

2022

The End of Freedom of the Seas: Grotius, Law of the Sea, and Island Building

Danielle Kroon

Recommended Citation

Danielle Kroon, *The End of Freedom of the Seas: Grotius, Law of the Sea, and Island Building*, 52 INT'L L. 299 (2022)

<https://scholar.smu.edu/til/vol52/iss2/7>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in The International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

The End of Freedom of the Seas?: Grotius, Law of the Sea, and Island Building

DANIELLE KROON*

I. Introduction

In 1608, a short work by Hugo Grotius entitled *Mare Liberum* was published,¹ the title translating to “freedom of the seas.” At the time of publication, the author was anonymous, but the full title of the work (in English) gave away its purpose: “The Freedom of the Seas or The Right Which Belongs to the Dutch to Take Part in the East Indian Trade.”² This was effectively a legal brief intended to address a specific legal dispute, but the influence of this document has far exceeded its original purpose. The underlying principle—that no country may own the seas—has shaped the development of modern law of the sea and remains a fundamental principle that continues to guide development for ongoing law of the sea issues as they arise. This paper will consider the Grotian conception of freedom of the seas, as applied to the controversial modern activity of island building. Technological advances have provided for developments in this area that were not envisioned at the time of Grotius, nor even fully realized at the time of the establishment of critical modern law of the sea treaties. This is inevitable; technological advances will require discussion about the best means of regulating the new subject matter and activities. When discussing new issues, the fundamental Grotian principle of freedom of the seas is continually referred to as a means of framing the discourse: no country may own the seas. Although there have been debates about the rights of coastal states and jurisdiction on the high seas, the fundamental principle of freedom of the seas remains enshrined as the opposing principle for proposed limitations.

* Solicitor, Litigation team at Marque Lawyers, Sydney; LLM (International Legal Studies, Jerome Lipper Award recipient)(NYU); BA, LLB (Hons I) (Macquarie University). Thank you to Professor Robert Howse for his guidance and assistance in drafting this paper, any errors are of course my own.

1. Throughout this paper, the following English translation of the text was used: HUGO GROTIUS, *THE FREEDOM OF THE SEAS OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE* (James Brown Scott ed., Ralph Van Deman Magoffin trans., Oxford University Press, 1916) (1633) (translation of *MARE LIBERUM, SIVE DE JURE QUOD BATAVIS COMPETIT AD INDICANA COMMERCIA DISSERTATIO*).

2. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE, INCLUDING THE LAW OF NATURE AND OF NATIONS* title page (A.C. Campbell trans., 1901) (1625) (translation of *DE JURE BELLI AC PACIS*).

Section II of this paper will seek to place Grotius's *Mare Liberum* in the appropriate historical context and discuss the purpose and motivation for his work. This will allow for a more well-reasoned analysis of his fundamental arguments, their justification, and their relevance for modern law of the sea. Section III will explore the ideas of Grotius as outlined in *Mare Liberum*, considering the various issues raised within the overall argument about freedom of the seas. It will also critically analyze the justifications that support his overarching thesis that no country may own the seas, and the subsequent acceptance of this concept in international law. Section IV will consider modern law of the sea, and expansions within that body of law that encroach upon the underlying idea of freedom of the seas. It will explore the underlying tension in modern law of the sea between coastal state rights and freedom of the seas, briefly noting examples of how this has been addressed. Section V will discuss the specific activity of island building, as an example of a modern issue in law of the sea that potentially infringes upon the concept of freedom of the high seas. This will outline current factual examples of island building, the international response to such activities, and the applicable law currently governing the regime of islands. Section VI will analyze what island building activities mean for law of the sea and the underlying Grotian principle of law of the sea. Section VII will conclude by arguing that island building does not represent a fundamental change in conceptualizing law of the sea and reinforce the need to maintain freedom of the seas within modern law of the sea.

II. Placing Grotius in Context

In order to analyze the Grotian conception of freedom of the seas, it is important to first place Grotius and his work, *Mare Liberum*, in the appropriate historical and philosophical context. He was not the first scholar or politician to consider the legal status of the oceans; in fact, Grotius specifically relies upon the writings of previous philosophers and statesman to justify his arguments.³ Nor did Grotius set out to provide a philosophical justification for freedom of the seas simply as an intellectual or academic pursuit. *Mare Liberum* was a very focused project, with a clear intent: it was a legal argument based on an actual case.⁴ The first sentence in Chapter I clearly states his “intention is to demonstrate briefly and clearly that the Dutch—that is to say, the subjects of the United Netherlands—have the right to sail to the East Indies, as they are now doing, and to engage in trade with the people there.”⁵ But, despite the underlying purpose of *Mare Liberum*, it has been stated that the principle “constitutes one of the pillars of

3. *Id.*

4. *Id.*

5. GROTIUS, *supra* note 1, at 7.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

END OF FREEDOM OF THE SEAS? 301

the law of the sea and stands at the beginning of modern international law.”⁶ To understand why this document, which was intended to provide support for a legal argument in a dispute, had such a significant impact on modern law of the sea, it is important to outline the background of Grotius, and examine the purpose and historical context of his work, *Mare Liberum*. It is then possible to ensure that subsequent analysis is framed within the appropriate context.

A. HUGO GROTIUS

Hugo Grotius has been described as the “father of international law,”⁷ the “founder of the *science* of international law,”⁸ and the “father of the modern law of nations.”⁹ These titles have been contested,¹⁰ and it would be inaccurate to describe one man as being solely responsible for the modern conception of international law, but it is unquestionable that Grotius was an influential writer that shaped international law. Born in the Netherlands in 1583, Grotius commenced university at age eleven, travelled to France as part of a diplomatic delegation at age fifteen, and received a doctor of laws at age sixteen.¹¹ He worked as a practicing lawyer in the Netherlands, was involved in politics, and became the attorney-general of the Netherlands at age twenty-four.¹² From this impressive background, Grotius wrote extensively about various topics, including the publication of sixty books.¹³ In his writing, he considered the concept of a law of nations or an international society, most notably within his influential work *On the Law of War and Peace*;¹⁴ and the influence of his work is still being considered by international law academics today.¹⁵ It is important to consider the

6. Rüdiger Wolfrum, *The Freedom of Navigation: Modern Challenges Seen from a Historical Perspective*, in *LAW OF THE SEA, FROM GROTIUS TO THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA* 89, 89 (Lilian del Castillo ed., 2015).

7. See, e.g., Jesse S. Reeves, *The Life and Work of Hugo Grotius*, 19 *AM. SOC'Y INT'L L. PROC.* 48, 57-58 (1925); J. Alan Beesley, *Grotius and the New Law*, 18 *OCEAN Y.B.* 98, 100 (2004).

8. Amos S. Hershey, *History of International Law Since the Peace of Westphalia*, 6 *AM. J. OF INT'L L.* 30, 30 (1912).

9. M.C.W. Pinto, *Hugo Grotius and the Law of the Sea*, in *LAW OF THE SEA, FROM GROTIUS TO THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA* 18, 19 (Lilian del Castillo ed., 2015).

10. R. W. Lee, *Hugo Grotius: 1588-1645*, 62 *L. Q. REV.* 53, 56 (1946); Benedict Kingsbury, *A Grotian Tradition of Theory and Practice: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull*, 17 *QUINNIPIAC L. REV.* 3, 9 (1997).

11. James G. Apple & Christine E. White, *Hugo Grotius*, *AM. SOC'Y OF INT'L LAW & THE INT'L JUDICIAL ACADEMY* (Oct./Nov. 2007), http://www.judicialmonitor.org/archive_1007/leadingfigures.html.

12. Yasuaki Onuma, *Hugo Grotius*, *ENCYCLOPAEDIA BRITANNICA* (Nov. 15, 2017), <https://www.britannica.com/biography/Hugo-Grotius>; Andrew Blom, *Hugo Grotius*, *INTERNET ENCYCLOPEDIA OF PHILOSOPHY* (2017), <http://www.iep.utm.edu/grotius/>.

