

**MARE LIBERUM, FREE TRADE, SOVEREIGNTY AND NATION-STATES:
REFLECTIONS ON GROTIUS IN AN INFORMATION AGE**

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I. Introduction

In his presentation at the Conference, Judge Maxwell Cohen stated that Grotius bridged the gaps between medieval and modern law. Medieval concepts and law were no longer relevant. Focusing on Grotius' other major work, *De jure belle ac pacis*, Cohen asked what would have been Grotius' response to just and unjust wars which could involve nuclear war and its irreversible consequences. Other participants addressed the philosophical, cultural, social and also legal aspects of Grotius and his time.

The purpose of this paper is to specifically focus on trade and economic aspects of Grotius' work and his time which are deemed to be very relevant to today. Not only did Grotius bridge the gaps between the medieval and modern law, he also very much helped to bridge the gap between the medieval and modern world in economics, trade and commerce. Consequently, one can add the question of what would have been Grotius' response to the concept of monolithic nation states, the role of national boundaries in restricting trade, centralization versus decentralization in light of the waning away of the Industrial Age and the emerging Information Age wherein the nation-state with physical boundaries may well be as irrelevant or obsolete a form of political organization as the feudal system had become in Grotius' time.

This paper is basically divided into three parts. The first part discusses the context and purpose of *Mare Liberum*. The second part is a discussion on a number of key aspects of *Mare Liberum* that are relevant to today. The third part consists of a number of reflections on Grotius' work in light of changes being brought on by the emerging Information Age.

II. The Context and Purpose of *Mare Liberum*¹

Mare Liberum was first published anonymously in November, 1608 although it was an open secret that its author was the young Dutch lawyer and scholar, Hugo Grotius. It was not until 1868 that it was discovered that *Mare Liberum* was but a chapter, i.e.,

Chapter XII, of a major treatise written by Grotius in 1604-1605 titled *De Jure Praedae Commentarius*, [Commentary on the Law of Prize and Booty]. As such, his greatest work *De Jure Belle ac Pacis* which appeared in 1625 was not a hurried treatise but must have represented more than twenty years of study, experience, observation and reflection conditioned by the fact that at the time he was in exile in France under the protection of the French monarch. While *De Jure Belle ac Pacis* addresses questions of eternal values, the laws of nature and law of peoples, *De Jure Praedae* is much more down to earth. *Mare Liberum* was written in the style of a lawyer's brief or plea. The reason for this was the following incident.

At the beginning of the sixteenth century the Spaniards claimed the water and lands of the Pacific Ocean and the gulf of Mexico while the Portuguese in like manner claimed the Atlantic Ocean south of Morocco and the Indian Ocean. Both countries sought to exercise their sovereignty by excluding all others from entering or navigating these waters. In this they had both tradition and the spiritual powers on their side. Their claims were based on the famous Donation of Pope Alexander VI in the Papal Bull of May 1493 (modified 7 June, 1494 by the Treaty of Tordesillas).

In 1598 the Dutch established themselves on the island of Mauritius and soon also had settlements on Java and the Moluccas, sending as many as 25 ships a year. The Dutch East India Company formed in 1602, in sending its vessels to trade in the East Indies, began competition with the Portuguese.

The Portuguese saw the Dutch as intruders and pirates and handled them accordingly. Many individual Dutch shippers suffered. This was the main reason for the founding of the Dutch East India Company. It received letters patent which granted the Company the right to trade, establish a Dutch presence, build forts, recruit soldiers, and conclude treaties with the local rulers.

Although the Dutch were at war with Spain under Philip II who had conquered Portugal, the Dutch were not at war with the Portuguese. As a matter of fact, the Dutch assisted the English and the Portuguese in their failed attempt to take Lisbon and incite a revolt against the Spanish. The States-General had always maintained a clear *de jure* and *de facto* distinction between

the Spaniards and the Portuguese and gave clear instructions that the Dutch not take any aggressive actions in the East Indies against the Portuguese. However, incidents started to occur of Dutch captains, contrary to their orders, attacking and seizing Portuguese ships.

In February 1604, Jacob van Heemskerck, already a Dutch naval hero, attacked and captured the St. Catherine, a large Portuguese ship of 700 lasts off the island of Tiaman. By July the prize and cargo had reached Amsterdam, and the cargo was put up for sale by the Admiralty on 15 August. Nevertheless, law and custom dictated that the Admiralty start a legal process for the allocation and division of the prize. The grounds on which the prize was directed are the same as those noted in *Mare Liberum*. This has led a number of historians to conclude that Grotius was in the employ of or counsel to the Dutch East India Company when he wrote his *Mare Liberum*.

While the long term impact of *Mare Liberum* has been rather profound, its original purpose was much more practical, namely, to put forward a case whereby a prize taken without a state of war existing between the two jurisdictions involved, i.e., the States-General and Portugal, could be claimed and properly divided among the three claimants, i.e. Heemskerck, the Dutch East Indian Company and the revenue/customs authority of Holland. The case before the Admiralty was basically one of legalizing an illegal or unprecedented act, i.e. the forcible seizure of a ship without an existing state of war. Consequently, in the arguments made to the Admiralty in *Mare Liberum*, one finds a complete review and analysis of the existing legal-political-economic system and thought at the time, the main arguments being that this system was obsolete, contrary to natural law, without foundation and in much need of change or replacement. The key arguments of *Mare Liberum* relevant to our situation today are presented below.

