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De Groot – A Founding Father of the Law of the Sea, Not the Law of the Sea Convention*

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Abstract
The present article examines if the principle of freedom of the high seas as formulated by Hugo de Groot still plays a significant role in international law. The article starts from an analysis of De Groot's ideas on the law of the sea and then turns to the freedom of the high seas in the modern law of the sea. In both cases, the legal framework is assessed against the background of the activities that require(d) regulation. Freedom of the high seas, although it has lost ground to other ordering principles, remains significant at the level of principles. However, at the level of designing an effective regime for current problems in oceans management, which to a large extent are caused by deficiencies in the enforcement scheme implicit in freedom of the high seas, the writings of De Groot, in whose time those activities did not require any significant measure of international coordination and cooperation, offer little assistance.

Keywords
freedom of the high seas, coastal States, flag state jurisdiction, international cooperation, law and international relations

Introduction

Hugo de Groot's *Mare liberum* is probably one of the best known publications on the law of the sea and international law in general.[1] When people learn that my work is concerned with the law of the sea, one surprisingly common reaction is a mention of the name of De Groot or the concept of

* The author would like to thank the editors of this special issue of *Grotiana* and Fred Soons for their comments on an earlier version of this article.

[1] For this article an English translation of *Mare liberum* has been used. This translation by Richard Hakluyt is included in D. Armitage (ed.) H. Grotius *The Free Sea* (Indianapolis: Liberty Fund, 2004) (available at <http://files.libertyfund.org/files/859/0450_eBk.pdf>; last accessed 4 December 2008) at pp. 1-62 (hereinafter in references identified as ML).

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freedom of the high seas. The only similar experience I have in this respect is telling you are from the Netherlands and the immediate reaction you get is 'Cruijff'. The fact that De Groot apparently evokes a similar reaction as this icon of popular culture, might suggest that *Mare liberum* is still the fountain of wisdom as far as the law of the sea is concerned. Having managed in the law of the sea for some time without ever having had to consult *Mare liberum*, that idea had actually never occurred to me and when I was asked by the editors of this special issue of *Grotiana* to write a contribution 'on the freedom of the seas principle today ..., against the background of Grotius's development and use of this concept'[2] I had some hesitance. However, the 'cult status' of De Groot and the possibility to finally take a closer look at *Mare liberum* and works of some of his contemporaries convinced me to accept the invitation.

The editors in particular requested to examine if the key notion of freedom of the high seas formulated by De Groot still plays a role in international law today and in the case of an affirmative answer to assess what this role consists of.[3] An answer to these questions first of all requires considering how these impacts are to be measured. The present article will first of all assess how the principle of freedom of the high seas was understood by De Groot. Next the present content of the principle, as reflected in the 1982 United Nations Convention on the law of the Sea (LOSC), will be considered. The freedom of the high seas no longer is the only major ordering principle of relevance to uses of the sea. To assess its present significance, it has to be viewed in that present-day context.

As the immediate cause for publication for *Mare liberum* – providing a legal justification for Dutch participation in trade on the East and West Indies[4] – shows, De Groot did not develop his argument in the abstract.[5] The factual

[2] E-mail of J. Nijman to the author of 31 August 2008 (on file with the author).

[3] *Ibid.*

[4] At the time the Dutch Republic and the Spanish Empire were involved in negotiations over an armistice in their decade-long conflict, which not only involved their territories in Europe, but also had acquired an important extra-European dimension (see *e.g.* J.I. Israel *The Dutch Republic and the Hispanic World 1606-1661* (Oxford: Clarendon Press, 1986), pp. 1-42. One of the obstacles to agreement was the Spanish demand of exclusive trade in the East and West Indies. *Mare liberum* was published to oppose this demand more effectively (J.K. Oudendijk *Status and Extent of Adjacent Waters; A Historical Orientation* (Leiden: A.W. Sijthoff, 1970), p. 15).

[5] Most of *Mare liberum* is actually not concerned with a discussion of the principle of freedom of the seas, but with refuting other arguments to deny the Dutch access to trade on the Indies.

context in which the principle of the freedom of the high was developed and in which it operates today will also be compared to assess how differences in those two frameworks have impacted on the significance of the freedom of the high seas as an ordering principle in international law. After these various issues have been considered, the article will formulate some tentative answers on the questions of the editors of this special issue of *Grotiana*.

