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## Tradition, Tendency, Temptation

Hugo Grotius (1583–1645) overlooked the North Sea from Holland’s shore in the early seventeenth century and observed an “immense, infinite” waterway,<sup>1</sup> so vast it could not be possessed,<sup>2</sup> so unbounded, except by the heavens,<sup>3</sup> it could only admit to uses such as navigation, fishing, and trade.<sup>4</sup> He claimed in *Mare Liberum* (The Free Sea, 1609), his small pamphlet quickly destined to become a classic, that the seas represented a shared resource, like air, which allowed for a “common use” to benefit mankind.<sup>5</sup> According to Grotius, Providence bestowed on humanity a particular kind of *dominium* (ownership) over the seas, which, unlike land, granted individuals a freedom of use but enjoined proprietary claims.<sup>6</sup> One could not give away what one never owned, he reasoned;<sup>7</sup> one could not discover what already belonged to someone else,<sup>8</sup> and one could not appropriate what was common to all.<sup>9</sup> According to Grotius, the seas represented a *res communis*, a common good.<sup>10</sup>

By the time Grotius died, *Mare Liberum* had cycled through thirteen editions,<sup>11</sup> securing its place among the classics of international law. Curiously, far less secure were its main claims that the seas could not be owned and were to be used in common. These assertions generated intense discussion and

<sup>1</sup> HUGO GROTIUS, *MARE LIBERUM* 1609–2009, at 81 (Robert Feenstra, ed., with a general introduction by Jeroen Vervliet, 2009) (1609) [hereinafter GROTIUS, *MARE LIBERUM*].

<sup>2</sup> See *id.* at 63.

<sup>3</sup> See *id.* at 81.

<sup>4</sup> See *id.* at 63 (navigation and fishing), and 25 (trade).

<sup>5</sup> *Id.* at 63 (emphasis added).

<sup>6</sup> See *id.* at 9.

<sup>7</sup> See *id.* at 15.

<sup>8</sup> See *id.*

<sup>9</sup> See *id.* at 63 (“the sea is an element common to all ... no one could possibly take possession of it”).

<sup>10</sup> See Jeroen Vervliet, *General Introduction*, in GROTIUS, *MARE LIBERUM*, *supra* note 1, at xv.

<sup>11</sup> See CHRISTIAN GELLINEK, HUGO GROTIUS at 147 (1983).

criticism during his time and ours: many claim Grotius' view of freedom of the seas has prevailed,<sup>12</sup> yet "few works of such brevity have caused arguments of such global extent and striking longevity."<sup>13</sup>

What did Grotius mean when he labeled the seas a *res communis*, the use of which was reserved for humanity's benefit? Consider the following points: almost four hundred years after publication, on August 2, 2007, Russian explorer and parliamentarian, Artur Chilingarov, piloting the mini-submarine, *Mir-I*, planted a rustproof titanium Russian tricolor flag on the seabed, fourteen thousand feet below the ice-covered North Pole. Russia's Arctic and Antarctic Institute hailed it as a "massive scientific achievement," likening it to placing a flag on the moon.<sup>14</sup> Canada's Foreign Minister called it a stunt: "This isn't the fifteenth century," he chafed; "you can't go around the world and just plant flags and say 'We're claiming this territory'."<sup>15</sup>

The well-publicized gesture generated pithy headlines about a coming "Race to the Pole" and a new "Cold War in the Arctic."<sup>16</sup> But the headlines eclipsed the expedition's far more significant mission, which foretells of Russia's greatest Arctic ambition.<sup>17</sup> The mission was to take core seabed

<sup>12</sup> See, e.g., Jon Miller, *Hugo Grotius*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/grotius/> (conceding that history may have favored Grotius and his view that the seas are open to all); ANTHONY D'AMATO & JOHN LAWRENCE HARGROVE, ENVIRONMENT AND THE LAW OF THE SEA: A REPORT OF THE WORKING GROUP ON OCEAN ENVIRONMENT OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 15 (1974) (noting "[h]istorically it was of course the Grotian position [freedom of the seas] that prevailed"); and Alison Reppy, *The Grotian Doctrine of the Freedom of the Seas Reappraised*, 19 FORDHAM L. REV. 243, 264 (1950) (declaring Grotius the victor in doctrinal battle of freedom of the seas versus closed seas).