The value of the prize was rather enormous and generated the same level of enthusiasm as did the capture of the "Silver-fleet" by Piet Hein a quarter century later. The captured cargo consisted of valuable silks and large quantities of fine porcelain of which the States-General appropriated some dinnerware service sets to give as presents to the rulers of Europe, not to mention large sums of specie, i.e., as high as the equivalent of \$400,000,000 Canadian today.²

Before going on to discuss *Mare Liberum*, one important fact should be noted. Not all the Dutch were pleased with the capture of the St. Catherine. As a matter of fact, a number of shareholders in the Dutch East India Company protested against this action which went against the letter and spirit of the Company's original charter. Some gave their share of the prize to the poor, others refused to accept their share. There were even some who sold their shares in protest. Mennonites and libertines who were against violence and plunder were the majority of those who sold their shares in the Dutch East India Company now that it had moved from being a purely (peaceful?) commercial venture to one which obtained greater profit from privateering.

The context thus for *De jure praedae* and *Mare Liberum* is that of the Dutch East India Company which in concert with the States-General, decided to carry on war ("undeclared") in the Indies and to enrich itself with the spoils. Because the legality of this course of action was contested in the Netherlands as well as Europe and conscientious objections were raised to this link between war and trade, an argument or dissertation was needed to justify this new course of action. To Grotius who had just reached the age of twenty-one and was practising as a lawyer in The Hague, but found daily practice too mundane complaining that it was thankless and without prestige, the opportunity to write such a treatise must have seemed a godsend. It is somewhat ironic that the trigger for Grotius' great contribution to the development of what later became known as "international law, was his defense of an "illegal" act as a paid counsel.

III. Aspects of Grotius' *Mare Liberum* and his Time Relevant to Today

A. Grotius and Free Trade

The oil crisis, the recession of the early 1980s, the massive debt accumulated by the Third World in ill-fated attempts to industrialize, the growing importance of computer-communication-information (CCI) technologies, the emergence of global markets and enterprises, the increasing social unrest caused in part by job loss and job displacement have made it clear to individuals and policymakers alike that the world is changing and has changed. As national economies and their leaders are (desperately) trying to obtain a clear bearing on where they are, let alone

where they are going, one major economic policy question that they are facing is that of their economic or trading relation with the rest of the world. Pushed by local, regional and special interests to protect a specific industry or sphere of economic activity from competition, policymakers at the same time must consider the nation as a whole, the "commonweal", and are thus caught between the forces advocating "protectionism" and those advocating "free trade".

The arguments made for "free trade" are economic and based on the theory of comparative advantage which holds that it is for the benefit of both parties or nations to trade even though one may be the low cost producer of all items traded. In the industrialized world and especially in countries which depend on trade, such as Canada where exports account for over 25% of the Gross National Product, the "free trade" versus "protectionism" debate is at the forefront.

Grotius also found himself faced with a protectionistic world. Not only had emperors and kings of the day laid sovereign claim to most of the known world (or at least all that had value or potential), they even extended their sovereign protectionistic rights to cover the seas, i.e., the trade, transportation and distribution routes. In this they were supported by the spiritual authorities, i.e. the Pope.

Thus one of Grotius' main challenges was in effect to make a case for free trade. It is interesting to note that his basic arguments were not economic but moral. They were based on natural law which in turn was derived from God. In his *Mare Liberum*, Grotius makes the following arguments. They are paraphrased as follows:

- there are some things which every man enjoys in common with all other men and there are other things which are distinctly his and belong to no one else. Similarly nature has willed that some things which she has created for the use of mankind remain common to all and that others through the industry and labour of each man become his own;
- laws were given to cover both cases so that all men might use common property without prejudice to anyone else, and in respect to other things so that each man being content with what he himself owns might refrain from laying his hands on the property of others;

- every man is entitled to manage and dispose of his own property;
- all citizens have equal and indiscriminate right to use rivers and public places; and there is "not one of you who does not defend with all his might the freedom of travel and of trade", i.e., *commercandique libertatem*;
- nature has given all things to all men but not all in the same place nor do all men live in the same place;
- because men live far apart and everything is not found everywhere, it is necessary to transport things from one place to another. Out of this arose a method of exchange by which the lack of one person was supplemented by that of which another person had an oversupply. Hence commerce was born out of the necessities for the commodities of life;
- in order that trade might be carried on more easily, "somewhat later they [mankind] invented money".

Thus Grotius' argument for "free trade" is based on moral obligations (and natural law). Trade is the means whereby the wealth of the world, unevenly distributed, can be shared by all.

Further for Grotius "free trade" is not "trade for free" but unhindered trade. As such he directed his arguments against what would today be called non-tariff barriers and restrictions.

B. Grotius and *Mare Liberum*³

The waters of the world served as the transportation/distribution mechanisms by which commerce was carried out. Grotius pointed out that according to the law of peoples, i.e., *juris gentium* or "volkenrecht", things which are called "public" are the common property of all and the private property of none. Two examples are given, the air and the sea. The sea is held as being common to all because like air it is not susceptible for occupation and because it is so limitless it cannot become the possession of anyone.