De Groot's freedom of the high seas

Hugo de Groot expressed his views on the principle of freedom of the high seas not only in *Mare liberum*, but also in a number of his later publications, including his principal work *De iure belli ac pacis*[6] and a reply to a criticism of *Mare liberum* by the Scottish lawyer Welwood.[7] Although there are some differences in the focus of these works, especially De Groot's reply to Welwood offers an illuminating elaboration of his views on the principle of freedom of the high seas.[8]

De Groot's basic premise is straightforward. The sea is common to all nations and all nations have equal rights to use the oceans for navigation, fishing or other activities.[9] Further content is given to this point of departure by its justification and delineation.

The common property regime of the oceans is explained by the fact that things that are never occupied do not have an owner, because all property has its beginnings in occupation.[10] In the case of the oceans, occupation is

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[6] For this article an English translation of the relevant parts of *De iure belli ac pacis* has been used (On the Law of War and Peace (Whitefish: Kessinger; 2004)) (hereinafter in references identified as IBP).

[7] English translation in H. Grotius 'Defense of Chapter V of the *Mare Liberum*' in Armitage, note 1 at pp. 77-130 (hereinafter in references identified as DML). The Chapter of Welwood's book on the law of the sea *An abridgement of all sea-laws* to which De Groot's Defense is a reaction is published in Armitage, note 1 at pp. 65-74 ((hereinafter in references identified as AS).

[8] For a discussion of the impact on De Groot's works of other publicists and State practice see *e.g.* M. Brito Vieira, 'Mare Liberum vs. Mare Clausum: Grotius, Freitas and Selden's debate on dominion over the seas', *Journal of history of ideas* 64 (2003), pp. 361-377; M. J. van Ittersum, 'Mare Liberum versus the Propriety of the Seas', *Edinburgh law review* 10 (2006), pp. 239-276; B. Johnson Theutenberg, 'Mare Clausum et Mare Liberum', *Arctic*, 37 (1984), pp. 481-492; Oudendijk, *Adjacent Waters*; C.G. Roelofsen, 'The sources of mare liberum; the contested origins of the doctrine of the freedom of the seas', in *International law and its sources: Liber Amicorum Maarten Bos*, ed. by W.P. Heere (Deventer: Kluwer Law, 1989), pp. 93-124.

[9] See *e.g.* ML, pp. 11, 25 and 28.

[10] *Ibid.*, p. 25.

impossible. They are so infinite they cannot be possessed.[11] This argument is further elaborated in De Groot's reply to Welwood and *De iure belli ac pacis*. Occupancy is only possible of things that can be confined within certain permanent bounds. No sovereign owns all of the shores of the oceans, and the land in any case is girdled by the sea and not *vice versa*.[12] Indeed the land is not the entire limit of parts of the sea, which in the mind constitute a certain entirety *per se*, such as the Spanish, French or Cimbrian Sea, for no such sea is surrounded completely by land.[13]

De Groot rejected the possibility that the extent of property over the oceans might be expressed by reference to imaginary lines, as had, for instance, been employed by Spain and Portugal to define their respective spheres of interest.[14] However, his argument on this point shows that such a division in principle is not excluded. De Groot submits that if it were allowed to use imaginary lines to divide the seas and that exercise would be sufficient for possession 'the geometricians should long since have taken away the earth from us and the astronomers the heaven'.[15] An absurdity of course. On the other hand, States could agree, and they have done so with frequency in the modern law of the sea, that it would be allowed to use imaginary lines to divide the seas and that this exercise would be sufficient for establishing rights. That possibility is in fact recognized by De Groot. States can agree upon the use of imaginary lines to define sea areas, but such agreement will only be binding on the States concerned.[16]

One argument of De Groot to reject imaginary lines sounds very familiar in a period in which coastal States have attempted to continuously extend their rights further seaward:

> And what reason operates, if the sea can be occupied up to one hundred miles, to prevent it being occupied up to 150, thence to 200 and so on? If water is property

[11] *Ibid.*

[12] DML, pp. 110-111 and 115; IBP, p. 63.

[13] DML, p. 115.

[14] ML, p. 34. The view that imaginary lines could be used to this effect was for instance convincingly argued by John Selden in his *Mare Clausum*, which takes issue with the main premises of De Groot's *Mare liberum*. For the present article the 1652 English translation of *Mare Clausum*, published in a facsimile edition has been used (J. Selden *Of the Dominion Ownership of the Sea* (Clark: The Law Book Exchange, 2002) (hereinafter in references identified as MC). His comments on De Groot are at Book I, Ch. XXII, pp. 138ff.

