. The right to navigate and prohibit navigation by others, Grotius concludes, can no more be acquired through custom than prescription, because the distinction commonly drawn between the two is irrelevant to the case.⁴⁷

More than ever before, Freitas has to rely on the exegetical method to meet the challenge of Grotius’s arguments. If for Roman jurists the sea could be partially (quasi-)occupied by acts of navigation and join those *res publicae*

⁴⁶ For Grotius’s transformation of the language of *facultas* into that of *ius* see Grotius, *De iure belli*, II, Book I, ch. I, 35, n.5. For the contention that a *facultas* (i.e. a power to do or not to do something at will) cannot prescribe when it belongs to one with respect to a *res* possessed by no one, and the underlying contrast between sphere of fact and sphere of right, *facultas* and *ius*, see Vázquez, *De successionum creatione, progressu et resolutione* (Salamanca, 1559), Book I, para. 22, Limitatio xii, n. 26.

⁴⁷ Grotius, *De iure praedae*, I, ch. xii, 249.

placed within the jurisdiction of the emperor,⁴⁸ then, Freitas points out, it is to be recognized that the sea is not *extra commercium*. As such the sea can be legitimately acquired either by first occupancy, prescription, especially immemorial, or custom, without clashing with the (concessive) natural law. Indeed, he adds, *res publicae* cannot be prescribed by any individual, but they can certainly be prescribed against another people and turned into acquirable goods by virtue of a royal privilege or concession.

To these considerations Freitas adds a further argument later picked up by Selden. If as Grotius claims prescription were not applicable between princes, their dominion over their kingdoms would be uncertain.⁴⁹ Despite being a product of civil right, prescription, Freitas continues, is assimilated by the customs of peoples and comes to pertain to the *ius gentium*.

As to the faculties, their exercise *simpliciter*, where there is no possession, does not generate any prescription. But whenever the purpose of possessing overlaps with the exercise of such faculties as navigating and fishing, Freitas insists, immemorial prescription, once hundred years have elapsed, may occur. In his discussion of the circumstances under which the exercise of a faculty can generate prescription, Freitas follows the Roman law, under which the acquisition of possession required both physical control (*corpus*) and mental intent (*anima*), that is, the intention to hold the property as one's own. This intention to hold the property as one's own, he adds, can be made manifest by a prohibition raised against others, by express declaration, or by a title issued by a superior, and there is no doubt that the Portuguese resorted to each one of them. For not only have foreign sailors needed a safe-conduct issued by the Portuguese authorities, but king Manuel I of Portugal sufficiently expressed his will to possess, by a right of his own, the control over the route to the East Indies, when naming himself "D. Manuel, Lord of Navigation and Commerce in Ethiopia, Arabia, Persia and India." Moreover, the Portuguese kings had surely been in possession of a title issued by a superior, since they were successively granted bulls of donation. As to Grotius's objection that the intention to hold dominion is denied by the fact that natives still navigate and fish freely in the waters adjacent to the Portuguese overseas empire, Freitas sees it as entirely ungrounded. For the sovereignty of the emperor is no more destroyed by the particular jurisdiction of each adjacent land than it is by the private dominion in

⁴⁸ In contradiction with his last words in the previous chapter (ch. 12), Freitas now argues that the distinction between ownership and jurisdiction is perhaps only nominal, their effects being, as a matter of fact, the same. See Freitas, *De iusto imperio*, II, ch. xiii, 159, n. 6.

⁴⁹ To "deny the title of prescription wholly among Princes" is also in Selden's opinion absurd. Both he and Freitas refer to the case of commonwealths by acquisition, where sovereign power is usurped by force or conquest, and becomes legitimized in the course of time by popular (tacit) consent. See Selden, *Mare Clausum*, Book I, ch. xxvi, 170-71, and Freitas, *De iusto imperio*, II, ch. xii, 153, nn. 12-13.

plots of land of his own subjects. The truth is thus, Freitas concludes, that the Portuguese acquired ownership of the Indian sea through immemorial prescription or custom that started counting from the pontifical grant of Martin V (1417) and was reinforced, some years later, by the actual occupation of the sea route to the Indies by Bartolomeu Dias and Vasco da Gama.

In truth, Freitas defiantly continues, manifest prohibition is only a necessary requirement in the case of prescription of negative rights such as servitudes. With positive rights, from which a negative right derives, (immemorial) prescription begins immediately with the fact in which (quasi-)possession consists,⁵⁰ and is to be inferred from the tacit consent given by others, even if out of fear. Freitas is resorting to a form of acquisitive prescription created by Justinian, known as *longissimi temporis praescriptio*. As *iusta causa* was not a requirement for this kind of prescription, Roman jurists believed that, thirty years having elapsed, immemorial prescription applied even if the thing had been originally stolen. Similarly, Freitas thinks that immemorial prescription applies, even when the non-exercise of a right by others is explained by fear of armed resistance.⁵¹ In the case of dominion over the seas, as it was a real right that prescribed on behalf of Portugal, prescription unequivocally extends to all other nations. But since in this situation possession and title did not concur, it would be juridically more accurate to say that the Portuguese have acquired their exclusive right of navigation to the East Indies through custom.

With these last contentions Freitas concludes an argument that, despite all its vacillations, constitutes a powerful response to Grotius as well as an earlier and more orderly exposition of many of the themes later made famous by Selden in his celebrated vindication of exclusive fishing rights in the North Sea. It is thus to the Portuguese friar, not to the English jurist, that we owe the earliest systematic attack on the ideal of the freedom of the seas in the name of a sea-born empire. That international law came largely to endorse Grotius's standpoints and the history of ideas to disclose the indebtedness of the new science of morality to Grotius and his immediate follower, John Selden, should constitute no reason for Freitas's treatise to recede from our view.

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⁵⁰ Negative rights are rights that prohibit something (such as the well-known servitude *non officiendi luminibus*). Conversely, positive rights are rights that allow us to do (or not to do) something, as, for instance, navigating or fishing, and from whose exercise can follow a prohibition against others. As to real rights or rights *in rem*, they are rights availing against persons generally or the world at large, as in the case of a right not to be personally injured or a right to the ownership of property. Commonly, jurists consider these rights *in rem* to be negative.

⁵¹ See Freitas, *De iusto imperio*, II, ch. xiv, 195, n. 45.