<sup>13</sup> David Armitage, *Introduction*, in THE FREE SEA: HUGO GROTIVS at xi (translated by Richard Hakluyt with William Welwod's Critique and Grotius' Reply, edited, and with an introduction, by David Armitage, 2004). The book was placed on the list of forbidden works in 1610. *Id.* at xviii [footnote omitted], as was much of the author's *oeuvre*. See INDEX LIBRORUM PROHIBITORUM SANCTISSIMI DOMINI NOSTRI GREGORII XVI. PONTIFICIS MAXIMI. JUSSU EDITUS. EDITIO NOVISSIMA IN QUA LIBRI OMNES AB APOSTOLICA SEDE USQUE AD ANNUM MDCCCLII PROSCRIPTI, SUI LOCIS RECENSITU 188–189 (1853).

<sup>14</sup> *Russia Plants Flag under N Pole*, BBC News (Aug. 2, 2007), <http://news.bbc.co.uk/2/hi/europe/6927395.stm>.

<sup>15</sup> *Id.*

<sup>16</sup> Jamie Doward, Robin McKie, & Tom Parfitt, *Russia Leads Race for North Pole Oil*, THE GUARDIAN (July 28, 2007), [www.theguardian.com/world/2007/jul/29/russia.oil](http://www.theguardian.com/world/2007/jul/29/russia.oil); Doug Struck, *Russia's Deep-Sea Flag-Planting at North Pole Strikes a Chill in Canada*, WASH. POST (Aug. 7, 2007), [www.washingtonpost.com/wp-dyn/content/article/2007/08/06/AR2007080601369.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/08/06/AR2007080601369.html); Owen Matthews, *The Coldest War: Russia and U.S. Face Off over Arctic Resources*, THE MAIL ONLINE (May 19, 2009), [www.dailymail.co.uk/news/article-1184291/The-coldest-war-Russia-U-S-face-Arctic-resources.html](http://www.dailymail.co.uk/news/article-1184291/The-coldest-war-Russia-U-S-face-Arctic-resources.html);

<sup>17</sup> See generally Pavel K. Baev, *Sovereignty Is the Key to Russia's Arctic Policy*, 37 STRATEGIC ANALYSIS 489 (2013).

samples of the Arctic Basin's massive underwater Lomonosov Ridge; the ambition is to prove to the United Nations Commission on the Limits of the Continental Shelf (CLCS) that the geological structure of the seabed of the Ridge is exclusively an extension of Russia's continental shelf, which would extend Russia's sovereignty over its abundant mineral resources.<sup>18</sup>

According to the United Nations Convention on the Law of the Sea (UNCLOS),<sup>19</sup> which Russia ratified,<sup>20</sup> each coastal state may claim a 200 nautical mile continental shelf as measured from its baseline.<sup>21</sup> Each state may file continental shelf extension claims with the CLCS beyond the 200 nautical mile swath granted by UNCLOS up to 350 nautical miles, but the state must pass a *test of appurtenance*<sup>22</sup> and show scientifically that its continental margin extends beyond 200 nautical miles and is part of the submerged prolongation of its mainland.<sup>23</sup> The CLCS rejected Russia's "sloppily prepared" 2001 submission due to lack of evidence<sup>24</sup> and recommended that Russia fortify and refile its claim.<sup>25</sup> Russia has already applied for extensions of its territories in the Barents, Bering, and Okhotsk Seas and recently signaled it will refile its Lomonosov claim, along with a claim over the Mendelev Ridge off the South Siberian Sea.<sup>26</sup>

<sup>18</sup> *Infra*, note 19, pt. XI, §§ 1–3.

<sup>19</sup> United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS], *available at* [www.un.org/depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm).

<sup>20</sup> UN Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, United Nations Convention on the Law of the Sea, *available at* <http://treaties.un.org/doc/Publication/MTDGS/Volume%20II/Chapter%20XXI/XXI-6.en.pdf>

<sup>21</sup> UNCLOS, *supra* note 19, pt. VI, art. 76, ¶ 1.

<sup>22</sup> *Id.* pt. VI, art. 76, ¶¶ 1–7. See Elizabeth Riddell-Dixon, *Canada and Arctic Politics: The Continental Shelf Extension*, 39 OCEAN DEV. & INT'L L. 343, 345 (2008).