[15] ML, p. 34.

[16] *Ibid.*, p. 31; AS, p. 112. The same holds true for modern day limits of coastal State maritime zones, which are all based on "imaginary" lines. The development of general agreement on the maximum breadth of coastal State zones has been an interaction between the rules contained in multilateral conventions and State practice.

> up to the 100th mile, why can not the water which is immediately contiguous to the property be equally property?[17]

The other fundamental reason *Mare liberum* provides for the common property regime of the oceans is that they can be used by all without changing their properties.[18] This proposition is further elaborated in *De iure belli ac pacis*:

> For the magnitude of the sea is such, as to be sufficient for the use of all nations, to allow them without inconvenience and prejudice to each other the right of fishing, sailing, or any other advantage which that element affords.[19]

As can be appreciated, the emphasis in *De iure belli ac pacis* is on the right of use and no longer on the immutable nature of the common property. Contemporaries of Grotius had in fact already pointed out that human activities did have an impact on the seas and oceans. For instance, Selden rejected the argument of inexhaustible abundance, observing:

> But truly wee often see, that the Sea it self, by reason of the other men's Fishing, Navigation, and Commerce, becom's the wors for him that own's it, and others that enjoie it in his right; So that less profit ariseth, then might otherwise bee received thereby. Which more evidently appear's in the use of those Seas, which produce Pearls, Coral, and other things of that kinde.[20]

Similarly, Welwood in his criticism of *Mare liberum* observed:

> For whereas aforetime the white fishes daily abounded even into all the shores on the eastern coast of Scotland, now forsooth by the near and daily approaching of

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[17] DML, p. 127. De Groot's remarks about the instability of a regime based on imaginary lines to define the extent of coastal State jurisdiction is borne out to an extent by the pressures from various quarters on the jurisdictional limits contained in the present legal regime. Coastal States have attempted to further enlarge their rights in existing zones and have sought to expand the outer limits of these zones seaward (for a discussion see *e.g.* E. Franckx 'The 200-mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage?', *German Yearbook of International Law* 48 (2006), pp. 117-149; B. Kwiatkowska 'Creeping Jurisdiction beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice, 1991 (22) *Ocean Development and International Law* 22 (1991) pp. 153-187; B.H. Oxman 'The Territorial Temptation: A Siren Song at Sea', *American Journal of International Law* 100 (2006) pp. 830-851). On the other hand, most claims to a territorial sea beyond 12 nautical miles were rolled back after the international community reached agreement on that figure as the maximum breadth of the territorial sea in the 1970s.

[18] ML, p. 24. The text reads in relevant part: all those things which are so ordained by nature that anyone using them may nevertheless suffice others whomsoever for the common use are at this day (and perpetually ought to be) of the same condition whereof they were when nature first discovered them (see also DML, p. 122).

[19] IBP, p. 63.

[20] MC, I.22, p. 141.

> the buss-fishers the shoals of fishes are broken and so far scattered away from our shores and coasts that no fish now can be found worthy of any pains and travails, to the impoverishing of all the sort of our home fishers and to the great damage of all the nation.[21]

Two themes are apparent from these criticisms. Fishing (and other activities) may have negative impacts on the amenities of the oceans. Secondly, these criticisms were largely inspired by economic considerations and also included activities (trade and commerce) that did not affect the amenities of the oceans.

The underlying economic concerns of these criticisms of *Mare liberum* reflect conflicting views on international economic policy. De Groot took a decidedly 'liberal' view in this respect, which is no doubt largely explained by the competitiveness of Dutch shipping and fishing in the first half of the 17th century. One of the arguments in *Mare liberum* to justify access of the Dutch to trade on the Indies was that a monopoly on trade would lead to abuse, and competition to cost-efficiency and advantage for buyers.[22] Similarly, in replying to Welwood, De Groot espouses the idea of economic competition and competitive advantages:

> If the British please, they can not only fish beside the Batavians, but also outstrip the Batavians, since they themselves are nearer the sea where fish are plentiful.[23]

The above also points out that one should not confuse De Groot's idea of common property with the present notion of common heritage. The latter implies that the use of resources themselves should lead to benefits for all.[24]