Grotius did, however, recognize that small portions of the sea could be occupied, (e.g. harbours, fish ponds, breakwaters), and that such occupation was recognized as long as nothing was

built whereby the sea or channel would be rendered less safe for navigation. Similarly, the fruits of working the seas could become private property, i.e. "the sea is common to all but what my net and hooks have taken is absolutely my own".

In short, Grotius argued that everyone who prevented another from navigating, i.e., trading on, the seas had no support in law. Further, in light of the Spanish and Portuguese position he stated, "prescription raised by long possession is not customarily recognized as valid in the acquisition of places known to international law [*iuris gentium*] as "public".

During the feudal and agrarian system of the Middle Ages, seaborne trade had been limited as most ships sailed within sight of land and/or made journeys of just a few days crossing the Mediterranean, Baltic and North seas, sailing by "dead reckoning". In the fifteenth century advances in the art and science of navigation, especially those achieved by the Portuguese, opened up vast new worlds, and opportunities for commerce and wealth. Legal principles and customs which had served agrarian Europe were expanded and extended to cover territories and seas much vaster in size and great distances away. This "feudal" approach excluded peoples such as the Dutch who increasingly depended on commerce and navigation to survive and prosper.

Grotius clearly recognized that without a *Mare Liberum*, i.e., free and unhindered access to the seas, which were the new transportation/distribution routes, commerce and trade could not take place and grow.

C. Centralization versus Decentralization

During the seventeenth century, the Dutch struggled with the question of centralization versus decentralization, peace or war, religious tolerance or intolerance. Being previously a mixture of duchies, bishoprics, cities and other political entities of the Holy Roman Empire, the Dutch having made a break with the Empire sought for a political organization suitable to their temperament and interests.

In the Netherlands, Grotius took the side of the Remonstrants, i.e. those who advocated religious toleration and

decentralization of national power in favour of provincial sovereignty. The Remonstrants also were in favour of provincial sovereignty. The Remonstrants also were in favour of efforts for promoting peace with the Spanish. On the other side were the Counter-Remonstrants who favoured both a stricter or pure Calvinist church as the state church and a high degree of centralized power for the united provinces under the leadership of the House of Orange. They also wished to resume hostilities with Spain under the leadership of the Stadhouder.

It was a time when political and religious strife was common throughout Europe and of increasing claims by leading monarchs of absolute sovereignty. It was also a time when the prestige and capacity of the Church of Rome was in decline especially its symbolic authority over the whole of Christendom. Further feudal traditions were being displaced and the changing art and demands of warfare emphasized territoriality, centralization and professionalism of military power. In short, it was a time of transition between the old order and the new.

Grotius' reply was "whether wittingly or not, to provide the foundation for a new normative order in an international society that acknowledged the realities of an emergent state system while remaining faithful to the shared heritage of spiritual, moral and legal ideas that any Christian society could still be presumed to affirm as valid".⁴ This is the basic thrust of his great work *De Jure Belli ac Pacis* published in 1625.

D. Nation-State versus "People" (volk) and National Boundaries

Not only was Grotius an advocate of decentralization and religious tolerance, it should also be noted that when he talked about the law of nations or "*jus gentium*", he did not have in mind abstract juristic personalities called nations. For him mutual relations among states were based on decisions, actions or treaties made by individual persons acting in either their private or public capacity. For Grotius, "international law" [although he never used this term] was human relations taking place outside the bonds of municipal law of *jus civile*.⁵

Similarly, even though Grotius had a clear conception of sovereignty, he did not think of states as abstractions but rather of the duties of sovereigns as the duties of individual men.

Considering the importance of the debate on the concepts of nation, state, sovereignty, people, etc. in our own Canadian context as well as that in many other countries, the translators of Grotius from Latin into English have done a great disservice by using the term "nation" when Grotius himself used such terms as people or "populos". Thus his terms *juris gentium* or "law of the peoples" or "volkenrecht" instead were translated as law of nations.⁶ It was not until almost two hundred years later when economic and political trends were clearly in the direction of the nation-state, that the term "international law" was coined by Jeremy Bentham⁷. Because the English language (and history) is not familiar with the term "people" or "volk" in Dutch/German and "peuples" in French, it almost by definition excluded possibilities such as several peoples in one state, and a people covering the territory of several states, i.e., that there need not be a one-to-one link between state, nation and people.

This is one reason why in the debates in Canada about political identity unilingual English-speaking Canadians have great difficulty initially in understanding what was meant by "deux nations, un État". Today the term "two founding peoples" seems to be understood (and accepted).

Similarly, the term "nation" has been much misunderstood. In a seminal but not widely known work the great Dutch historian Huizinga convincingly makes the case that the term "nation" and the concept we ascribe to it today as a political entity is rather new. One does not find the term "nationalism" in France until 1812 and in England until 1832.⁸ More common were the terms *patria* or fatherland and *polis*, the city-state. *Patria* could contain more than one *polis*, (e.g. the Hellenic community). A *patria* could cover several regions, as with the concept found in the French term "pays".