13. Apple & White, *supra* note 11.

14. GROTIUS, *supra* note 1.

15. See, e.g., John MacDonell, *Transactions of the Grotius Society*, 5 *PROBLEMS OF PEACE AND WAR* xvii, xxii (1919).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

302 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

background, influences, and purpose of Grotius—and how these factors shaped his perspective and overall argument—when discussing and analyzing Grotian concepts. Grotius was not a philosopher that considered international relations, laws, and governing principles from the perspective of an outsider, analyzing the system purely in the realm of thought.¹⁶ Grotius was firmly rooted in the realm of realism: his background in politics, law, and international relations meant that his analysis and arguments were driven and influenced by a pragmatic perspective.¹⁷

B. MARE LIBERUM

Given the extensive publishing history of Grotius, it is important to understand the context of the specific work referenced, *Mare Liberum*. This work was first published anonymously in 1608, and it was only revealed in 1868 that *Mare Liberum* was originally Chapter XII of a larger treatise entitled *De Jure Praedae* (On the Law of Prize and Booty), written by Grotius between 1604 and 1605.¹⁸ This particular work arose from a factual dispute: Grotius was retained by the Dutch East India Company after one of its ships captured a Portuguese galleon in 1602.¹⁹ At the heart of this dispute was the claim by Portugal of ownership or control of the Indian Ocean and Atlantic Ocean south of Morocco, and the assertion of a right to exclude all foreigners from navigating or entering those waters.²⁰ The purpose of *Mare Liberum* was to refute the claim made by Portugal that it had a right to exclude foreigners, or restrict navigation, in a specific portion of the high seas.²¹ In the first chapter, Grotius clearly states that he bases his argument on the “most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable, to wit: [e]very nation is free to travel to every other nation, and to trade with it.”²² The purpose of *Mare Liberum* was not a purely philosophic exercise, unlike some of his notable later work, but is framed more appropriately “in the nature of a brief.”²³ It was effectively a legal document: Grotius put forward an argument for his client, and argued to support that opinion by justifying a principle of law favorable to the position of his client.²⁴

16. GROTIUS, *supra* note 1, at vi.

17. Apple & White, *supra* note 11.

18. HUGO GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY i (Martine Julia van Ittersum ed., 2006) (1603) (translation and introduction of DE JURE PRAEDAEE).

19. *Hugo Grotius*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Hugo_Grotius#Works (last visited Nov. 6, 2018); *see also* GROTIUS, *supra* note 1, at vi.

20. *See, e.g.*, MICHAEL PEARSON, THE INDIAN OCEAN 122-23 (2003); Benjamin Straumann, *Is Modern Liberty Ancient - Roman Remedies and Natural Rights in Hugo Grotius's Early Works on Natural Law*, 27 LAW & HIST. REV. 55, 66-67 (2009).

21. GROTIUS, *supra* note 1.

22. *Id.*

23. *Id.* at vi.

24. *Id.* at vi-vii.

To understand *Mare Liberum*, it is important to consider both the man behind it and the reason for its creation. Grotius was a scholar, a legal practitioner, and involved in politics and international relations from a young age.²⁵ He was in a position that allowed him to understand the more complex issues involved in international relations and frame an argument that came from both practical and theoretical experience. But this particular work was not simply an intellectual pursuit seeking to make a normative argument as to what the fundamental principle should be. This was a directed and purposeful work that made a legal argument to support the position of a real-world party to a dispute; and therefore, the justification is more appropriately framed as supporting the position of his client by establishing a positive argument as to what the law actually was at the time that this was written. This is an important distinction: one purpose is to defend a position as to what the law actually was, and the other is to establish a justification and rationale for what the law should be.

III. Fundamental Grotian Principles

Bearing in mind the historical context of *Mare Liberum*, it is important to then analyze the principles it seeks to establish, the justification for those principles, and the reception in terms of political acceptance and subsequent academic writing. The work is largely divided into two areas—freedom of navigation and freedom of trade—whereby Grotius seeks to disprove Portuguese claims of exclusivity by establishing these freedoms as part of the Law of Nations.²⁶ It is worth noting that the arguments are similar in relation to both freedoms, and that Grotius states that claims by Portugal in relation to trade will “be refuted by practically all the same arguments” as were used in relation to freedom of navigation.²⁷ The main focus for the purpose of this paper relates to his argument that “navigation is free to all persons whatsoever.”²⁸ It is this freedom of navigation that has shaped modern law of the sea; it is now an entrenched principle. Although there have been restrictions and qualifications placed upon it, this idea is still the opposing argument in the standard of discourse when states seek to limit the freedom of navigation for their own purposes.

To establish his claim, Grotius had to first disprove that Portugal has sovereign rights over the East Indies, and that the sea in question does not and cannot belong to them.²⁹ He did this by countering all potential arguments that could be made to establish such ownership, effectively proving his argument by establishing that there was no possible justification that Portugal could rely upon to succeed.³⁰ In relation to the East Indies, he

25. Apple & White, *supra* note 11.

26. GROTIUS, *supra* note 1, at 7-11.

27. *Id.* at 61.

28. *Id.* at 7.

29. GROTIUS, *supra* note 1, at 11-13.

30. *Id.* at 11-14.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

304 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

addressed and sought to disprove sovereignty by way of title of discovery, “Papal Donation,” or title of war.³¹ In relation to potential exclusive rights to the sea, he addressed potential title of occupation, Papal Donation, and title by prescription or custom.³² Acknowledging that these are largely legal arguments specific to the facts and dispute in question, it is important to then delve further into the work and consider the principles relied upon to support this position.

C. NATURAL LAW AND DIVINE LAW

Grotius relies upon natural law throughout his work, stating that the “law by which our case must be decided is not difficult to find, seeing that it is the same among all nations; and it is easy to understand, seeing that it is innate in every individual and implanted in his mind . . . [f]or it is a law derived from nature.”³³ This is demonstrated by reliance on the statements of previous scholars and politicians, which Grotius uses to justify his claim that certain practice or ideas are custom, or a common rule among all mankind.³⁴ There is also a theme of divine law and religion throughout his work, which is in many ways a reflection of the period in which Grotius was writing.³⁵ This means that Grotius is able to refer to God as a “founder and ruler of the universe,”³⁶ or “King of the universe.”³⁷ By creating a supreme ruler, or world ruler, Grotius is able to overcome a problem that plagues modern international law—the fact that there is no higher authority above all sovereign states capable of creating and enforcing a body of law.³⁸ Further, Grotius establishes a conceptual tribunal that governs international relations, being the two tribunals of “[c]onscience, or the innate estimation of oneself, and [p]ublic [o]pinion, or the estimation of others,”³⁹ meaning that Grotius is seeking to make his case by persuading Portugal itself, and to sway public opinion, in favor of his argument. It is the reliance on natural law and divine law that shapes the style of justification and argument made by Grotius.

D. CUSTOM

Grotius consistently refers to the idea that there are certain things that “by the [l]aw of [n]ations or by [c]ustom are common to all,”⁴⁰ and seeks to

31. *Id.* at 15-17, 45-46, 66.

32. *Id.* at 22, 47-50, 52.

33. GROTIUS, *supra* note 1, at 5.

34. *Id.* at 8-11

35. Gary Edmond, *The Freedom of Histories: Reassessing Grotius on the Sea*, 2 LAW TEXT CULTURE 179, 194-95 (1995).

36. GROTIUS, *supra* note 1, at 1.

37. *Id.* at 3.

38. *See, e.g.*, Rosalyn Higgins, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 1 (1994).

39. GROTIUS, *supra* note 1, at 3.

40. *Id.* at 9.

justify his argument by proving that particular principles or ideas are custom based on historical practice or statements. In many ways, this could be interpreted as similar to customary law, a recognized source of modern international law,⁴¹ which requires both state practice and *opinio juris*.⁴² But this would only apply where a number of states had acted in a consistent manner over a period of time because they believed that they had an obligation to do so (whether by virtue of natural law, divine law, or some other body of ethics or law). This would be difficult in systems of governance that predate the modern international law system, and it would be more appropriate to consider the style of Grotius as one which uses specific writers to support a viewpoint and provide philosophical justification that specific ideas could be traced throughout history. But it is useful to consider his analysis of the law of nations, as he considers it to be a statement of what the law was at the time of writing, rather than an argument for what the law should be.

E. COMMON PROPERTY

An important issue that is discussed by Grotius, and which underlies the concept that no country can own the seas, is the distinction between common property and private property. Grotius directly describes the seas as not being capable of private ownership (whether by an individual or country), stating that: “in the legal phraseology of the [l]aw of [n]ations, the sea is called indifferently the property of no one (*res nullius*), or a common possession (*res communis*), or public property (*res publica*).”⁴³ Grotius outlines the general distinction between private property and common property, stating that:

Now, as there are some things which every man enjoys in common with all other men, and as there are other things which are distinctly his and belong to no one else, just so has nature willed that some of the things which she has created for the use of mankind remain common to all, and that others through industry and labor of each man become his own.⁴⁴

Further, Grotius discusses the development of the concept of ownership, and draws two conclusions in relation to common property. Firstly, he argues that “that which cannot be occupied, or which never has been occupied, cannot be the property of any one.”⁴⁵ Secondly, he states “that all that which has been so constituted by nature that although serving some person it still suffices for the common use of all other persons, is today and

41. Statute of the International Court of Justice, art. 38(1)(b).

42. North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment 1969 I.C.J. Rep 3, 44.

43. GROTIUS, *supra* note 1, at 22.

44. *Id.* at 2.