<sup>23</sup> UNCLOS, *supra* note 19, Annex II, art. 4. The provision holds: "Where a coastal State intends to establish, in accordance with Article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within ten years of the entry into force of this Convention for that State. The coastal State shall at the same time give the names of any Commission members who have provided it with scientific and technical advice." Under a separate provision, refilings are admissible beyond the ten year period. *Id.* annex II, art. 8 ("In the case of disagreement by the coastal State with the recommendations of the Commission, the coastal State shall, within a reasonable time, make a revised or new submission to the Commission").

<sup>24</sup> Baev, *supra* note 17. The Russian Federation was in fact the first country to submit a claim. For a summary of submissions, see CONTINENTAL SHELF: THE LAST MARITIME ZONE 30–33 (Tina Schoolmeester & Elaine Baker, eds., 2009) [hereinafter Schoolmeester & Baker].

<sup>25</sup> The Secretary-General, Oceans and the Law of the Sea: Report of the Secretary General, Addendum, ¶ 41, delivered to the General Assembly, U.N. Doc. A/57/57/Add.1 (Oct. 8, 2002).

<sup>26</sup> *Russia to Apply for Extension of Arctic Shelf Boundaries in 2014*, ARCTIC INFO (Aug. 26, 2013), [www.arctic-info.com/News/Page/russia-to-apply-for-extension-of-arctic-shelf-boundaries-in-2014](http://www.arctic-info.com/News/Page/russia-to-apply-for-extension-of-arctic-shelf-boundaries-in-2014).

If successful, Russia will be allowed legally to extend its control over about 1.2 million square kilometers of underwater terrain that formerly had been considered part of the deep seabed, which is the seafloor beyond the scope of national jurisdiction – an area meant to be administered for the benefit of all countries in trust, as part of a Grotian-inspired Common Heritage of Mankind.<sup>27</sup>

From a global Arctic perspective, Russia's filings portend gloom for the shrinking global commons – as they would enclose almost half of the territory beneath the Arctic Ocean for its own resource exploitation.<sup>28</sup> From a management perspective, capturing efficient economies of scale makes sense; from a stewardship perspective, extending decision-making and police powers to the adjacent coastal state have bases in law; from parochial political and national security perspectives, the attractions of extending sovereign control over the world's diminishing unsecured geospatial regimes are enticing.

Russia's claims are unexceptional. All circumpolar states are seeking continental shelf extensions into the Arctic cryosphere.<sup>29</sup> Denmark has identified five potential claim areas off the Faroe Islands and its territory, Greenland;<sup>30</sup> Norway presented three separate claims,<sup>31</sup> which extend its continental shelf by the equivalent of seven soccer fields for each of its almost five million people;<sup>32</sup> Canada's Arctic Ocean extension claim covers three-quarters of a million square kilometers; when added to its claims in the Atlantic and Pacific Oceans, Canada's total claim approaches 1.75 million square kilometers, which equals the combined size of its three prairie provinces, Alberta, Saskatchewan, and Manitoba.<sup>33</sup> The United States, although not party to UNCLOS, has amassed scientific evidence to support a continental shelf extension claim, which “could extend more than six hundred nautical miles from the north coast of

<sup>27</sup> UNCLOS, *supra* note 19, pt. I, arts. 1.1 (pertaining to the “The Area,” which is defined as “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction) and 136 (referring to the Area and its resources as the “common heritage of mankind”).

<sup>28</sup> Roderick Kefferputz, *On Thin Ice? (Mis)interpreting Russian Policy in the High North*, at 3, CEPS Policy Brief, No. 205 (Feb. 2010).

<sup>29</sup> UNCLOS and the Commission on the Limits of the Continental Shelf (CLCS), Munk School of Global Affairs, <http://gordonfoundation.ca/sites/default/files/images/UNCLOS%20and%20the%20Commission%20on%20the%20Limits%20of%20the%20Continental%20Shelf.pdf>

<sup>30</sup> See the Continental Shelf Project of the Kingdom of Denmark, Ministry of Science, Innovation and Higher Education, [http://a76.dk/Ing\\_uk/main.html](http://a76.dk/Ing_uk/main.html).

<sup>31</sup> Summary of the recommendations of the Commission on the Limits of the Continental Shelf in regard to the submission made by Norway in respect of the areas in the Arctic Ocean, the Barents Sea, and the Norwegian Sea on November 27, 2006 (Mar. 27, 2009) [www.un.org/Depts/los/clcs\\_new/submissions\\_files/nor06/nor\\_rec\\_summ.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf).