De Groot did not accept the point of Welwood that fishing had led to a depletion of fish shoals.[25] However, the discussion by De Groot of cases of common property regimes provides strong arguments on the possible preferences of De Groot to resolve the problems resulting from the impairment or depletion of common pool resources in the oceans: they should be reduced to individual ownership.[26] In *Mare liberum* De Groot quotes with approval from Vásquez who recognizes that the basis for control of individual states over natural resources is that they may be depleted: '[f]or it is manifest that if many hunt on the land or fish in a river, the forest will soon be without

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[21] AS, p. 74.
[22] ML, pp. 10 and 55-56.
[23] DML, p. 123; see *ibid.* for a further elaboration of the point.
[24] On the common heritage principle in the law of the sea see further *infra*.
[25] DML, p. 123.
[26] See *e.g.* ML, pp 46-47; DML, pp. 87 and 116.

game and the river without fishes'.[27] In his argument with Welwood, De Groot observes:

> In the case of movable things, the cause of instituting property was that such things perish by use. Hence quarrels could scarcely fail to arise from common ownership, since this one would use a thing so that another having as much right in the same thing would not be able afterwards to use it. Moreover, in matters of the soil there was another reason, because things of the soil do not bear fruit 'to a great extent' (which is sufficient in moral matters) unless stirred up by human labor and industry. Here again it was proper that fights be feared as a result of common ownership, since the industrious and hard-working men would be sorely tried that others whose labor was by no means equal bear off as much or even more of the fruits.[28]

His conclusion in respect of these points as they relate to the sea seals the argument:

> Now both these reasons fail in the case of the sea. For by using, the sea itself is not at all impaired, and it needs no cultivation to bear fruit. Therefore the sea deservedly remained common.[29]

Obviously, this is no longer so and the sea no longer is wholly common. Most marine resources have been removed from the pool of common property through the extension of coastal State jurisdiction over areas adjacent to the coast in the second half of the 20th century.[30]

De Groot's freedom of the high seas is not an unrestricted liberty to use or abuse.[31] The above quotation from *De iure belli ac pacis* on the nature of this

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[27] Quoted in ML, p. 47.

[28] DML, p. 116.

[29] *Ibid.*

[30] A similar conclusion on the implications of De Groot's views is reached by Jaenicke: 'It can justifiably be argued that the institution of the fishery zone was supported by cogent reasons and inspired by considerations of equity in the attribution of a scarce resource, and thus defensible under Grotian standards of natural law', G. Jaenicke, 'Commentary', in *International law and the Grotian heritage: a commemorative colloquium held at The Hague on 8 April 1983 on the occasion of the fourth centenary of the birth of Hugo Grotius* (The Hague: T.M.C Asser Instituut, 1985), pp. 94-98 at p. 95). However, Jaenicke does not seem to consider that De Groot's view on the two alternative property regimes is the essential aspect in this connection as he further concludes that 'the heavy balance in favour of the fishing interests of the coastal State remains a flaw in this concept' (*ibid.*). It is difficult to see how the balancing of conflicting interests in one management regime fits the Grotian binary opposition of common and individual property.

[31] See also M.C.W. Pinto, 'The law of the sea and the Grotian heritage', in *International law and the Grotian heritage: a commemorative colloquium held at The Hague on 8 April 1983 on the occasion of the fourth centenary of the birth of Hugo Grotius* (The Hague: T.M.C Asser Instituut, 1985), pp. 54-93 at pp. 70-71.

freedom suggests that he considered that the exercise of rights should not lead to inconvenience and prejudice of others. That view is confirmed by his discussion of constructions on the shore, which according to De Groot falls under the same open access regime as the oceans. Constructions are allowed as long as they do not impair the common use of the shore.[32] The temporary occupation of certain sea areas in connection with specific activities such as fishing or navigation is also in accordance with the exercise of freedom of the high seas.[33]

De Groot's remarks on the potential impact of navigation on fish stocks in his discussion of the Dutch fishery in the North Sea seem to contradict the view that the exercise of rights should not prejudice the rights of others. If the dispersion and scattering of fish were to result from navigation one:

> should prohibit navigation up to the shore. But it is well known in law that those things which happen on account of the destination "and *per accidens*" are never imputed to those using their own right.[34]

This binary opposition between freedom and prohibition is a far cry from the complex regulatory regimes presently in place for international shipping. The justification for allowing these negative impacts of an activity on the sea and its resources relates somewhat uncomfortably to De Groot's general argument on no prejudice and non-impairment. The fact that the North Sea fishery was a mainstay of the Dutch economy may explain De Groot's vigilant defense of this particular interest.