45. *Id.* at 27.

ought in perpetuity to remain in the same condition as when it was first created by nature.”⁴⁶ The important conclusion to be drawn from Grotius’s analysis is that there are things that—by their very nature—are intended to be common property and are not capable of ownership.

F. NATURE OF THE SEAS

To strengthen his overall argument, and as a second step to the argument that some things are common property and incapable of ownership, it is argued in *Mare Liberum* that the nature of the ocean itself provides the justification for the freedom of navigation. Grotius states that “this right belongs equally to all nations,” and that to deny this would be to “do violence to Nature herself.”⁴⁷ Grotius considers two criteria for whether things are “by nature things open to the use of all”: firstly, whether they were produced by nature, and had never been under the sovereignty of any one, and secondly, whether they were created by nature for common use.⁴⁸ He argues that the sea meets this criteria as it “is so limitless that it cannot become the possession of any one, and because it is adapted for the use of all.”⁴⁹ It is important to note that Grotius distinguishes the sea from the shore (which is capable of ownership), as it “can neither easily be built upon, nor inclosed.”⁵⁰ This will be analyzed in more detail below, where island-building activities (a practice not envisioned by Grotius) are discussed. But there was a qualification to his statement: even if there was a capability to build (which there arguably now is as a result of technological advances), this would not change Grotius’s argument as these activities would be a “hindrance to the general use.”⁵¹ This idea will be discussed in more detail when analyzing specific activities in the oceans, but the important principle is that it is the very nature of the ocean that makes it a common resource that is incapable of being owned by a single country, and there is an ensuing freedom of navigation for all.

G. RECEPTION FOR GROTIUS

There was not an immediate and universal acceptance of the principle of freedom of navigation following the publication of *Mare Liberum*. In fact, in direct response to the underlying claim, John Selden, an English lawyer, published the book that argued for the opposite idea, *Mare Clausum* (translating to “Closed Sea”).⁵² The history of these competing viewpoints,

46. *Id.*

47. *Id.* at 8.

48. *Id.* at 28.

49. *Id.* at 28.

50. GROTIUS, *supra* note 1, at 31.

51. *Id.*

52. JOHN SELDEN, OF THE DOMINION, OR OWNERSHIP, OF THE SEA: TWO BOOKS: IN THE FIRST IS SHEW'D, THAT THE SEA, BY THE LAW OF NATURE, OR NATIONS, IS NOT COMMON TO ALL MEN, BUT CAPABLE OF PRIVATE DOMINION OR PROPRIETIE, AS WELL AS THE LAND?:

the acceptance of the principle of freedom of navigation, and the development of modern law of the sea have already been extensively documented.⁵³ But it is important to note that it was not certain at the time of Grotius, or even for a period of time after his work was published, that freedom of navigation would become an accepted principle in state practice or academic writing. Although the principle of freedom of navigation forms a fundamental backbone for modern law of the sea, the method and style of argument used by Grotius is not what is relied upon to justify this concept. W.E. Butler states:

What persuaded Grotius'[s] contemporaries to make the logical leap from evidence to conclusion was seen by later generations as implausible, unscientific, unresponsive, or irrelevant: the founder of modern international legal doctrine, so forward-looking in his ideas, represented the end of an era in scholastic exposition. The ideas live on through others, even though much in his exposition declined in importance owing to his antiquated method of presenting argument.⁵⁴

Although the method of justification may be questioned, and there was a clear motivation for the commission of *Mare Liberum*, the fundamental principle in Grotius continues to underlie modern law of the sea: no country may own the seas and there is a freedom of navigation for all countries.⁵⁵

IV. Law of the Sea and Freedom of the High Seas

While it has been noted that “Grotius'[s] views were the commonly accepted theory and practice for hundreds of years,”⁵⁶ it must also be accepted that modern law of the sea consists of a tension between freedom of navigation and arguments for the various rights of states.⁵⁷ The fundamental tension that drives law of the sea is the question: to what extent are the seas free? This tension will always exist. Law of the sea is in constant development, as technology develops there will continue to be greater

IN THE SECOND IS PROVED, THAT THE DOMINION OF THE BRITISH SEA . . . IS, AND EVER HATH BEEN, A PART OR APPENDANT OF THE EMPIRE OF THAT ISLAND (J.H. Gent trans., Andrew Kembe & Edward Thomas eds., 1663) (1635) (translation of MARE CLAUSUM: SEU DE DOMINIO MARIS, LIBRI DUO).

53. See, e.g., Monica Brito Vieira, *Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas*, 64 J. OF THE HIST. OF IDEAS 361, 363-64 (2003); David J. Bederman, *The Sea*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 359, 359-60 (Bardo Fassbender & Anne Peters eds., 2012); Robert Feenstra, HUGO GROTIUS MARE LIBERUM 1609-2009 (Jeroen Vervliet ed., 2009).

54. W. E. Butler, *Grotius and the Law of the Sea*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 209, 215-16 (Hedley Bull et al. eds., 1990).

55. GROTIUS, *supra* note 1, at 7-8.

56. Jan Schneider, *Something Old, Something New: Some Thoughts on Grotius and the Marine Environment*, 18 VA. J. INT'L L. 147, 149-50 (1977).

57. Nong Hong, *Understanding the Freedom of Navigation Doctrine and the China-US Relations in the South China Sea*, INSTITUTE FOR CHINA-AMERICAN STUDIES 1, 3 (May 2017), <https://chinaus-icas.org/wp-content/uploads/2017/05/FONOP-Report.pdf>.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

308 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

possibilities and things that were never previously possible will require consideration and regulation.⁵⁸ This raises great difficulties for law of the sea: if no single country may own the high seas, then no single country may regulate the activities that are conducted there. It is therefore useful to briefly outline some of the key law of the sea conventions, and their provisions, in relation to freedom on the high seas, and the qualifications or limits upon that freedom.

A. LAW OF THE SEA CONVENTIONS

When discussing modern law of the sea, it is important to refer to the four 1958 Geneva Conventions on the Law of the Sea: the Convention on the Territorial Sea and Contiguous Zone,⁵⁹ the Convention on the Continental Shelf,⁶⁰ the Convention on the High Seas,⁶¹ and the Convention on Fishing and Conservation of Living Resources of the High Seas.⁶² These treaties were concluded after the United Nations held its first Conference on the Law of the Sea in 1958.⁶³ Although a second Conference was held in 1960, no further treaties were agreed on that occasion.⁶⁴ The third Conference convened in 1973, and an agreement was reached in 1982 that gave birth to the United Nations Convention on the Law of the Sea (UNCLOS), which came into force in 1994.⁶⁵ UNCLOS is considered to be the modern statement of law of the sea; 150 state parties have ratified the Convention,⁶⁶ and the majority of the provisions are considered to be a codification of existing customary law or a restatement of the provisions in the 1958 Conventions.⁶⁷ It should be noted that UNCLOS has not been ratified by

58. Schneider, *supra* note 56, at 148.

59. U.N. Convention on the Territorial Sea and the Contiguous Zone, *opened for signature* Apr. 29, 1958, 516 U.N.T.S. 205, 205 (entered into force Sept. 10, 1964).

60. U.N. Convention on the Continental Shelf, *opened for signature* Apr. 29, 1958, 499 U.N.T.S. 311, 311 (entered into force June 10, 1964).

61. U.N. Convention on the High Seas, *opened for signature* Apr. 29, 1958, 450 U.N.T.S. 11, 11 (entered into force Sept. 30, 1962).

62. U.N. Convention on Fishing and Conservation of the Living Resources of the High Seas, *opened for signature* Apr. 29, 1958, 559 U.N.T.S. 285, 285 (entered into force Mar. 20, 1966).

63. Tullio Treves, *Introductory Note: 1958 Geneva Conventions on the Law of the Sea*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2017), <http://legal.un.org/avl/ha/gelos/gelos.html>.

64. *Id.*

65. *Third United Nations Conference on the Law of the Sea*, CODIFICATION DIVISION PUBLICATIONS: DIPLOMATIC CONFERENCES (2017), http://legal.un.org/diplomaticconferences/1973_los/.

66. *Chronological Lists of Ratifications or, Accessions and Successions to the Convention and the Related Agreements*, UNITED NATIONS, DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA (Nov. 6, 2017), http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm.

67. ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 9-10 (3d ed. 2013); Rüdiger Wolfrum, *The Legal Order for the Seas and Oceans*, in *ENTRY INTO FORCE OF THE LAW OF THE SEA CONVENTION* 161, 174-75 (Myron H. Nordquist & John Norton Moore eds., 1995).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

END OF FREEDOM OF THE SEAS? 309

some notable countries, including the United States.⁶⁸ But the provisions that will be referred to in this paper are generally considered to be a codification of existing customary law or a restatement of existing provisions from the 1958 Conventions.