<sup>32</sup> *UN Backs Norway's Claim to Arctic Seabed Extension*, AFP (Apr. 15, 2009), [www.google.com/hostednews/afp/article/ALeqM5gQORJjsuFpxulrmjBRhjCNIQyhj?hl=en](http://www.google.com/hostednews/afp/article/ALeqM5gQORJjsuFpxulrmjBRhjCNIQyhj?hl=en).

<sup>33</sup> Riddell-Dixon, *supra* note 22, at 347.

Alaska.”<sup>34</sup> The legal basis underpinning this claim remains oblique. But one might wonder legitimately what portion of the global commons will be left of the Arctic once circumpolar states complete their Arctic extensions.<sup>35</sup>

Expansive as these claims are, set against the geomorphology of the world’s smallest ocean,<sup>36</sup> they are surpassed by continental shelf extension claims elsewhere. Australia submitted ten claims for continental shelf extension in its surrounding oceans and seas,<sup>37</sup> resulting in its May 25, 2012 proclamation of exclusive rights to oil, gas, mineral, and biological resources over eleven million square kilometers of continental shelf;<sup>38</sup> New Zealand, Sri Lanka, the United Kingdom, France, Portugal, and South Africa filed claims exceeding the scope of Russia’s claims;<sup>39</sup> the total area of seabed under review by the CLCS in 2009, involving (at that time) fifty-one submissions, covered an area almost as large as the North American continent; since that time, twenty-six additional claims have been filed.<sup>40</sup>

Some Arctic claims overlap<sup>41</sup> and will doubtless generate delicate diplomatic negotiations.<sup>42</sup> But focusing on extant and emerging bilateral boundary

<sup>34</sup> National Strategy for the Arctic Region, May 2013, 1–11, [www.whitehouse.gov/sites/default/files/doc/nat\\_arctic\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/doc/nat_arctic_strategy.pdf), with a cover letter from President Barak Obama dated May 10, 2013.

<sup>35</sup> Continental shelf extension claims do not affect the legal status of the superjacent water column. Reports of a melting polar ice cap, an increasingly long and warmer polar summer, and prospects for an ice-free Arctic summer within 30–100 years, suggest a northern movement in migratory fish patterns toward warmer Arctic waters, attracting a variety of international fishing fleets and the prospect of overfishing. A race for the fish and to control overfishing are two likely issues of coming concern. See generally MYRON H. NORDQUIST, JOHN NORTON MOORE, & RONÁN LONG, *CHALLENGES OF THE CHANGING ARCTIC: CONTINENTAL SHELF, NAVIGATION, AND FISHERIES* (2016); see also Allison Winter, *U.S. Bans Commercial Fishing in Warming Arctic*, N.Y. TIMES (Aug. 21, 2009), [www.nytimes.com/gwire/2009/08/21/gwire-us-bans-commercial-fishing-in-warming-arctic-33236.html](http://www.nytimes.com/gwire/2009/08/21/gwire-us-bans-commercial-fishing-in-warming-arctic-33236.html).

<sup>36</sup> Vladimir Golitsyn, *Climate Change, Marine Science and Delineation of the Continental Shelf*, in 235 BEITRÄGE ZUM AUSLÄNDISCHEN ÖFFENTLICHEN RECHT UND VÖLKERRECHT 245, 248 (Susanne Wasum-Rainer, Ingo Winkelmann, & Katrin Tiroch, eds., 2011), available at <http://link.springer.com/content/pdf/10.1007%2F978-3-642-24203-8.pdf>.

<sup>37</sup> Continental Shelf Submission of Australia, Executive Summary Aus-Doc-ES, available at [www.un.org/depts/los/clcs\\_new/submissions\\_files/aus04/Documents/aus\\_doc\\_es\\_web\\_delivery.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/aus04/Documents/aus_doc_es_web_delivery.pdf).

<sup>38</sup> Proclamation on the continental shelf, Senator the Hon. Bob Carr, Australian Minister for Foreign Affairs, May 25, 2012, [http://foreignminister.gov.au/releases/2012/bc\\_mr\\_120525.html](http://foreignminister.gov.au/releases/2012/bc_mr_120525.html).

<sup>39</sup> SCHOOLMEESTER & BAKER, *supra* note 24, at 17.

<sup>40</sup> *Id.* at 16. For claim filings, see [www.un.org/depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/depts/los/clcs_new/commission_submissions.htm).