An important corollary of the freedom of the high seas is the principle of exclusive flag State jurisdiction on the high seas. In accordance with this principle only the State, which has registered a ship and has accorded such a ship the right to fly its flag, is entitled to exercise enforcement jurisdiction over that ship on the high seas. This regime will be effective if flag States effectively exercise jurisdiction over ships flying their flag. The absence of effective jurisdiction on the high seas was less problematical in an epoch in which vessel source pollution and overfishing were largely inexistent. At present the failure of many flag States to effectively exercise jurisdiction is one of the major shortcomings of the high seas regime.[35]

Although the principle of freedom of the high seas is applicable to all the oceans, De Groot recognizes that there are certain spatial limitations. As is

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[32] See *e.g.* ML, p. 27.
[33] DML, p. 123.
[34] *Ibid.*
[35] See also *infra.*

observed in *Mare liberum*: 'the controversy is not of a bay or narrow strait or concerning all that may be seen from the shore'.[36] No further elaboration is provided to which area this observation applied. Although it is possible to argue that this view contributed to the development of the territorial sea, there are two fundamental differences. De Groot does not consider that this concerns all near shore areas. Even in the case of islands, shoals and rocks fringing the coast, this in his view did not change the legal regime of the interjacent waters.[37] This would all the more be the case for the adjacent waters of coasts facing the open ocean. That is, unlike the case of the territorial sea, in De Groot's scheme only States in a specific geographical position would have rights over an adjacent belt of coastal waters. Secondly, De Groot considered that in the areas concerned, the State should exercise jurisdiction to protect freedoms of the high seas, not to limit them.[38] This concept has little in common with the concept of the territorial sea, over which the coastal State has sovereignty and other States only a right of innocent passage for their ships. De Groot's discussion of the rights of the coastal State in adjacent waters shows that he did not turn a blind a eye to practical necessities, and allowed for certain derogations from freedom of the high seas. De Groot finds that it would undoubtedly be unjust to place any burdens foreign to the nature of the trade on goods carried by land, a river or any part of the sea.[39] However, 'if the sovereign incurs expense by providing security and protection to trade, he has a right to reimburse himself by the imposition of *moderate and reasonable* duties.'[40]

The freedom of the high seas at the beginning of the 21st century

The freedom of the high seas remained the major ordering principle for the oceans until approximately the middle of the 20th century. The most important

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[36] ML, pp. 32-33. The latter possibility is also mentioned in IBP, p. 74, where it is also noted that the right of property over sea areas can never take place where the sea is of such a magnitude, as to surpass all comparison with that portion of land it washes.

[37] DML, p. 112.

[38] See *e.g. ibid.*, pp. 127-128.

[39] IBP, p. 69.

[40] *Ibid.*, p. 70 (emphasis provided). A modern day equivalent of this approach is provided by article 26 of the United Nations Convention on the law of the sea, which provides that no charge may be levied upon foreign ships by reason only of their passage through the territorial sea. However, such charges may be levied as payment for specific services rendered to the ship. These charges moreover shall be levied without discrimination.

exception to its application was formed by the waters in the immediate vicinity of the coast. States had different views on the breadth of these territorial waters, which traditionally ranged from 3, 4 to 6 nautical miles, but claims to coastal State zones extending beyond that distance were limited[41] and claims to broader zones were generally met with opposition from maritime powers. The development of fisheries and off-shore oil and gas exploitation in the middle of the past century led to the first significant inroads in the traditional regime. After the Second World War, the International Law Commission (ILC) of the newly founded United Nations was charged with, among others, codifying and developing the law of the sea. The ILC not only considered the traditional regimes of the high seas and the territorial sea, but also looked at the development of a regime for the continental shelf and the fishing and conservation of living resources in the high seas.[42] One of the main purposes of the latter was to accommodate the interests of coastal States in areas adjacent to their territorial sea.

On the basis of the work of the ILC, the 1958 United Nations Conference on the law of the sea adopted four conventions on the abovementioned topics. The Convention on the high seas can be considered as a codification of the regime of freedom of the high seas as it then existed. The Convention on the continental shelf implied a significant limitation on that regime. Coastal States were accorded sovereign rights for exploiting the natural resources of the continental shelf beyond the territorial sea. This implied that this important economic activity was wholly excluded from the regime of freedom of the high seas. There had been some feeble attempts to create an international regime, but these were doomed from the beginning in view of the overwhelming support for the coastal State approach.[43]

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[41] This in general concerned claims to control activities which had a bearing on the territory of the State, such as smuggling.