B. MARITIME ZONES AND RIGHTS

One of the largest encroachments on the idea that the seas are free is the establishment of maritime zones to protect the rights of coastal states.⁶⁹ The first maritime zone is that closest to the coast, the territorial sea, and this zone can extend up to twelve nautical miles from the relevant baselines.⁷⁰ Relevantly, the “sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State . . . to an adjacent belt of sea, described as the territorial sea.”⁷¹ Beyond this, and partially overlapping, is the contiguous zone, which can extend up to twenty-four nautical miles from the relevant baselines.⁷² The purpose of this zone is to prevent and punish infringement of “customs, fiscal, immigration[,] or sanitary laws and regulations within its territory or territorial sea.”⁷³ There has also been the establishment of the Exclusive Economic Zone, which can extend up to 200 nautical miles.⁷⁴ This zone creates sovereign rights for “exploring and exploiting, conserving and managing the natural resources, whether living or non-living . . . for the economic exploitation and exploration of the zone,”⁷⁵ and jurisdiction in relation to artificial islands, marine scientific research, and the protection and preservation of the marine environment.⁷⁶ Rights can also be claimed in relation to the continental shelf, which is comprised of the seabed and subsoil, and the outer limits of the continental shelf cannot exceed 350 nautical miles from the relevant baselines.⁷⁷

These zones are all distinct, with different rights based upon the proximity to the coast, and these zones can be interpreted as a concession to coastal states. It is important to consider the establishment of these zones, which are a recognition and protection of coastal states rights, when considering

68. Myron H Nordquist, *Why is the U.S. not a Party to UNCLOS?*, INSTITUTE FOR CHINA-AMERICA STUDIES (Dec. 17, 2015), <http://chinaus-icas.org/materials/us-not-party-unclos/>; Roncervert Ganan Almond, *U.S. Ratification of the Law of the Sea Convention*, THE DIPLOMAT (May 24, 2017), <https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/>.

69. U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 3, 27 (entered into force Nov. 16, 1994).

70. *Id.*

71. *Id.* at art. 2(1).

72. *Id.* at art. 33(2).

73. *Id.* at art. 33(1).

74. *Id.* at art. 57.

75. *Id.* at art. 56(1)(a).

76. U.N. Convention on the Law of the Sea, *supra* note 69, art. 56(1)(b).

77. *Id.* at art. 57.

the principle of freedom of the seas.⁷⁸ The rights in these zones range from an ability to exercise sovereignty (in the territorial sea),⁷⁹ to an ability to exercise specific exclusive sovereign rights (most notably in the Exclusive Economic Zone).⁸⁰ All remaining ocean that does not fall within one of these zones is referred to as the “high seas,”⁸¹ and is the maritime zone that aligns with the Grotian conception that no man may own the oceans—this zone is viewed as common to all mankind.⁸² Therefore, the principle of freedom of the seas, and the idea that no country can own the oceans because they are a common resource, still underscores modern law of the sea. But the establishment of specific maritime zones and the recognition of coastal state rights represents a limitation on the area where this principle can apply. This is an ongoing tension in law of the sea—coastal states arguing for greater exclusive rights, as balanced against the Grotian concept that the seas should be free for all.

C. FREEDOM OF NAVIGATION AND RIGHT OF INNOCENT PASSAGE

Despite the limitation in area, the protections provided in the high seas actually exceed those envisioned by Grotius. Grotius specifically argued that there was a freedom of navigation and freedom of fishing, and these freedoms are provided for in the high seas.⁸³ But a greater number of freedoms are explicitly provided for: freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands, and freedom of scientific research.⁸⁴ Additionally, the right to freedom of navigation has been considered within the territorial sea, recalling that this is a zone where a state exercises sovereignty. It is important to remember that Grotius’s argument was that a state was not able to exclude another state from navigation in the ocean, however, granting states sovereignty appears to allow exclusion from certain areas of the ocean.⁸⁵ This concern has been addressed by establishing the right of innocent passage,⁸⁶ which allows for navigation through the territorial sea where the passage is “continuous and expeditious.”⁸⁷ The important feature of these provisions is that the fundamental freedom envisioned by Grotius—that freedom of navigation shall exist for all states—is enshrined in modern law of the sea. In fact, it has even been expanded to specifically provide for further freedoms in the high seas, which reflect an expansion of the potential activities that can occur as a result of technological and societal advancements.

78. *Id.* at art. 25.

79. *Id.*

80. *Id.* at art. 56.

81. *Id.* at art. 86.

82. GROTIUS, *supra* note 1.

83. U.N. Convention on the Law of the Sea, *supra* note 69, at 57.

84. *Id.* at art. 81(1)(b)(c)(d)(f).

85. GROTIUS, *supra* note 1, at viii.

86. U.N. Convention on the Law of the Sea, *supra* note 69, at 30.

87. *Id.* at art. 18(2).

D. CONCLUSION

Modern law of the sea still reflects the Grotian principle that the seas should be free; it is the fundamental principle that all potential restrictions must be balanced against. But there have been encroachments, most notably in the establishment of specific maritime zones, which create exclusive rights for coastal states.⁸⁸ It has been argued that the principle that countries may own, or exercise exclusive control, over the oceans, has made some “inroads” into certain areas of law of the sea.⁸⁹ But it should be recalled that the principle of freedom of navigation is still alive and—at least in theory—a fundamental tenet of law of the sea, albeit restricted.⁹⁰ The right to freedom of the seas is not absolute. It will continue to be balanced against competing rights as issues and claims arise; this is an inevitability of technological advancement and the changing needs and desires of modern society. It is therefore important to consider emerging and controversial issues as they are introduced, and it is still appropriate to do this within the Grotian conception of freedom of the seas—as this will continue to form the opposing position in all discourse about future rights which encroach upon this principle.

V. Island Building

The principle that no single country can own the high seas has the inherent effect of limiting the potential power available to countries. This is going to be a concern for more powerful countries, as it prevents them from obtaining the advantages that would arise if ownership or control were permitted. An activity with the potential to infringe on the freedom of the seas, and increase the power of states, are a collection of activities which will be referred to as island building. The activities that will be considered include building upon an existing maritime feature (such as a low tide elevation or high tide elevation) to construct an island and building an island where there is no existing maritime feature. The distinction between these activities is important, particularly in terms of the different consequences in law of the sea, however, they will be referred to collectively as island building except for when it is necessary to distinguish between them. This section of the paper will briefly discuss current activities and the response of the international community, outline the framing of island building activities in law of the sea, and note why this development could be concerning for the principle of freedom of the seas.

The issue of island creation, or island building, has moved beyond the realm of academic interest for law of the sea scholars. Recent media articles have reflected a public interest in this issue, particularly in relation to the extensive island building activities being conducted by China in and around

88. *Id.* at art. 3.

89. Schneider, *supra* note 56, at 150.

90. *Id.* at 150-51.

the Spratly Islands in the South China Sea.⁹¹ Technological advances have resulted in these activities being conducted on a far larger scale than previously envisioned or considered within the realm of possibility, and this has created controversy in terms of the political response and discourse.⁹² The extent, purpose and ramifications of these activities are currently quite controversial issues, and the extent of the construction is being continually documented with photographic updates by the Asia Maritime Transparency Initiative.⁹³ The purpose of this paper is not to analyze the specific conduct of China within the framework of international law of the sea. There is existing academic commentary that addresses both sides of the issue, either justifying or questioning China's position.⁹⁴ China is not the only country performing these activities; there are other examples of controversy based on claims that a maritime feature has been converted into an island by artificial means, including the controversy over Okinotorishima between Japan and China.⁹⁵ But the activities of China are the most notable as a current issue that needs to be addressed, and will be the example referred to when considering the response of the international community to island building. This selection is the result of the scale and extent of the conduct, and the controversial location of the activities in an area of water disputed by multiple countries, namely the South China Sea.

Considering the unprecedented nature of these activities, it is important to reflect upon the response of the international community. The most authoritative legal statement in this regard has been the ruling in the *South China Sea Arbitration*,⁹⁶ proceedings brought by the Philippines against

91. See, e.g., Derek Watkins, *What China Has Been Building in the South China Sea*, N.Y. TIMES (Feb. 29, 2016), <https://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea-2016.html>; Matthew Pennington, *As Tensions Ease, China Keeps Building on Disputed Islands*, MILITARY TIMES (Dec. 14, 2017), <https://www.militarytimes.com/flashpoints/2017/12/15/as-tensions-ease-china-keeps-building-on-disputed-islands/>; Dan Southerland, *China's New Island-Building Ship Raises the Stakes in South China Sea*, RADIO FREE ASIA (Nov. 10, 2017), <http://www.rfa.org/english/commentaries/china-ship-11102017153948.html>.

92. Southerland, *supra* note 91.

93. *China Island Tracker*, ASIA MARITIME TRANSPARENCY INITIATIVE, <https://amti.csis.org/island-tracker/china/> (last visited Nov. 4, 2018).