The early uses of the word nation or *natio* were linked to *natus* and *natura* which indicated a wider and vaguer context than *gens* or *populos*. The Vulgate used the terms *gentes*, *populos* and *nationes* for the people of the Old Testament without any clear distinction or any administrative meaning. Throughout the Middle Ages the term "nation" had a vague meaning representing a commonality of "stam", i.e., race, tribe or clan, language, customs, and region in a very loose and undefined manner. Thus one reads of nations such as the Burgundians, the Bretons, the Bavarians, the French (Franken) etc. The term still had no administrative

or political meaning but was more that of a primitive "we-group", a concept which unfortunately thrived on enmity. The closer the neighbor the stronger the enmity, (e.g. Genoa and Pisa, the English and Scots, the Danes and Swedes, etc.).

The earliest areas of activity in Europe where the term "nation" came to have some administrative and legal meaning were the universities and commerce. In principal commercial cities such as Bruges, Bergen and Novgorod, the merchants formed themselves into "nations" as early as the fifteenth century. The advent of the Renaissance and humanism led to a revival and flowering of the concept of *patria* and it was during this time that the concepts of *patria* and nation were first linked to ideas of unity of state and interest of country, even though it was in the academic terms of antiquity (e.g. the rediscovery of Tacitus' *Germania*). By the time of Grotius the Renaissance patriotism and emerging national consciousness were starting to bloom. The period of Charles V, Philip II and Elizabeth I was marked by the linkage of the two concepts to politics and rulers, in the attempts by monarchs to move towards absolute sovereignty. The majesty of the crown, of the law, and the creation of states found its expression in the "godlike aura of the royal blood".⁹

The terms *patria* and *pater patriae* received new meaning and the term "patriot" was born. Noteworthy was the fact that when Oldenbarnevelt was about to be executed (Grotius was also in jail at that time for the same reasons) in the Binnenhof in The Hague he declared "Men do not believe that I am a traitor, I have dealt sincerely and devoutly as a true patriot".¹⁰

In England, the term "patriot" received a particular meaning, namely that of friend and lover of freedom (e.g. Lord Bolingbroke's "The Patriot King" and "On the Spirit of Patriotism" where he urged the King to join the people against the aristocratic parliament). However in England, the concept of patriot was soon ridiculed and demeaned, a trend typified by Dr. Johnson's statement directed to Boswell, "Patriotism is the last refuge of a scoundrel".

Yet it was the British concept of patriot, not the Germanic, which penetrated France, i.e. that of a true friend of the people and of freedom. Patriotism thus moved from that of love and ties to the fatherland, to a political striving for freedom of a people, equality under law, reform of the state, progress of society

and ultimately revolution. But in trying to formulate the brotherhood of man, tolerance, and equality, one fell back on the state as the guarantor. The patriotism of the French Revolution as expressed in the Marseillaise and the new "people's armies" soon became an expressive nationalism. It was a nationalism which sought for the first time to establish one's own land, one's own people in one's own "natural" frontiers, i.e., fixed geographic territory. *Patria* and *polis* had become joined as one in the nation-state.

Since now state, nation and people were to be joined as one with a national boundary to be defended by the people's armies of the Convention, it is not surprising that in this all-out effort, the interest and liberty of the individual were soon to be subjected to that of the new nation-state. This also included commerce and trade.

Already, the eighteenth century had been marked by continuous attempts to subjugate commerce and especially maritime trade to states of war between monarchs. This had led to the development of the doctrine of "rights of neutrals" in the last quarter of the century. It is therefore not surprising that the first striving for the establishment of "natural national boundaries" of the French Revolution found its economic expression in the Continental Blockade.

While the Congress of Vienna legitimized the concept of the nation-state, i.e., the integration of sovereignty, people and territorial boundaries into one political entity, the emerging industrial revolution both fed on and nurtured the nation-state concept as it gave guaranteed access to markets while at the same time through customs, tariffs and other barriers restricting the entry of the products of competitors. Colonies would absorb the surplus production. Just as the feudal system with its focus on landholding suited agrarian society, so the nation-state with its fixed national frontier and barriers serving as a captive market for infant industries was the political form of organization which was eminently suited to the Industrial Age. *Mare Liberum*, which had laid down the moral and legal arguments for the right to trade freely by individuals and peoples wherever located was forgotten by the nation-state. The interests of the individual, people, state and nation were to be one and the same.

The world economy of trade and commerce with a wide variety of functional economic areas, many overlapping, that had emerged

out of the feudal agrarian society of the Middle Ages linked via a *Mare Liberum* had become a world economy of national economies of an industrial age with the nation-state being predefined as the functional economic unit. It did not take long for the Darwinian concept of "survival of the fittest" to merge with the Spenglerian notions of race to give the nation-state and its goals the idealistic or spiritual aura which the absolute monarchs and like-minded rulers had striven for for centuries. Saint Simon's proposal to the Congress of Vienna for a "Réorganisation de la société européenne ou de la nécessité et des moyens de rassembler les peuples de l'Europe en un seul corps politique," i.e., a single European community, would have to wait almost a century and a half before finding a fertile soil.