[42] The codification of the law of the sea had also been considered at a conference in 1930 organized by the League of Nations, the predecessor of the United Nations. The work at that conference to a large extent had focused on the regime of the territorial sea.

[43] During the general debate on the draft articles on the continental shelf at the 1958 Conference, the Federal Republic of Germany introduced a proposal for an alternative regime for the exploitation of the continental shelf's resources (*United Nations Conference on the Law of the Sea; Official Records* Vol. VI: Fourth Committee (Continental Shelf) pp. 7-8, paras 1-5; the proposal is contained in *Federal Republic of Germany: Memorandum concerning draft articles 67 to 73* of 4 March 1958 (Doc. A/CONF.13/C.4/L.1; reproduced in *ibid.*, pp. 125-126). Germany considered that the proposal of the ILC detracted too much from the freedom of the high seas. The German proposal envisaged a regime, which would make that exploitation a regulated high seas freedom under which the coastal State should act on behalf of the international community. The coastal State would only bear responsibility for securing internationally agreed rules in

Coastal State interests also had a preponderant impact on the development of the regime for fisheries. Initially, the 1958 Convention on fishing and conservation of the living resources of the high seas was mostly aimed at safeguarding the interest of the coastal State in fisheries in the high seas adjacent to its coast. The failure of the international community to agree on the breadth of the territorial sea and an adjacent fisheries zone at the 1958 and 1960 United Nations Conferences on the law of the sea - in 1960 a proposal on a 6-nautical-mile territorial sea and an additional 6 nautical miles for an adjacent fishing zone fell one vote short of being adopted - and the continuously increasing impact of fishing on the high seas on coastal State interests eventually led to a much more radical departure from the traditional regime.[44] The third United Nations Conference on the law of the sea, which met between 1973 and 1982, led to the adoption of the 200-nautical-mile exclusive economic zone, in which the coastal State has, among others, sovereign rights over living and non-living resources. That compromise is included in the United Nations Convention on the law of the sea (LOSC), which to this day remains the generally recognized international legal framework for the management of the oceans. Although the Convention gives coastal States certain rights in respect of certain fisheries beyond 200 nautical miles and coastal States have exerted pressures to extend their fishery jurisdiction beyond that limit, it until now seems that this line in the water is here to stay for at least the foreseeable future.

The LOSC has also led to further limitations on the freedoms of the high seas as concerns the exploitation of the mineral resources of the seabed. On the one hand, the Convention addresses one of the shortcomings of the Convention on the continental shelf, which had not succeeded in securing agreement on clearly defined outer limits of the shelf. The LOSC contains substantive rules and procedural mechanisms, which should lead to generally binding and final limits. These limits probably in many, if not most cases, will be located significantly seaward of what originally were perceived to be the possible limits of the continental shelf.[45]

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respect of installations which would be closest to its coast. The German proposal was immediately rejected by a large majority of the participants in the Conference (see *ibid.*, pp. 9-30).

[44] Adoption of the '6 plus 6' proposal by a narrow margin at the 1960 Conference would in all likelihood not have stopped the drive for extended coastal State jurisdiction at the 12-nautical-mile limit.

[45] See further A.G. Oude Elferink, 'Article 76 of the LOSC on the Definition of the Continental Shelf: Questions concerning its Interpretation from a Legal Perspective', 2006 (21) *International Journal for Marine and Coastal Law* 21 (2006) 269-285 (at pp. 270-274).

On the other hand, the seabed and subsoil beyond national jurisdiction, referred to as the Area in the LOSC, have been 'internationalized'. Part XI of the Convention sets up the regime for the Area. The Area and its mineral resources are declared to be the common heritage of mankind. The mining of these resources is to be carried out for the benefit of mankind as a whole. Mining activities in the Area under this regime are no longer part of the freedom of the high seas. Mining in the Area can only take place in accordance with sections 3 and 4 of Part XI, which set up rules for exploitation of the mineral resources of the Area and establish an international regulatory body, the International Seabed Authority (Authority), which is required to act on behalf of mankind. The regime contained in Part XI has not replaced the regime of the high seas in its entirety. Freedoms of the high seas may also be exercised in the Area to the extent this is done in accordance with the regime of Part XI. For instance, marine scientific research in the Area remains a freedom of the high seas, to which certain additional conditions attach as compared to the water column of the high seas.[46]