94. See, e.g., BEN DOLVEN ET AL., CONG. RESEARCH SERV., R44072, CHINESE LAND RECLAMATION IN THE SOUTH CHINA SEA: IMPLICATIONS AND POLICY OPTIONS 1, 1-2 (2015); Bernard H. Oxman, *The South China Sea Arbitration Award*, 24 U. MIAMI INT'L & COMP. L. REV. 235, 281 (2017); Mira Rapp-Hooper, *Parting the South China Sea: How to Uphold the Rule of Law*, 95 FOREIGN AFF. 76, 78-79 (2016); Stefan Talmon, *The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility*, 15 CHINESE J. INT'L L. 309, 323-25 (2016).

95. Andrew L. Silverstein, *Okinotorishima: Artificial Preservation of a Speck of Sovereignty*, 16 BROOK. J. INT'L L. 409, 420-21 (1990); Guifang Xue, *How Much Can a Rock Get - A Reflection from the Okinotorishima Rocks*, 2011 CHINA OCEANS L. REV. 1, 4-8 (2011).

96. South China Sea Arbitration (Phil. v. China), Case No. 2013-19 (PCA Case Repository 2015) [hereinafter *South China Sea Jurisdiction*]; South China Sea Arbitration (Phil. v. China), Case No. 2013-19, 1,7 (PCA Case Repository 2016) [hereinafter *South China Sea Arbitration Award*].

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

END OF FREEDOM OF THE SEAS? 313

China in relation to various activities in the South China Sea, including island building and reclamation. But the scope of the decision was intentionally narrow as a result of the jurisdiction of the Tribunal.⁹⁷ The Tribunal did not, and could not, address the question of sovereignty for the various maritime features in question.⁹⁸ The specific question addressed was the classification of various maritime features (and consequent maritime entitlements), an issue that the Tribunal found it could decide without determining which country had sovereignty over those features.⁹⁹ The Tribunal found that a country could not claim a maritime entitlement that extended beyond the limits imposed by UNCLOS, and specifically found that none of the features in the Spratly Islands met the criteria of being an 'island' under UNCLOS, and therefore could not generate an exclusive economic zone (EEZ) or continental shelf.¹⁰⁰

Although China rejected the jurisdiction of the Tribunal and did not make submissions (either written or oral), the Chinese position was outlined in a Position Paper that sought to justify both their activities in the South China Sea and their rejection of the Tribunal's jurisdiction.¹⁰¹ There has also been a strong response from the international community disputing the activities in the South China Sea and Chinese claims supporting these activities and claiming rights or control of waters outside of the limits of their entitlements under UNCLOS.¹⁰² This includes both the parties that are actively involved in the dispute in the South China Sea,¹⁰³ as well as statements about law of the sea from other interested parties, including the United States and Australia.¹⁰⁴ The position of the United States is arguably weakened by the fact that it is arguing in relation to provisions of UNCLOS, when it is not a party to that Convention.¹⁰⁵ But as noted earlier, the provisions relied upon are considered to be customary international law, and therefore binding

97. *South China Sea Arbitration Award*, *supra* note 96, at 1-2.

98. *South China Sea Jurisdiction*, *supra* note 96, at 15; *South China Sea Arbitration Award*, *supra* note 96, at 1-2.

99. *South China Sea Arbitration Award*, *supra* note 96, at 1-2.

100. *Id.* at 254.

101. *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, 15 CHINESE J. OF INT. L. 431 (Aug. 12, 2016), <https://doi.org/10.1093/chinesejil/jmw024>.

102. Michael McDevitt, 'The South China Sea: Assessing US Policy and Options for the Future', CNA (Nov. 2014), https://www.cna.org/cna_files/pdf/IOP-2014-U-009109.pdf

103. See, e.g., Felipe Villamor, *Philippines Sends Defense Chief to Dispute South China Sea Island*, NEW YORK TIMES (Apr. 21, 2017), <https://www.nytimes.com/2017/04/21/world/asia/philippines-south-china-sea.html>; Laura Zhou, *China-Vietnam Maritime Tensions Flare as Foreign Ministers Meeting Called Off*, SOUTH CHINA MORNING POST (Aug. 7, 2017), <https://www.scmp.com/news/china/diplomacy-defence/article/2105828/china-vietnam-maritime-tensions-flare-foreign-ministers>.

104. McDevitt, *supra* note 102; 2017 Foreign Policy White Paper, at 46-47 (Nov. 2017), <https://www.fpwwhitepaper.gov.au/file/2651/download?token=Q5CYuX29>.

105. See U.N. Convention on the Law of the Sea, *supra* note 69.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

314 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

upon all countries.¹⁰⁶ The various arguments for and against the Chinese claims, and shaping the discourse in relation to island building, will be considered in section VI, when analyzing these arguments within the framework of Grotius' conception of freedom of the seas.

To understand the potential consequences of island building activities within the current law of the sea regime, it is useful to outline the classification of maritime features within UNCLOS.¹⁰⁷ The important consequence of this classification results from the maritime entitlement (or maritime zone) that each feature is capable of generating.¹⁰⁸ The first important distinction is whether a feature is a low tide elevation or a high tide elevation: a low tide elevation being above water at low tide but submerged at high tide, whereas a high tide elevation is above water at both low and high tide.¹⁰⁹ A low tide elevation is not capable of generating a territorial sea, EEZ, or continental shelf,¹¹⁰ but may be used as a baseline where it is located within the territorial sea of a state.¹¹¹ A low tide elevation is not capable of being artificially transformed into a high tide elevation under the UNCLOS regime, as a high tide elevation must be "naturally formed" above water at high tide.¹¹²

Where a maritime feature is above water at high tide, there are two possible classifications; the feature may be a "rock" or an "island."¹¹³ The difference between these features is important, as an island is capable of generating a territorial sea, a contiguous zone, an EEZ, and a continental shelf,¹¹⁴ whereas a rock can only generate a territorial sea and contiguous zone.¹¹⁵ The distinction is based on the definition in UNCLOS, which states that rocks "cannot sustain human habitation or economic life of their own,"¹¹⁶ and conversely means that an island must be able to sustain human habitation or an economic life of its own. Although it's unlikely, in a practical sense, that one will be fulfilled without the other being present, it has been determined that only one of the criterion must be satisfied for the feature to be considered an island.¹¹⁷ It is this distinction that raises the critical question: whether a rock can be converted into an island by human alteration, as the feature is already a "naturally formed" high tide elevation.

106. Meagan P. Wilder, *Who Gets the Oil?: Arctic Energy Exploration in Uncertain Waters and the Need for Universal Ratification of the United Nations Convention on the Law of the Sea*, 32 HOUS. J. INT'L L. 505, 541-42 (2010).

107. U.N. Convention on the Law of the Sea, *supra* note 69.

108. *Id.* sec. 2.

109. *Id.* at art. 13(1).

110. *Id.* at art. 13(2).

111. *Id.* at art. 13(1).

112. *Id.*

113. *Id.* at art. 121.

114. U.N. Convention on the Law of the Sea, *supra* note 69, at art. 121(2).

115. *Id.* at art. 121(3).

116. *Id.*

117. *South China Sea Arbitration Award*, *supra* note 96, at 209.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

END OF FREEDOM OF THE SEAS? 315

This issue is important because of the difference in maritime entitlements and will be discussed in greater detail in the analysis in section VI.

A state is also permitted to construct a wholly artificial island within their EEZ,¹¹⁸ and on their continental shelf.¹¹⁹ But an artificial island will not generate *any* maritime zones, and the only claim that can be made is for a 500m safety zone.¹²⁰ Where a state constructs an artificial island in the high seas, there will be serious questions as to exclusive jurisdiction because “[n]o State may validly purport to subject any part of the high seas to its sovereignty.”¹²¹ It is therefore important to distinguish between whether the specific island building referred to is construction upon an existing maritime feature and capable of generating an entitlement, or is purely artificial and therefore not capable of creating any maritime entitlements.¹²² Even where the classification of a maritime feature and the consequent maritime entitlement is determined or agreed, there will still be a relevant question as to the sovereignty over those features.¹²³ The law of the sea regime specifically does not address the issue of sovereignty over land territory, but this will be a relevant issue to consider in terms of international relations and international law generally.¹²⁴

Island building activities potentially pose a threat to the fundamental freedom of the seas; they can be a means for more powerful and well-resourced countries to encroach upon areas of the sea they do not have entitlement to under UNCLOS. As technology has developed, this threat has become a more realistic possibility, and island building activities are already being performed.¹²⁵ In particular, the legal consequences of the large-scale activities in the South China Sea—a highly contested area—will need to be addressed within the framework of law of the sea.¹²⁶ The potential consequences of these activities are numerous. First, constructing an island provides potential strategic advantages in terms of expanding land territory, which may increase the power and military capability of a state.¹²⁷ Secondly, where a feature is determined to be an island under the UNCLOS

118. U.N. Convention on the Law of the Sea, *supra* note 69, at art. 60.

119. *Id.* at art. 80.