The reason for the above discussion (albeit somewhat disjointed) is to make the following points:

- Grotius' *Mare Liberum* was a plea for the right of individuals or groups of individuals to navigate and trade wherever they wished;
- sovereign power was acknowledged but was exercised by individuals (or groups of individuals) having such authority;
- the nation-state as the political and legal entity which we know today was alien to Grotius;
- similarly the direct one-to-one link between *patria*, people ("volk" or "people") or race, and a defined geographical territory as expressed in the nation-state is relatively new.

The economic changes taking place during the time of Grotius were fundamental. It was a time of transition between the agricultural and the industrial age, a transition that had begun and become noticeable enough in Grotius' time to warrant a basic rethinking and reformulation of the existing political and legal framework. It was a transition that was not completed until the beginning of the nineteenth century, when industrialization became the dominant means of organization of production.

IV. Grotius in an Information Age¹¹

A. From an Industrial to an Information Age: The Role of Transportation/Distribution Systems as Transition Factors

Grotius and his works were of considerable help to those dealing with the transition from the feudal agrarian to the nation-state industrial age. The period in between was one of transition and flux. The Roman Empire was known for its roads, i.e., its transportation/distribution system overland. The agricultural age was a time when most of what was bought or sold came from the immediate vicinity. In the thirteenth and fourteenth centuries, transportation/distribution started to be of importance, witness the rise of the Hanseatic League. Initially confined to basically coastal shipping, with the advances in navigation of the Portuguese it soon established totally new trade routes and distribution systems.

It is the thesis of this author that a fundamental change in transportation/distribution systems is a necessary precursor to widespread adoption of changes in modes of production of economic value, i.e., that without the transportation/distribution revolution from the time of Grotius to the French Revolution, the industrial revolution would not have been possible, since the infrastructures necessary to distribute, sell and finance the goods of the industrial age would not have been in place.

Today, as at the time of Grotius, we are facing another time of transition, that from an Industrial to an Information Age. A short discussion and understanding of some of the key dynamics of the Information Age is therefore in order.

The events of the past decade or so have been given a variety of labels. Some call it a Third Wave, i.e., the third major change in mode of production with agriculture and industrialization forming the first two waves. Others call it a communications revolution, while still others speak of a Gutenberg II focusing on the digitization of all forms of information and expression and having a cultural and societal influence akin to that of the invention of the printing press.

The fact is that all are correct. The Information Age is marked not by one but three very different revolutions rolled into one. The three revolutions are:

- a structural change in modes and means of production and processing based on the microprocessor and software, i.e., data processing, miniaturization, robotics, etc. This structural change, or new industrial revolution has created a totally new means whereby one creates wealth or provides added-value to existing agricultural or industrial products and services;
- a profound change in the form of communication and presentation of content or information, i.e., digitization, with single data input and multimedia output. This structural change or information revolution is raising questions due to the blurring of distinctions between information or content-based industries and concerns about access to and use of data, i.e., privacy; and
- a radical change in the means whereby products and services are distributed, i.e. a transportation or communications revolution. It is this transportation revolution which provides the distribution channels for information-based goods and services. It should be noted that it was the transportation revolution with accompanying development of financial instruments in the sixteenth through eighteenth centuries, basically one in maritime transportation, which developed new and efficient means of distribution. Whole new networks for trading and linking many new geographic areas were developed. This made it possible for the products of the nineteenth century industrial revolution to be distributed. In short, one would do well to remember that industrialization by its very nature requires transportation networks and distribution systems as a prerequisite.

One should also note other characteristics of this transportation revolution. The first is that ships once having left port were free to go where they pleased. A country or port that placed too onerous a restriction on trade was simply by-passed. Similarly, should any one country place onerous restrictions on transborder data flows, it runs the risk of simply being by-passed in the Information Age. As a matter of fact, it seems that those who had the least restrictions on the movement of goods and people, i.e. offered the most hospitable environment, profited the most, witness the success of the seventeenth Dutch ports. Second, it soon became apparent that agreement on common sets of principles and conventions benefited all parties

concerned. Grotius started this process with his *Mare Liberum*. Consequently, a majority of the principles and policies developed as part of an international maritime and transport law since the time of Grotius may also be applicable to issues arising from the use of CCI technologies (but more by way of analogy).

The transportation revolution of the pre-industrial era made it possible for Europe to transport low-value per unit industrial products such as textiles anywhere in the world in high volume. If the transportation revolution had not occurred, and the trading networks with their whole financial and commercial infrastructures had not been put into place, and maritime transport on a "free" sea had not been available as an alternative to costly and regulated or controlled overland transportation, the industrial revolution would have remained a local north European affair. Similarly, the post-World War II development of telecommunications networks culminating in satellite and packet-switched networks have just as significant an impact for the realization of the "Third Wave". From a transportation and distribution perspective, one can liken a packet of data to an economic good or value in a container. If one likens packets of data to the sailing ships of yesterday, the electronic ocean can be sailed by any one shipping or transporting data to any point on earth served by a network or serviceable by a network. In the Information Age, there is no such thing as being "land-locked". For some, this represents a challenge, for some a threat, and for others an opportunity.