The negotiations over the regime for mining in the Area at the third United Nations Conference on the law of the sea took place at the time the developing States were espousing the idea of a new international economic order, which should lead to more equitable economic relations between developed and developing States. The idea of a new international economic order entailed less room for market mechanisms and a larger measure of regulatory intervention of States. For developing States, the negotiations over the regime for deep seabed mining were to become a showcase for the idea of a new international economic order. The outcome of these negotiations, after a protracted debate, as contained in Part XI of the LOSC, contained many elements of an interventionist policy for deep seabed mining.[47] For many developed States, the regime of Part XI was unacceptable and they refrained from becoming a party to the Convention, threatening the universal character of the regime contained in it. In the 1990s, at a time when the importance of market oriented policies for the international economy had become the generally accepted standard, the regime contained in Part XI was substantially modified.[48] This has led to a general acceptance of the LOSC, which at present has almost 160 parties. The debate of the regime for deep seabed mining

[46] See LOSC, articles 87, 143, 256 and 257.

[47] For an overview of the negotiations on and contents of Part XI see *e.g.* R.R. Churchill and A.V. Lowe *The law of the sea* 3rd edn (Manchester: University Press, 1999), pp. 224ff.

[48] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 of 28 July 1994.

illustrates the obvious point of the impact of policy preferences on international law. In a sense, the present regime for deep seabed mining could be characterized as managed freedom, attaching significant importance to the capacities of individual States and companies to explore and exploit resources and de-emphasizing the distributive elements of the regime as originally envisaged.

Notwithstanding the considerable limitations the LOSC has put on the application of the regime of the high seas *ratione loci* and *ratione materiae*, the LOSC also bears witness to the continued relevance of the freedom of the high seas. The regime of freedom of the high seas applies to all parts of the sea that are beyond the outer limit of the exclusive economic zone, or in a case in which a coastal State had not established that zone, the other limit of the territorial sea, which under the Convention now has a maximum permissible breadth of 12 nautical miles.[49] Moreover, high seas freedoms related to international communication continue to exist in the exclusive economic zone. Article 58(1) of the Convention provides that in the exclusive economic zone, all States enjoy, subject to the relevant provisions of the Convention, the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, and compatible with the other provisions of the Convention. The importance of communication to the international community indicates that it remains desirable that a balance is found between the interests of the coastal State and the international community at large. In this connection freedom of the high seas can be expected to remain relevant as a legal principle and ideological justification.

Part VII of the LOSC containing the regime of the high seas also indicates that basic premises of the traditional regime of the high seas remain relevant. The high seas are open to all States and high seas freedoms shall be exercised by all States with due regard for the interests of other States. As Part VII also indicates, on the high seas the principle of flag state jurisdiction remains paramount. Only in a number of specifically defined cases, States can exercise enforcement jurisdiction over ships which fly the flag of another State on the high seas.

It would be a mistake to conclude at this point that the continued relevance of the traditional core of the regime of freedom of the high seas is testimony to its efficacy. The abysmal record of flag State enforcement in respect of labor standards, vessel source pollution, safety of navigation and illegal fishing

[49] However, the latter case at present is only relevant for the Mediterranean Sea.

activities indicates quite the contrary. The traditional regime rather seems to persist because there is no readily available and generally acceptable alternative overarching regime. At the same time, recent developments indicate that a solution to the abovementioned problems will not be found by fine tuning the regime of freedom of the high seas, while relying exclusively on flag State control and enforcement. The LOSC already recognized that fact by providing for enhanced possibilities of coastal State and port State jurisdiction over vessel source pollution. Recent developments in the field of fisheries also indicate that States seek to exploit the additional possibilities port State enforcement has to offer.

The LOSC also attempted to put more emphasis on international cooperation in the field of high seas fisheries, but basically its provisions in this respect are hortatory rather than mandatory. The 1995 Fish Stocks Agreement seeks to address the latter shortcoming and has made participation in regional cooperation a precondition for participation in a fishery.[50] Developments after the adoption of the Fish Stocks Agreement suggest that this has now become a generally recognized principle, reflective of a general trend towards coordination of high seas fishing activities through cooperation. At the same time, the widespread opposition to the Fish Stocks Agreement's limited exceptions to high seas non-flag State enforcement indicates that support for the traditional regime of flag State exclusivity remains strong.