120. *Id.* at art. 60(4)-(5), art. 80.

121. *Id.* at art. 89.

122. *Id.* at art. 60.

123. *Id.* at art. 89.

124. *See generally* U.N. Convention on the Law of the Sea, *supra* note 69.

125. Seth Robson, *China Quietly Continues Island-Building Campaign as Tensions Ease in South China Sea*, STARS AND STRIPES (Dec. 15, 2017), <https://www.stripes.com/news/china-quietly-continues-island-building-campaign-as-tensions-ease-in-south-china-sea-1.50252>.

126. Daniel Mooney, *Lack of a Legal Framework Regarding Island Building in the South China Sea*, MICH. J. INT’L L. 37.

127. Peter Pham, *The Arms Race in the South China Sea*, FORBES (Dec. 16, 2017), <https://www.forbes.com/sites/peterpham/2017/12/20/the-arms-race-in-the-south-china-sea/#696218bd4b1a>; Seth Robson, *China Island-Building Continues in South China Sea*, MILITARY (Dec. 16, 2017), <https://www.military.com/daily-news/2017/12/16/china-island-building-goes-tensions-ease-south-china-sea.html>.

regime, it will be capable of generating both a territorial sea and an EEZ up to 200 nautical miles.¹²⁸ Thirdly, exclusive control over the Spratly Islands may influence all future negotiations about sovereignty and maritime delimitation in the South China Sea.¹²⁹ Fourthly, the pragmatic reality is that the risk of environmental damage, or harm to the biodiversity of the region, will be significantly increased by such large-scale construction activities.¹³⁰ Additionally, and important for the purpose of this paper, these activities could be viewed as a means of circumventing the Grotian principle of freedom of the seas, and raise questions about the continuing relevance of this principle in modern law of the sea.

VI. Grotian Analysis of Island Building

The following critique builds upon the previous discussion of background and context, the analysis of legal principle and development, and the description of the current factual scenario and concerns. Island building activities are now able to be undertaken on a scale not envisioned at the time of Grotius, or even as recently as the negotiation of the provisions in the UNCLOS.¹³¹ This is a new development; it raises controversial issues and represents an unsettled area of law at the fringe of the settled body of law codified within UNCLOS. It also raises larger conceptual issues about the role of the Grotian principle—freedom of the seas—in the context of modern law of the sea generally. The underlying question must be asked: does island building represent a shift away from one of the fundamental propositions that modern law of the sea was built upon?

This broad theme will be explored by discussing a series of smaller questions. The first question is whether the current island building activities actually do represent a shift, or seek to be a shift, away from the concept of freedom of the seas. This will involve analyzing the response of the international community, as well as considering the stance taken by China and their justification for these activities within the current law of the sea regime. The second question is theoretical, and is whether these activities have the *potential* to conceptually represent a shift from freedom of the seas, or are simply a further restriction in line with qualifications previously granted in favor of recognizing state rights. The paper will then consider the consequences based on both potential views: that it is only an isolated qualification to the freedom, or that it represents a desire in the international community for a fundamental shift in the law of the sea. The third question is based on the former view, that this is only an isolated qualification, and considers whether this restriction is justified in contrast to the competing right to freedom of the high seas. The fourth question is based on the view that this represents a fundamental shift, or a momentum towards such a

128. See U.N. Convention on the Law of the Sea, *supra* note 69, at art. 57.

129. Mooney, *supra* note 126.

130. *South China Sea Arbitration Award*, *supra* note 96, at 475-76.

131. See generally U.N. Convention on the Law of the Sea, *supra* note 69.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

END OF FREEDOM OF THE SEAS? 317

change, and questions whether it is appropriate to reconsider this fundamental principle in light of developments in technology and international relations, or if there is an overriding need to preserve the principle of freedom of the seas. By considering and answering these smaller questions, the larger conceptual issues raised by island building can be answered within the Grotian conception of freedom of the seas.

**A. DO CURRENT ACTIVITIES INDICATE A DESIRE FOR A
FUNDAMENTAL SHIFT IN LAW OF THE SEA?**

The first thing to consider is the nature and consequences of the specific conduct being undertaken: do the activities in question, and the attitude of the international community more generally, indicate a shift in thinking about freedom of the seas? Answering this question involves discussion from two different sides: that of the international community, in response to the island building activities, and that of China, when justifying such conduct under the law of the sea regime. Whether this new practice is accepted by other countries as legitimate under law of the sea, and the rationale for any such acceptance, will largely determine if this represents a fundamental change in law of the sea. It has already been noted in this paper that the extensive island building activities have received a negative reaction from the international community, ranging from concern to condemnation. But it is important to look at why these activities are receiving negative scrutiny: is it because of the underlying conceptual concern in relation to freedom of the seas, a theoretical debate about the law of the sea, or is it framed within another discourse?

The statements and actions of the international community in response to these activities indicate that the concern is not primarily focused on conceptual principle, or a strict legal debate, but is about broader political concerns.¹³² This is primarily being framed as an issue about the growth of China's power and military interests.¹³³ At the beginning of 2017, U.S. Secretary of State Rex Tillerson stated that: "We're going to have to send China a clear signal that, first, the island-building stops and, second, your access to those islands also is not going to be allowed."¹³⁴ The discussion has even moved to whether a response against Chinese activities will initiate a

132. See Mark J Valencia, *Beijing Now Calls the Shots in the South China Sea, and the US and ASEAN Must Accept this for Lasting Peace*, SOUTH CHINA MORNING POST (July 9, 2017), <http://www.scmp.com/comment/insight-opinion/article/2101696/beijing-now-calls-shots-south-china-sea-and-us-and-asean>.

133. *China Builds New Military Facilities on South China Sea Islands: Think Tank*, REUTERS (June 29, 2017), <https://www.reuters.com/article/us-southchinasea-china-islands/china-builds-new-military-facilities-on-south-china-sea-islands-think-tank-idUSKBN19L02J>; Valencia, *supra* note 132.

134. David Brunnstrom & Matt Spetalnick, *Tillerson Says China Should Be Barred from South China Sea Islands*, REUTERS (Jan. 11, 2017), <https://www.reuters.com/article/us-congress-tillerson-china/tillerson-says-china-should-be-barred-from-south-china-sea-islands-idUSKBN14V2KZ>.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

318 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

large scale war in the South China Sea,¹³⁵ and “freedom of navigation” patrols are being conducted within twelve nautical miles of the artificial islands to demonstrate the stance of the international community that these activities are not legitimate or legal.¹³⁶ This is not an academic discussion about provisions of UNCLOS, or a conceptual debate; it is now a political issue about power, growth, and military, and this indicates broader concerns from the international community than strict law of the sea issues. Additionally, the states bordering the South China Sea, notably the Philippines and Vietnam, are concerned about the infringement upon their own claims to maritime entitlements, the effect on their ships and fishing, and the environmental consequences of their actions.¹³⁷

Considering this negative response from states directly affected, such as countries bordering the South China Sea, and states not directly involved in the disputed area, it is important to consider the stance that has been taken by China. China has continued to argue that they are acting in conformity with the law of the sea.¹³⁸ In particular, they have argued that they are entitled to a portion of the sea enclosed by a line referred to as the nine-dash-line, based on historical rights.¹³⁹ This claim was specifically addressed by the Tribunal in the *South China Sea Arbitration*, who determined that a state cannot claim an entitlement greater than that provided for by UNCLOS, and that China was not entitled to claim these waters.¹⁴⁰ But the most important aspect of the Chinese justification and stance is the lack of engagement with the law; China did not engage with the Tribunal after claiming that they did not have jurisdiction, and maintained this stance even

135. See Alexander L. Vuving, *How America Can Take Control in the South China Sea*, FOREIGN POLICY (Feb. 13, 2017), <http://foreignpolicy.com/2017/02/13/how-the-u-s-can-take-control-in-the-south-china-sea>; James Holmes, *How China Plans to Win a War in the South China Sea*, NATIONAL INTEREST (Aug. 27, 2017), <http://nationalinterest.org/blog/the-buzz/how-china-plans-win-war-the-south-china-sea-22073>; Naomi Woodley, *South China Sea: ‘There Cannot Be’ Conflict Between US and China, Foreign Minister Warns*, ABC (Feb. 7, 2017), <http://www.abc.net.au/news/2017-02-08/us-china-conflict-on-south-china-sea-not-good-warns-foreign-mini/8249812>.