<sup>41</sup> See generally *Overlapping Sovereignty Claims in the Arctic*, International Institute for Strategic Studies, Mar. 7, 2012, [www.openbriefing.org/regionaldesks/polarregions/arcticsoverigntymap/](http://www.openbriefing.org/regionaldesks/polarregions/arcticsoverigntymap/). See also UNCLOS, *supra* note 19, art. 83 (providing that delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law).

<sup>42</sup> Michael Becker, *Russia and the Arctic: Opportunities for engagement Within the Existing Legal Framework*, 25 AM. U. INT’L L. REV. 225, 227 (noting ample opportunities for constructive engagement).

disputes miss a larger point about the changing circumstances and improving technological abilities to exploit resources formerly considered too remote, inaccessible, or unworthy of attention.

A rapidly receding polar ice cap<sup>43</sup> and new information about the value of potentially accessible resources<sup>44</sup> have altered circumpolar state calculations dramatically vis-à-vis the interests of the rest of the world. This alteration exposes a strong state tendency to territorialize resources formerly considered beyond the control of any state's national jurisdiction. In a variation of this theme, for the first time in history, states actively contemplate commercial trans-arctic voyages across the Northwest Passage, the amorphous waterway straddling the North American landmass and connecting the Atlantic and Pacific Oceans. The thought is mind-boggling. For over four centuries, explorers and nations competed to unlock the icebound secrets of this Arctic labyrinth in a frustrating, deadly search for an ever-shifting navigable route through the nineteen thousand islands of the Canadian Archipelagic island chain. After Portugal (da Gama) cracked the navigational sea code, enabling expedited passage to India around Africa (1498), and Spain (Magellan) rounded Cape Horn into the Pacific Ocean (1520), Elizabethan through Victorian sea interests made conquest of the Northwest Passage a national objective. Joseph Conrad wrote in *Heart of Darkness* that the “tidal currents of the Thames” launched “the great knights-errant of the sea” down its stream, pursuing dreams of men, sowing seeds of commonwealths, and spreading germs of empire in search of fame, gold, and the elusive route.<sup>45</sup> Counted among these wandering sea knights were Francis Drake, John Cabot, William Bligh, Henry Hudson, William Baffin, James Cook, George Vancouver, James Clark Ross, and, most psychologically enervating for the British, Sir John Franklin, whose 1845 expedition aboard the *Erebus* and *Terror* vanished.<sup>46</sup> The

<sup>43</sup> The National Snow and Ice Data Center records a 10.6 percent per decade decline in monthly August Arctic Sea Ice Extent measurements from 1979 to 2013. *Arctic Sea Ice News & Analysis*, National Snow & Ice Data Center (Sept. 4, 2013), <http://nsidc.org/arcticseaicenews/>.

<sup>44</sup> See generally *Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle*. United States Geological Survey Fact Sheet (2008), <https://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf>.

<sup>45</sup> JOSEPH CONRAD, *HEART OF DARKNESS* 8–9 (2003) [1899].

<sup>46</sup> *Id.* at 9 (“never returned”). See generally GLYN WILLIAMS, *VOYAGES OF DELUSION: THE NORTHWEST PASSAGE IN THE AGE OF REASON* (2002); GLYN WILLIAMS, *ARCTIC LABYRINTH: THE QUEST FOR THE NORTHWEST PASSAGE* (2011). Traces of Franklin's expedition were located in 1859 on remote King William Island along with evidence that Franklin's men may have endured for months, possibly succumbing to temptations of cannibalism or sickness due to botulism, conveyed by shoddily made and improperly sealed canned meats and vegetables. For a reconstructed

chimera of a passageway connecting the Mississippi-Missouri River System to the Pacific Ocean occupied the American mind and motivated US President Thomas Jefferson's commissioning of the 1804 Corps of Discovery expedition, captained by Meriwether Lewis and William Clark. But it was not until 1906, with Norway's supreme discoverer Roald Amundsen at the helm of the tiny *Gjøa*, that a mariner proved it could be traversed. The voyage took him three years to complete. As improbable as it seems, slightly more than one century after Amundsen's feat, recreational sailing vessels, including row boats, ply these waters;<sup>47</sup> some vessels, including private yachts, have completed passage during a single season of the Canadian Arctic's lengthening summer.<sup>48</sup>