Developments in other areas of the law of the sea show similarities to the regime for fisheries. Emphasis is placed on international cooperation in the establishment of rules and regulations. The recent developments in respect of the designation of marine protected areas in areas beyond national jurisdiction (the high seas and the Area) illustrate the complexities involved. Work on this issue at the regional level has advanced most in the framework of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention). Various issues need to be considered in this connection. For instance: there are a large number of organizations which have a regulatory competence for specific activities in areas beyond national jurisdiction included in the regulatory area of the OSPAR Convention and the OSPAR Convention only has a limited number of States parties and it can in any case not legally bind States that are not a party to it. It will be apparent that an answer to these intricate legal questions is not to be found in *Mare liberum*.

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[50] United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

Concluding remarks

It should by now have become clear what inspired the choice of the article's title. The use of the indefinite article preceding 'founding father' obviously is a conscious choice. De Groot undoubtedly has made an important contribution to the initial stages of the development of the law of the sea, as well as international law in general, but his work should be read in context. As has been observed in one of today's standard works on the law of the sea:

> [*Mare liberum*] was met by spirited responses from writers such as the Scot Welwood in his *Abridgment of all Sea Lawes* (1613) and the Englishman Selden in his *Mare Clausum* (1635). Such literary exchanges did much to clarify understanding of the issues involved in the law of the sea, and to refine the concepts upon which it was based.[51]

The legal framework for ocean management contained in the LOSC has in large part been developed by limiting the freedom of the high seas. The latter regime remains most of all relevant to international communication, De Groot's principal focus in *Mare liberum*. However, also in that case existing problems cannot be resolved by relying solely or even mainly on the regime of freedom of the high seas with its emphasis on flag State control and enforcement.

Interestingly, De Groot's work foreshadows the modern-day development towards extended coastal State jurisdiction over resources, which previously were common property. De Groot did not envisage that such a development would occur in the oceans, but he was clearly aware that the exploitation of common pool resources might lead to inefficiency and wastefulness. He advanced the view that such resources, to be effectively managed should be reduced to individual ownership. The idea that such resources could be brought under a coordinated management regime of the interested States or the international community as a whole is foreign to De Groot's thinking. This is not surprising, as the idea for such regimes only developed at a much later stage.

De Groot's writings and those of his contemporaries have little interest for addressing the challenges facing the modern law of the sea. Neither freedom of the high seas nor coastal State jurisdiction work miracles. Problems in respect of the former regime were already noted above. Extended coastal State jurisdiction has for instance not been much more successful in managing fisheries, basically leading to a replay of the problems involved in the high seas

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[51] Churchill and Lowe, *The law of the sea*, p. 4.

regime at the national level. The complexity involved in the regulation of many ocean uses indicates that what is most of all required is addressing the shortcomings of both regimes. International cooperation and coordination and accountability will be essential in that respect.

What then is the present significance of *Mare liberum*? For one thing, *Mare liberum* provides a classical case study on the relationship between legal argument and political interests.[52] *Mare liberum* was mainly written as a defense of the trading interests of the Dutch Republic. The success of the argument of *Mare liberum* is in large part explained by the subsequent ascendancy of trading (and naval) interests within the international community at large as compared to more narrowly focused coastal State interests.[53] Only in the 20th century the balance between these interests shifted far enough to the other side to allow a gradual erosion of especially freedoms of the high seas concerning resource exploitation. In any case, for a better understanding of the present structure of the law of the sea, De Groot and his contemporaries provide a logical starting point.[54]

The fact that De Groot's *Mare liberum* still appeals to the imagination is evidence of the strength of a cogently and concisely formulated idea. In an age in which international communication is more important than ever, the concept of freedom of the high seas, with its promise of combating unwarranted government interference, is bound to remain a powerful legal and ideological tool for rejecting attempts to elaborate stricter regulations to protect the global commons or coastal State interests as threatening international communication and economic growth.

[52] See also Van Ittersum, 'Mare Liberum versus the Propriety of the Seas', p. 269.

[53] See also Churchill and Lowe, *The law of the sea*, pp. 204-205; Johnson Theutenberg, 'Mare clausum et Mare liberum', p. 492.

[54] See also Churchill and Lowe, *The law of the sea*, p. 4; Oudendijk, *Adjacent Waters*, p. 11.