136. See Prashanth Paresmeswaran, *US South China Sea Policy After the Ruling: Opportunities and Challenges*, BROOKINGS INST. (July 22, 2016), <https://www.brookings.edu/opinions/u-s-south-china-sea-policy-after-the-ruling-opportunities-and-challenges>; Idrees Ali, *US Destroyer Challenges China’s Claims in South China Sea*, REUTERS (Aug. 10, 2017), <https://www.reuters.com/article/us-usa-china-southchinasea-exclusive/u-s-destroyer-challenges-chinas-claims-in-south-china-sea-idUSKBN1AQ0YK>.

137. See Jeffrey Bader et al., *Keeping the South China Sea in Perspective*, BROOKINGS INST. (Aug. 14, 2014), <https://www.brookings.edu/wp-content/uploads/2016/06/south-china-sea-perspective-bader-lieberthal-mcdevitt.pdf>; Commodore Agus Rustandi, *The South China Sea Dispute: Opportunities for ASEAN to Enhance its Policies in Order to Achieve Resolution*, AUSTRALIAN DEFENCE COLLEGE (Apr. 2016), http://www.defence.gov.au/ADC/Publications/IndoPac/Rustandi_IPSP.pdf.

138. Huaxia, *Full Text of Chinese Government Statement on China’s Territorial Sovereignty and Maritime Rights and Interests in South China Sea*, XINHUA (Dec. 7, 2016), http://news.xinhuanet.com/english/2016-07/12/c_135507754.htm.

139. *South China Sea Arbitration Award*, *supra* note 96, at 71-74.

140. *Id.* at 116-17.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

END OF FREEDOM OF THE SEAS? 319

after the Tribunal issued the initial judgment on jurisdiction.¹⁴¹ This raises concerns about whether this issue is going to be discussed within the framework of law of the sea or is simply a matter of power politics where both sides seek to use legal discourse as a means of justifying their position.

But this is an inherent feature of international law; there is no supreme authority that can enforce a body of law, and thus international law will have to be viewed as only one part of a broader discussion about international relations. Even though China is unlikely to accept the award of the *South China Sea Arbitration*, the value of the decision may be more properly realized in terms of its impact and influence on the future relations and negotiations between various countries.¹⁴² Consideration of the influence of power politics on international law, and the appropriateness of such influence, is a much broader issue than contemplated by this paper. For the purpose of this discussion, it is assumed that there is no clear demarcation between international law and international politics. With that concept in mind, it can reasonably be concluded that this issue does not represent a conceptual shift in thinking about the law of the sea, but instead it represents an issue of self-interest for states. China is acting to increase their power and capabilities, both military and strategic.¹⁴³ Other countries are responding based on protecting their own interests, either because China is directly infringing on their rights (including the disputed maritime entitlements of coastal states and more general concerns about freedom of navigation), or they are concerned about an increase in China's power posing a threat to their country.¹⁴⁴ Either way, these specific activities should not serve as evidence that a fundamental shift in thinking about law of the sea is being contemplated by the international community.

B. IF ACCEPTED AS A LEGITIMATE PRACTICE, WOULD ISLAND
BUILDING REPRESENT A FUNDAMENTAL SHIFT IN LAW OF
THE SEA OR SIMPLY A FURTHER LEGITIMATE
QUALIFICATION OR LIMITATION?

The concept of freedom of the seas, and the principle that no country may own the high seas, inherently means that the regulation of the oceans is an international issue and requires a functioning body of international law to

141. Tom Phillips, *Beijing rejects tribunal's ruling in South China Sea case*, SOUTH CHINA SEA (July 12, 2016), <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china>.

142. See Clive Schofield, *Explainer: What are the Legal Implications of the South China Sea Ruling?*, THE CONVERSATION (July 13, 2016), <http://theconversation.com/explainer-what-are-the-legal-implications-of-the-south-china-sea-ruling-62421>.

143. Patrick Cronin, *Toward a New Maritime Strategy in the South China Sea*, THE DEBATE (June 22, 2018), <https://thediplomat.com/2018/06/toward-a-new-maritime-strategy-in-the-south-china-sea/>.

144. Lynn Kuok, *Countering China's actions in the South China Seas*, IISS, (Aug. 16, 2018), <https://www.iiss.org/blogs/analysis/2018/08/countering-china-south-china-sea>.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

320 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 2

establish rules for all countries.¹⁴⁵ If island building were accepted as a legitimate practice, then it has the potential to function as a method for states to use artificial means to obtain more land territory, and consequently obtain control over surrounding portions of the ocean. The acceptance of China's conduct and stance could result in a transformation from the need to regulate the oceans as a common resource for all of mankind, to a battleground where states seek to obtain more territory, influence, and power. Although it has not directly been stated as the policy objective of China, the practice of allowing states to have exclusive control or ownership over the oceans is more in line with the principle within *Mare Clausum*.¹⁴⁶ This raises conceptual concerns, as it has been the opposing principle, within *Mare Liberum*, that has been the commonly accepted practice for hundreds of years and forms a fundamental pillar of law of the sea.¹⁴⁷

It should be recalled that the opposing arguments put forward by Grotius and Selden were based on the self-interest of their respective countries at the time, using conceptual justification to support their overall position. This raises the question of whether we are currently revisiting this conceptual debate within the framework of a new factual matrix. There are two ways to consider this question or issue. The first is to treat this as simply another debate about an encroachment or limitation on freedom of the seas, in favor of recognition of state rights. This is a continual debate that is necessary within law of the sea every time there is a new development that raises questions about the existing tension between freedom of the seas and exclusive state rights. But there is a second way to interpret this issue: although it is not being directly stated as the objective, it could be viewed as only one in a series of encroachments on the high seas that represents a gradual and ongoing long-term shift away from the principle of freedom of the seas. This must be considered carefully, as revisiting this fundamental proposition will require a complete overhaul of existing law of the sea—a body of law that is premised on the concept of freedom of the seas and works to regulate an area that is not owned by any single state.¹⁴⁸ Both of these questions will be addressed below: discussing the validity of island building as a discrete limitation on freedom of the seas, as well as the appropriateness of re-conceptualizing law of the sea without the fundamental principle of freedom of the seas.

145. United Nations, *Oceans and the Law of the Sea*, GLOBAL ISSUES, <http://www.un.org/en/sections/issues-depth/oceans-and-law-sea/> (last visited Nov. 4, 2018).

146. See Bo Johnson Theutenberg, *Mare Clausum et Mare Liberum*, ARTIC INST. OF N. AMERICA (Dec. 1984), https://www.jstor.org/stable/40510310?seq=1#metadata_info_tab_contents.

147. *Id.*

148. See generally U.N. Convention on the Law of the Sea, *supra* note 69.

C. AS A DISCRETE ISSUE, IS ISLAND BUILDING A JUSTIFIED
LIMITATION ON FREEDOM OF THE SEAS?

It has already been noted that entrenched within law of the sea is an underlying tension between freedom of the seas and the recognition of coastal state rights; this issue is not unique, and it was the finding of a balance between these competing rights that formed the foundation of the modern law of the sea.¹⁴⁹ Whether island building is a practice that should constitute a justified limitation on freedom of the sea will largely depend on how the issue is framed within existing law of the sea. If these islands are considered to be artificial islands, the only relevant maritime entitlement will be the 500m safety zone.¹⁵⁰ The more relevant question will then be one of land territory, an issue not addressed by law of the sea and more properly considered within general international law.¹⁵¹ It is accepted that land dominates the sea,¹⁵² meaning that the maritime entitlement will follow the sovereignty over the land. The relevant principle within law of the sea is that no country may claim sovereignty over the high seas, and this practice has the potential to circumvent that.¹⁵³ Where a state creates a purely artificial island, the issue of sovereignty will be determined by other areas of international law and is not an issue apt to be addressed within law of the sea.¹⁵⁴ The relevant observation about artificial islands within the law of the sea regime is that they are not capable of claiming a territorial sea or EEZ with exclusive rights for the state and are therefore not a means of capturing large portions of the oceans for exclusive state control.¹⁵⁵

The larger issue will be whether a state is capable of transforming an existing maritime feature. Although the wording of UNCLOS suggests that a low tide elevation could not be artificially transformed into an island, as it would not be naturally formed above the high tide, the more significant question is whether a rock can be transformed into an island, as both terms are defined under UNCLOS.¹⁵⁶ Despite the Tribunal in the *South China Sea Arbitration* unambiguously stating that a rock cannot be converted into an island, as a maritime feature must be assessed as naturally formed,¹⁵⁷ this issue is likely to remain controversial between states seeking to justify further exclusive maritime rights. Given the clarity of the wording in the *South China Sea Arbitration*, unless the law is further clarified or revisited, the appropriate practice will continue to be to assess the development of specific

149. United Nations, *supra* note 145.

150. U.N. Convention on the Law of the Sea, *supra* note 69, at art. 60.

151. *See generally*, U.N. Convention on the Law of the Sea, *supra* note 69.