Likewise, global climate change is "creating conditions of siege for the oceans and coasts of the world,"<sup>49</sup> altering the fourteen million square kilometers of the "world's next resource frontier" – the Arctic Ocean.<sup>50</sup> This alteration is particularly pronounced along Arctic coastlines, where significant portions are now "ice-free for a substantial period of time each year,"<sup>51</sup> including substantial portions of the coastal seascape of the Northeast Passage, which connects Asia and Europe via waterways atop Russia. Scarcely any such traffic ever before had ventured this far north. The first non-Russian navigation of the Northern Sea Route, a treacherous Siberian stretch of the waterway, took place in the summer of 2009; but as recently as 2013, 450 vessels queued up for commercial voyage of the entire passage.<sup>52</sup> Canada and Russia straddle an ideological divide, but in mirror image fashion, they have long made similar sovereign claims over these waterways adjacent to their respective continental landmasses.<sup>53</sup> Both countries regard the passages as internal waters and have fortified their claims with

account of the ordeal, *see generally* SCOTT COOKMAN, *ICE BLINK: THE TRAGIC FATE OF SIR JOHN FRANKLIN'S LOST POLAR EXPEDITION* (2000).

<sup>47</sup> Scott Yorko, *Rowing the Northwest Passage – Because They Can*, *OUTSIDE* (July 10, 2013), [www.outsideonline.com/1917256/rowing-northwest-passage%E2%80%94because-they-can](http://www.outsideonline.com/1917256/rowing-northwest-passage%E2%80%94because-they-can).

<sup>48</sup> Elaine Lembo, *Northwest Passage Routes Made Passable: With the Retreat of Arctic Ice, Boat Traffic in the Northwest Passage is Rising*, *CRUISING WORLD* (Feb. 14, 2013), [www.cruisingworld.com/northwest-passage-routes-made-passable](http://www.cruisingworld.com/northwest-passage-routes-made-passable).

<sup>49</sup> *See* Randall S. Abate & Dr. Sarah Ellen Krejci, *Climate Change Impacts on Ocean and Coastal Law: Scientific Realities and Legal Responses*, in *CLIMATE CHANGE IMPACTS ON OCEAN AND COASTAL LAW: U.S. AND INTERNATIONAL PERSPECTIVES* 2 (Randall S. Abate, ed., 2015).

<sup>50</sup> Kamrul Hossain, *Governance of Arctic Ocean Marine Resources*, in *CLIMATE CHANGE IMPACTS ON OCEAN AND COASTAL LAW: U.S. AND INTERNATIONAL PERSPECTIVES* 273–275 (Randall S. Abate, ed., 2015).

<sup>51</sup> *Id.* at 273–274.

<sup>52</sup> Ben Anderson, *Yong Sheng: Why Arctic Voyage of Chinese Cargo Ship Is Business as Usual*, *ALASKA DISPATCH* (Sept. 1, 2013), [www.alaskadispatch.com/article/20130901/yong-sheng-why-arctic-voyage-chinese-cargo-ship-business-usual](http://www.alaskadispatch.com/article/20130901/yong-sheng-why-arctic-voyage-chinese-cargo-ship-business-usual).

<sup>53</sup> Robert Dufresne, *Controversial Canadian Claims over Arctic Waters and Maritime Zone*, at 2, Law and Government Division, Parliamentary Information and Research Service,



domestic environmental and administrative legislation.<sup>54</sup> UNCLOS lends some support to their coast state regulatory claims by acknowledging that coastal states may exercise special environmental police powers over ice-covered areas.<sup>55</sup> But global warming has made the legal status of these waterways, and the extent to which they constitute internal waters or international straits, much more of a topical concern to other maritime powers.<sup>56</sup>

Global warming also has prompted interest in other Arctic realms, ranging from environmental concerns such as ocean acidification and loss of marine and aboriginal habitat, to sovereignty issues. These sovereignty issues involve extended continental shelf claims of circumpolar powers, ownership of resources in and under the waters adjacent to the High Arctic archipelago of Svalbard, and establishing the proper governance regime for Arctic waters. This latter interest increasingly involves inputs from non-circumpolar states and nongovernmental actors, and envisions a new stewardship arrangement more expressive of the establishment of a global Arctic.

In the aggregate, these claims signify that a dramatic territorialization of this geospatial resource is underway. This book argues that it has long been underway – reflecting a tendency present at the creation of the Grotian Tradition and embraced personally or at least politically by the master himself. Recognizing this coastal state interest in extending *dominium* over the seas gives rise to

PRB 07-47E, Library of Parliament (Jan. 10, 2008), available at [www.parl.gc.ca/Content/LOP/researchpublications/prbo747-e.pdf](http://www.parl.gc.ca/Content/LOP/researchpublications/prbo747-e.pdf); Central Executive Committee of the U.S.S.R., Decree of April 15, 1926, reprinted in Leonid Timtchenko, *The Russian Arctic Sectoral Concept: Past and Present*, 50 ARCTIC 30 (1997), <http://pubs.aina.ucalgary.ca/arctic/Arctic50-1-29.pdf>. See also WILLIAM E. BUTLER, NORTHEAST ARCTIC PASSAGE 72 (1978).

<sup>54</sup> Arctic Waters Pollution Prevention Act, R.S.C. ch 2 (1970), amended by S.C. ch 41 (1977–1978) (Can.) (imposing safety and environmental regulations on all shipping within 100 nautical miles of Canada's Arctic coast); Russian Federation Federal Law N132-Φ3 On Amendments to Specific Legislative Acts of the Russian Federation related to Governmental Regulation of Merchant Shipping in the Water Area of the Northern Sea Route, adopted by the State Duma, July 3, 2012, approved by The Council of Federation July 18, 2012, available at [www.arctic-lia.com/docs/nsr/legislation/federal\\_law\\_nsr.pdf](http://www.arctic-lia.com/docs/nsr/legislation/federal_law_nsr.pdf) (establishing, *inter alia*, navigation rules and administrative requirements for pilotage of vessels in the waters of the Northern Sea Route).

<sup>55</sup> UNCLOS, *supra* note 19, art. 234 (granting coastal states the right to adopt and enforce nondiscriminatory regulations for the prevention, reduction, and control of marine pollution where particularly severe climatic conditions and ice covering for most of the year create obstructions or exceptional hazards to navigation and where pollution could cause major harm or irreversible disturbance of the ecological balance).

<sup>56</sup> Michael Byers, *How the Arctic Ocean Could Transform World Trade*, AL JAZEERA (Aug. 27, 2013), [www.aljazeera.com/indepth/opinion/2013/08/201382273357893832.html](http://www.aljazeera.com/indepth/opinion/2013/08/201382273357893832.html) (noting US objections to Russian and Canadian sovereignty claims). See also Scott G. Borgerson, *Arctic Meltdown: the Economic and Security Implications of Global Warming*, FOREIGN AFF. 63 (March–April 2008); and James Kraska, *International Security and International Law in the Northwest Passage*, 42 VAND. J. TRANSNAT'L L. 1109–1132 (2009).



fundamental questions about the global commons and sovereignty, not simply in the Arctic region but also elsewhere in international relations, making Grotius' problematic introduction of common use relevant and worthy of reconsideration.

### THE SUSTAINING POWER OF THE GROTIAN TRADITION

This book investigates the significance of common use as a legal and political construct. It sets the concept of the global commons against the historical backdrop of the law of the sea, which, famously, has been informed by the Dutchman, or the Hollander as he preferred to be called, and his seventeenth-century classic, *Mare Liberum*. A key interest here is the future of common use in relation to the global commons, given its historical treatment in pelagic space. This historical treatment itself is informed by a misreading of *Mare Liberum* and the context in which Grotius presented it. It is based on a misreading of the intentions of states as applied to the freedom of navigation in the high seas, a freedom driven historically by commercial and security interests. It is also based on a misunderstanding of the so-called Grotian Tradition in international relations, which affirms a luminous and rational complementarity between passions and interests,<sup>57</sup> where the totality of international relations conforms to the rule of law,<sup>58</sup> where a sense of epochal or profound change monumentally transformed the previous world disorder into our emerging new world order.<sup>59</sup>

The sustaining power of the Grotian Tradition in international law and relations credits the important contribution of Cornelis Van Vollenhoven<sup>60</sup> and, later, Hersch Lauterpacht, and many subsequent scholars who advanced the twentieth-century belief in the moral necessity of international law, its binding force, and its value as a normative approach. John T. Parry recounted the contributions of some of these scholars, including Hans Kelsen, Louis Henken, and Thomas Franck, along with more recent presentations by Mary Ellen O'Connell and Michael Scharf.<sup>61</sup> "In 'semiotic' terms," according to Scharf,

<sup>57</sup> See A. Claire Cutler, *The 'Grotian tradition' in International Relations*, 17 REV. OF INT'L STUD. 41, 41 (1991).

<sup>58</sup> Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1 (1946).

<sup>59</sup> See Antony Anghie, *The Grotius Lecture: ASIL 2010: International Law in a Time of Change: Should International Law Lead or Follow?* 26 AM.U. INT'L L. REV. 1318 (2011) (linking the genius of Grotius to the phenomenon of profound change).

<sup>60</sup> See, e.g., CORNELIS VAN VOLLENHOVEN, *DE DRIE TREDEN VAN HET VOLKENRECHT* (1918; English translation, 1919); Randall Lesaffer, *The Grotian Tradition Revisited: Change and Continuity in the History of International Law*, 73 BRIT. Y.B. INT'L L. 103, 108 (2003) (crediting Van Vollenhoven's publication of *THE THREE STATES IN THE EVOLUTION OF THE LAW OF NATIONS*).

<sup>61</sup> John T. Parry, *What is the Grotian Tradition in International Law?* 35 U. PA. INT'L L. REV. 299, 300–301 (2014).

“the ‘Grotian Tradition’ has come to symbolize the advent of the modern international legal regime, characterized by a community of states operating under binding rules.”<sup>62</sup> The English school of international relations, headed by Hedley Bull, Martin Wight, and Barry Buzan, championed its place among leading theoretical traditions, envisioning it as the offsetting fulcrum between the international relations traditions of realism and idealism, and international law’s traditions of positivism and naturalism. In this position, the Grotian Tradition portrays international society as an ordered system of territorial states, neither in perpetual conflict nor peace, but governed by the idea of sovereignty. Sovereignty, despite its many detractors and potential challenges, remains the stable centerpiece of the Grotian Tradition.<sup>63</sup> Occupying this “middle position,”<sup>64</sup> the Grotian Tradition shaped the foundation for modern liberal internationalism,<sup>65</sup> which essentially combines multidimensional projects of republicanism, commercial liberalism, and regulatory institutionalism to promote peace, freedom, human rights, and liberal democracy.<sup>66</sup> Few introductory textbooks on international relations or international law fail to discuss its pragmatism, principles, and significance.

According to Benedict Kingsbury, this popular placement between the Machiavellian and Kantian Traditions became a kind of trilectic Tradition within international relations theory.<sup>67</sup> Its viability, as noted by C. G. Roelofsen, made it a convenient twentieth-century starting-place for reflections in international relations despite its reflexive invocation as a shibboleth.<sup>68</sup> Randall Lesaffer labeled the twentieth century as “Grotian,”<sup>69</sup> although he and others recognized that Emmerich de Vattel’s (1714–1767) more systematic and succinct treatment of the law of nations would expand Grotius’ teachings and dominate international legal thinking into the twentieth century.<sup>70</sup> Vattel’s

<sup>62</sup> Michael P. Scharf, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE RECOGNIZING GROTIAN MOMENTS 4 (2013); Parry, *supra* note 61, at 301.

<sup>63</sup> See generally F. H. HINSLEY, SOVEREIGNTY (1986); ALAN JAMES, SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY (1988); ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD (1990).

<sup>64</sup> MARK WESTON JANIS, AMERICA AND THE LAW OF NATIONS, 1776–1939, at 52 (2010); see also MARTIN WIGHT, INTERNATIONAL THEORY: THE THREE TRADITIONS 15 (1991) (arguing Grotius occupied “a broad middle road” between Machiavellian and Kantian thought); Parry, *supra* note 61, at 318.

<sup>65</sup> See Parry, *supra* note 61, at 306–311.

<sup>66</sup> See MARTIN GRIFFITHS, RETHINKING INTERNATIONAL RELATIONS THEORY 19–32 (2011).

<sup>67</sup> See Benedict Kingsbury, *A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull*, 17 Q.L.R. 8 (1997).

<sup>68</sup> C. G. Roelofsen, *Grotius and the ‘Grotian Heritage’ in International Law and International Relations; the Quatercentenary and Its Aftermath* (circa 1980–1990), 11 GROTIANA 11 (1990).

<sup>69</sup> Lesaffer, *supra* note 60, at 108–109.

<sup>70</sup> See Randall Lesaffer, *A Schoolmaster Abolishing Homework? Vattel on Peacemaking and Peace Treaties*, in VATTTEL’S INTERNATIONAL LAW IN A XXI<sup>ST</sup> CENTURY PERSPECTIVE / LE