Finally, in this context it should be noted that in the sixteenth-to-eighteenth century transportation revolution, some countries tried to establish control of routes and traded in goods and services, i.e., the seas. This did not work. Policy makers would do well to note this fact for today's transportation revolution. Like its earlier predecessor, its very nature does not support such a monopolistic approach. As a matter of fact, how questions of trade of economic values in the form of data are to be dealt with are a major issue facing GATT. They form a key component of the debate on how to address trade in services which currently is not covered by GATT. The fact that an increasing part of the GNP of countries such as the U.S.A. is now in services, and a substantial part is CCI-based, creates an increasingly urgent need to develop a framework or set of rules for this electronic ocean as Grotius did in his *Mare Liberum* for his time. At the waning of the feudal agrarian age, Grotius successfully

argued for the right of individuals (or groups of individuals, partnerships, companies, etc.) to trade goods using the seas as the mode of transport and distribution. Similarly today at the waning of the Industrial Age, one needs to develop a "Grotius II" for the right of individuals and companies to trade services (or data) in an Information Age using the "electronic ocean" for transmission and distribution.

B. National Boundaries and Sovereignty¹²

While the concept of sovereignty is rather old and that of national boundaries in comparison is rather recent, the characteristics of the Information Age that are becoming known warrant a rethinking of both.

At present there is no internationally agreed-upon definition of the term "sovereignty". Properly and in a legal sense, sovereignty is a rather narrow concept. In international law, sovereignty refers to the legal power to control policy and to exercise jurisdiction over a determinate tract of territory and the inhabitants therein without the consent or concurrence of any other state. Any restriction upon the exercise of this jurisdiction, not imposed by the state itself or by international law and deriving validity from an external source, constitutes a diminution of a state's sovereignty.

While it is true that practical constraints on what a state is legally entitled to do, do not amount to a diminution of sovereignty in the legal sense, it should be noted that practical steps do cause changes. For example, the willingness of the Icelanders to fire a shot across the bow of a British fishing trawler which did not respect the "new" 50 mile extension into the seas of Icelandic sovereignty, was the trigger that started a process that resulted in the concept of the 200 mile economic zone and a global approach to the mining of the seabeds of the seas for the "common heritage of mankind".

In the context of the Information Age, national sovereignty concerns go considerably beyond that of the narrow legal concept, touching on a wide range of economic, social, cultural, and vulnerability considerations. From a practical perspective, the term "sovereignty" could be used to designate the practical ability of a nation (or a people)

- to protect itself and its citizens from intolerable encroachment from without, i.e., the protective or defensive element; and,
- to develop and effectively implement its economic, cultural and social policies for the benefit of and as desired by their citizens, i.e., the positive element.

In an Information Age, the exercise of sovereignty will have to find a new approach and form of application which are not as physical or territorially bound as those of today.

The rapid technological changes, the interconnection of communication networks, the introduction of satellite-based systems and the transformation of all types of information flows into a common format, i.e., digital, call for a reappraisal of the role of national boundaries in an information age.

Traditionally, national boundaries not only marked the territorial limits of the state, they also served as the location at which a nation exercised its sovereignty. Movements of goods and people are controlled at the frontier or at locations of first landing, i.e. ports, whether by sea or land or later by air. Various international conventions, codes and agreements have developed during the last three centuries affecting the physical movement of goods and people.

The rapidly changing computer-communication-information technologies have led to the development of electronic information networks whose functional boundaries more often than not overlap several national boundaries. Geographers and economists would call such computer-communications information activities "functional economic areas". Some relevant examples from daily life are the area (different jurisdiction of towns and suburbs) from which a large city draws all its daily commuters, or all the points served by an airline or a trucking company, or the activities of a multi-national enterprise. The history of the integration of Europe as represented by the EEC reflects a recognition that the different European nations are really one (or should be treated as one) functional economic area, and should thus form an economic community which requires the harmonization of the policies of the participating nations.

It is quite common for such functional economic areas to

overlap several different political jurisdictions. Until now the legal framework, domestic as well as international, public as well as private, has been able to adjust itself to new functional economic areas. However, this was because one is quite familiar in dealing with questions raised by the movement of persons or goods, i.e., tangibles. If a nation-state so desired, it could exercise its ability to monitor and/or control the flow of goods across its borders. A state would exercise its sovereignty in these matters through customs and immigration checkpoints, landing or berthing rights, import or export restrictions, tariffs, etc. Insofar as one can conceive of "physical boundaries" in telecommunications, those that do exist are basically those that have been imposed on or by the carriers, i.e. the question of access and interconnection. Currently "boundaries" are maintained in communications networks through various gateways, international agreements and revenue sharing settlements. Examples are the telex and telecommunication networks. They are not on the flow or content.

The introduction of direct long-distance dialing between countries, the merger of communications and data processing in a time-share network, and the introduction of distance-insensitive pricing, has led to the creation of thousands of functional electronic information networks with boundaries of their own. For example, the "boundaries" of an on-line computer time-sharing system are defined by all the locations from which its users access the system.

The fact that the communication, i.e. transportation/distribution networks have a cost-structure which is distance-insensitive (e.g. packet-switched or satellite-based networks) has meant that data transportation costs are not only radically reduced but that one can now serve any geographic location in a network at basically the same cost regardless of the physical distances involved. Consequently, in the provision of computer-communications-information-based products and services, geographical location has become a much less important if not negligible factor. Many of the issues related to sovereignty and economics represent attempts to come to grips with this decreasing relevance of geographical location as a factor of where to locate one's base of operations in an information age.

The increasing ease of interconnection and much lower costs especially for long distance communications have had the result

that for all practical purposes, physical national boundaries have little or no relevance to an increasing number of users of computer-communication facilities. They are given a set of instructions, codes and passwords to sign-on to a system and often do not even know or need to know where the computer they are working with is located.

The nature of these networks raises the question of whether the mechanisms that a state uses to maintain its national boundaries in the physical world are extendable to those of the electronic digitized world.

To date most of the discussion of the "national boundary" has focused on terrestrial communication networks, to so-called "electronic highways" of the world. It has also been noted that national boundaries will have increasingly less relevance to users of computer-communication systems. The use of satellites, i.e., non-terrestrial transmission technologies, introduces the concept of an "electronic ocean". A communication satellite exhibits more the characteristics of a ship in international water than a truck on a highway, the latter being much more easily subject to regulation than the former.

In addition, satellite-based computer communications introduce a unique dimension to the concept of national boundaries. They generate passive electronic information networks, i.e., footprints or spillover. Even if legally a satellite operates only on a domestic basis, it can passively serve several countries. This is true especially of those satellites in geosynchronous orbits.

Consequently national boundaries, in functional or practical terms and in relation to electronic data flows, are becoming increasingly difficult to maintain, especially if a nation-state wishes to realize the full benefits of the new technologies. By its very nature, the Information Age is one of interconnection with flows of data being either the product or service sold or the vital element in the support of other activities. If a state wishes to create electronic boundaries, this may require policies and enforcement mechanisms of a different nature than those which currently apply to the movement of people and physical products. It also requires a realistic appraisal of whether the creation of an "electronic boundary" for certain purposes is either an achievable objective or the best means for minimizing the adverse effects of a specific technology.

The policy of trying to maintain an "electronic boundary" through restrictions may not only be non-enforceable but it may well in the long term place that country and its citizens at a comparative disadvantage.

While it is true that the nation-state, with sovereignty vested in it, appears to have been the political form of organization most suitable to an industrial society, it remains to be seen what political form of organization and definition of sovereignty is most suitable to an information age.

The concept of peoples, regional differences and pride in one's culture and roots, elements of the old *patria* and "volk" or "people", are on the rise. Canada is officially bilingual and multicultural. The U.S.A. is no longer the "Great Melting Pot". Of interest is the fact that the resurgence of consciousness, identity and the striving for political and economic power which has marked the development of Quebec during the last two decades was symbolized by the figure of a "habitant" in the costume of 1837, the old Germanic concept of *patria*, of roots, of a strong, pure and simple heritage; whereas the use of the term "patriot" by the Québécois was that of the French Revolution, of liberation and striving for freedom, a movement which had hitherto by-passed Quebec. While *patria* appears to be an eternal concept, that of *polis* or now nation-state will always be in flux.

Whether it is through regionalism, language/cultural interests, economic disparities, the concept of centralized nation-state powers is in decline. Decentralization, deregulation, local autonomy are trends on the rise. In this the Information Revolution has been a factor.

Computing power and communication facilities are now within everyone's reach. Through the use of CCI technologies it is not only possible but also economically feasible to link individuals having a common language, culture, ideas and/or interests. It will not be necessary, as it was in the past, for a people to physically be close to each other on a determinate physical territory; they can all be logically connected, a virtual rather than a physical nation.

One of the great legacies of World War II is the United Nations and especially its Universal Declaration of Human Rights.

Article 19 of the Declaration states:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions and without interference and to seek, receive and import information and ideas through any media and regardless of frontiers".

The more we move towards an Information Age, the more the rights of individuals to exercise these rights using the most modern technologies for their benefits will increase in importance and relevance. What political form of organization this will take is not yet clear. The present system of over 150 nation-states ranging from superpowers to specks on the earth, but all "equal", may at some time in the future seem as illogical and unpractical as the Donation of Pope Alexander VI and the claims of the Portuguese and Spanish seemed to Grotius at the beginning of the seventeenth century.

V. Conclusions

The main thrust of this paper is to argue that in between the major changes in the focus and basis of production of economic values (be they agricultural products, industrial goods or now information services) and the accompanying forms of political organization, there are periods of transition. This in itself is nothing new. What has not been recognized and studied is that the hallmark of these transition periods is a basic change in the transportation/distribution of economic values. A key feature of the Roman Empire was its roads which together with the invention of the horse harness in the twelfth century allowed for much better transport of products. While it is true that there was a land-based trade between Europe and Asia and parts of Africa, it was limited in volume and scope, and although the items were of high value their overall impact on the economy was negligible. By the time of Grotius, however, man had learned to navigate the high seas and greatly expanded the "known" world. It had also become economically feasible and attractive to trade on a much larger and capital-intensive scale. Financial and commercial instruments such as bills of exchange, future contracts, bills of lading, assurance were developed. The organization of commercial activity took new legal forms such as corporations and limited liability companies. As a matter of fact, it is difficult to

find a major type of financial or commercial instrument existing today which was not already in use prior to the Industrial Revolution and the emergence of the nation-state.

Most likely, Grotius wrote his *Mare Liberum* or developed his basic arguments as a paid consultant to the Dutch East India Company to defend and justify what at that time was considered to be an unlawful act. The Dutch clearly perceived that to grow and prosper they would have to trade where and whenever possible. As such the sovereign claims to the new territories coupled with a monopoly claim to the use of the seas by the powers of the day, Spain and Portugal, were diametrically opposed to the economic interests of the Dutch. Being denied an opportunity to trade within existing custom and law, the Dutch simply took matters into their own hands and started to sail to the Indies to engage in commerce. The possible gains well outweighed the risks, and the Portuguese monopoly over that part of the world crumbled.

Had Grotius been alive today, he would have advocated free trade. While recognizing the underlying economic motivation, he based his free trade theory on natural law, reaching the conclusion that it was an immoral and unlawful inhibition of individual rights to restrict trade. One was therefore justified in taking actions against Spanish and Portuguese protectionism.

The concept of the nation state as we know it today was alien to Grotius; *patria*, "people" and "sovereign" were not. His close friend Oldenbarnevelt died a "patriot" and given Grotius' views on centralization and absolute monarchs, he probably would have viewed the nation-state, as a sovereign power not subject or accountable to a higher form of law, as a depersonalized form of absolute monarchy. Grotius believed in the concept of sovereignty but held that it should be vested in individuals who could be held accountable. This was possible because in Grotius' time the world as it was known shared the spiritual, moral and legal ideas of a Christian society. Such is no longer the case.

At the end of the transition period, the industrial state with its "natural" boundaries emerged. Boundaries were soon used and are still used to restrict trade. However, the transportation/distribution revolution of the Information Age is basically boundary-free. It is characterized by the creation, storage, trade and use of economic values which have no tangible properties. Once the transportation system or communication network is

in place and linkages are made, a national boundary as a physical entity becomes impossible to maintain not only for terrestrial networks but especially for those which are satellite-based.

This is not to say that sovereignty and culture are not important. On the contrary, the quest for a distinct identity of various "peoples" is becoming more and more visible. Yet at the same time, businesses wish to be able to trade unrestrictedly, and individuals wish to have access to whatever CCI-based products and services are available. Canada is one country constantly striving to progress economically using as many CCI-based technologies as possible, yet at the same time trying to maintain its sovereignty and cultural identity(ies).

While the legal concepts and political forms of organization appropriate to the Information Age have yet to be developed, there can be no doubt that the time has come to develop the concept of the "electronic ocean" and an appropriate legal framework to make a break with the Industrial Age, just as Grotius' *Mare Liberum* marked the first clear break with the agrarian feudal age.

Grotius and his time marked the beginning of a world economy of large national companies (at first trading and later manufacturing) and soon composed of nation-states as the economic and political unit.

The actions of the Dutch East India Company, the capture of the Portuguese treasure ship by one of its captains and Grotius' vigorous defense and justification of the incident in his *Mare Liberum* were not accepted by all including the shareholders. Some gave their "illgotten" extra dividends to the poor, others refused to accept the payment, some even sold their shares in protest, i.e. practised disinvestment.

Today, we have reached the stage of a global economy; large national firms become internationals, then multi-nationals and now global companies. Yet the political form of organization has not yet changed. The nation-state is finding it increasingly difficult to address economic activities and events which are outside of its ability to control or influence. The CCI-technologies are very portable and jobs can be switched to almost any location on earth. CCI-based products or services are forming their own functional economic networks whose size, scope and

"boundaries" are different if not larger than most nation-states. Whether permanently fixed national boundaries will remain is less important than how sovereignty can be exercised, a set of laws can be mutually respected and cultural identities of peoples can be maintained.

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NOTES

1. Factual information in this section is based on **Fruin**, vol. III, "Een onuitgegeven werk van Hugo de Groot", pp.388-415.
2. **Fruin** notes that it is not possible from extant records (the most important were destroyed by fire) to recalculate the total value of the prize. The goods and ship themselves fetched 3,389,772 guilders while mention was also made of circa 6,000,000 guilders worth of gold ducats. Altogether the prize may have had a 1605 market value of near 10,000,000 guilders. Depending on what price indices and conversions one uses (e.g. nominal monetary value of daily wages in 1605 versus today, or value of an ounce of gold today), the value of the prize today would be equivalent to 300,000,000 to 800,000,000 guilders or in \$150-400 million Canadian range.
3. This section is based on **Mare Liberum**.
4. **Edwards**, p. xv.
5. **Ibid.** p. 146, quoting P.P. Remec.
6. Both the Dutch and German languages are quite comfortable with the term and concept of "volk" which is similar to the French term "peuple". The English language unfortunately is not. English translations of the works of Grotius tend to use the term nation for **populos** and law of nations for **iures gentium**. They therefore give the erroneous and mistaken impression that the concept of nation and nationalism existed several centuries before they actually did. The Dutch translation uses the terms "volk" and "volkenrecht" respectively.
7. **Edwards**, p. 147.
8. **Huizinga**, pp. 11-12.
9. **Ibid**, p.66.
10. **Idem**.
11. This section is drawn from **Summary**, pp. 52-57.
12. This section is drawn from **Sovereignty**, pp. 76-77, 81-85, and 91-96.