152. Territorial and Maritime Dispute (Nicar. v. U.S.), Judgment, 2012 I.C.J. Rep. 1, ¶ 140 (Dec. 13); Delimitation of the Maritime Boundary in the Bay of Bengal (No. 16) (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012, ITLOS Rep. 4, ¶ 185.

153. U.N. Convention on the Law of the Sea, *supra* note 69, at art. 89.

154. *Id.* at art. 60.

155. *Id.*

156. *Id.* at arts. 13, 121.

157. *South China Sea Arbitration Award*, *supra* note 96, at 214.

features on a case-by-case basis, considering the location, natural state, and transformation for each feature in question.¹⁵⁸ It is important to note that this is conceptually different than creating land territory where none previously existed. This is the concern in relation to island building: that it will grant land territory and maritime entitlements where there previously were none.¹⁵⁹ In the case of purely artificial islands, the establishment of exclusive maritime rights (with the exception of the safety zone) is not permissible under law of the sea.¹⁶⁰ Island building activity is concerning because it involves construction activities in an area that is—as a fundamental principle of law of the sea—not permitted to be owned by one country.¹⁶¹ This is concerning and will require clarification within international law if it comes to be seen as a permissible and legitimate activity. It will then become an issue of determining the best means of regulating this practice to balance the tension and ensure that freedom of the seas is protected.

D. DO WE NEED TO RECONSIDER FREEDOM OF THE SEAS?

It has been established in this section that the specific issue of island building is not a purely conceptual debate about the relevance of freedom of the seas: is it an issue about states acting in their self-interest to increase their power or, conversely, seeking to ensure that their rights are not infringed upon and to limit the growth of other states? But it raises a valid conceptual concern about whether this is a sign that a powerful nation is seeking to exercise power by establishing dominion over valuable parts of the seas. This is not the first time that this has happened; the publication of *Mare Liberum* was in direct response to an argument from a powerful country that the seas were not, in fact, free.¹⁶² In that sense, the response to these complex issues is actually simple: this is why we needed, and will continue to need, freedom of the seas. There will always be a desire for more powerful states to seek to monopolize areas of the sea that are beneficial to them. It is in their self-interest, and it can be seen as acceptable or even necessary as an obligation that leaders have to the citizens of their country to act in their self-interest.¹⁶³ But this is also why the concept—even if purely theoretical—that underlies international law is that of sovereign equality.¹⁶⁴ The more powerful states are theoretically not able to control the weaker states simply by virtue of their power.

158. *Id.* at 214-15.

159. U.N. Convention on the Law of the Sea, *supra* note 69, at art. 60.

160. *Id.*

161. *Id.* at art. 89.

162. See Peter Borschberg, *Hugo Grotius' Theory of Trans-Oceanic Trade Regulation: Revisiting Mare Liberum (1609)* 1 (Int. L. and Justice, Working Paper No. 14, 2005).

163. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2611 (1997).

164. Juliane Kokott, *States, Sovereign Equality*, OXFORD PUBLIC INTERNATIONAL LAW, <http://opil.oup.com/view/10.1093/law:epil/9780199231690/law-9780199231690-c1113> (last updated Apr. 2011).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

END OF FREEDOM OF THE SEAS? 323

In practice, this is more controversial and the relationship between developing and powerful states was noted earlier in this paper. But freedom of the seas needs to be maintained as a fundamental tenet of law of the sea because it acts as a protection against the more powerful nations seeking to monopolize the seas for their own benefit. The concept of the oceans as a common resource was noted in Grotius and, although his justification through the use of natural and divine law may be questioned as legitimate in modern society, his overall argument is still relevant.¹⁶⁵ We continue to rely on the seas to travel between and trade with other countries.¹⁶⁶ The seas are distinct from the land: although they can be built upon, this is simply the creation of further *land* territory, which will not be governed by law of the sea.¹⁶⁷ The seas are a natural resource distinct from the land, which is capable of ownership, and it is required for all peoples to be able to travel, trade, and utilize for their own benefit.

Accepting that the nature of the oceans and the need to enshrine a protection against the more powerful states monopolizing them justifies maintaining a freedom of the seas, the relevant question becomes how we should use the law to maintain this fundamental freedom of the seas, when the situation is more reflective of a power-politic situation within international relations. But this issue is not confined to island building, or even to the law of the sea as a body of law. This is an inherent problem faced by international law and will continue to be a conceptual topic that needs to be addressed. In this case, a relevant example is the decision of the *South China Sea Arbitration*.¹⁶⁸ It has already been directly stated by China that they do not recognize the decision, but that was clear from the beginning of the arbitration, and yet the Philippines continued to pursue this matter through the international law process.¹⁶⁹ The advantage that comes from this decision will not be a legal advantage as enforced by a top down system; it will be an advantage in how the decision can be used in a horizontal based legal system with no controlling authority. The statement of international law can be viewed as part of a larger negotiation tactic in international relations, and as a tool in diplomacy and political discussion. By preserving the principle of freedom of the seas, we ensure that all future action in relation to the law of the sea has to be measured and justified against this principle—and that is the protection that the principle of freedom of the seas provides within international law of the sea.

165. See generally Borschberg, *supra* note 162.

166. *How much trade transits the South China Sea?*, CHINA POWER, <https://chinapower.csis.org/much-trade-transits-south-china-sea/> (last visited Nov. 4, 2018).

167. See generally U.N. Convention on the Law of the Sea, *supra* note 69.

168. See generally *South China Sea Arbitration Award*, *supra* note 96.

169. *Id.*

VII. Conclusion

When Grotius outlined the principle of freedom of the seas in *Mare Liberum*, he established the principle that would form one of the fundamental pillars of modern law of the sea.¹⁷⁰ It is the continuing limiting principle that all future action and potential encroachments must be measured against, and that is the value of his work. Grotius gave great thought to the idea of regulating relations between nations, and regulating an international society more generally; both of these ideas were reflected in his writings.¹⁷¹ But it is important to contextualize the particular work that this freedom was first outlined in; *Mare Liberum* was written with a particular purpose and to provide support for the position of one side in a legal dispute between two powerful states.¹⁷² This is the continuing theme surrounding the oceans; they are an area where more powerful states will continue to desire and seek greater power. By conceptualizing the high seas as an area in which *no* state has control, this inherently creates a power vacuum. This is the importance of freedom of the seas as a fundamental principle—it ensures that no state can take control to the exclusion of other states. To revisit this principle would open a battleground to be divided as a means of increasing state power and influence, and be to the detriment of all other countries who currently benefit from the freedoms protected on the high seas.

It is this principle that all future actions must be measured against, and this is the case for the controversial activity of island building. The concept was considered when UNCLOS was established, and this is why there is a provision that specifically addresses artificial islands.¹⁷³ What was not considered was the scale of these activities, as technological developments have resulted in these activities being far more extensive than ever previously contemplated. The positioning and scale of these activities raises the legitimate concern that island building will be used as a means of obtaining advantages and control in strategic locations, effectively extending the influence and power of countries where they previously did not have any exclusive control. But, the response of the international community to these activities has indicated that countries do not accept this practice as legitimate.¹⁷⁴ Even if all parties involved are acting in their self-interest, and not based on a conceptual discussion removed from reality, this further serves to reinforce why we need this principle. All countries agreeing to

170. James Brown Scott, *Hugo Grotius, The freedom of the Seas, 1609*, UNIV. OF MASS. DARTMOUTH (1916), <http://www1.umassd.edu/euro/resources/dutchrep/4.pdf> (last visited Oct. 26, 2018).

171. *Id.*

172. Borschberg, *supra* note 162.

173. U.N. Convention on the Law of the Sea, *supra* note 69, at art. 60.

174. David Brunnstrom & Matt Spetalnick, *Tillerson Says China Should Be Barred from South China Sea Islands*, REUTERS (Jan. 11, 2017), <https://www.reuters.com/article/us-congress-tillerson-china/tillerson-says-china-should-be-barred-from-south-china-sea-islands-idUSKBN14V2KZ>.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

END OF FREEDOM OF THE SEAS? 325

respect the principle of freedom of the seas serves as a means of protecting against the self-interest of any one state resulting in control of the oceans. Although it means that no state can obtain the advantage for itself, it ensures that no *other* country can obtain that advantage, and that is likely to be the motivating factor that ensures that this principle is preserved. Island building is a controversial issue, and the specific conduct will need to be discussed further within an international law framework, but it does not represent a signaling of the end of freedom of the seas. There is a self-interest for all states to protect this freedom. It can be difficult to conceptualize freedom of the seas as a common resource for all rather than a power vacuum waiting to be captured. But the very fact that the majority of countries will not allow a single country to take control—a fact highlighted in the analysis of island building in the South China Sea—is what will ensure that this principle remains a fundamental tenet of law of the sea.

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW