

Chapter 5

The Law of Nations and International Trade

It is difficult to underestimate the shock of the European encounter with the Americas at the end of the fifteenth century. The confusion, violence, and changing circumstances immediately raised questions among scholastic thinkers about how Europeans should treat the peoples of the Americas. It also resulted in an exploration of two related questions.

The first was how nations should interact with each other, and on what basis such relations should be based. The second concerned the issue of the freedom of people to trade: not simply within with sovereign states but also across state boundaries. What restrictions, if any, could the authorities place on those members of their political community who wanted to engage in commerce with those who belonged to other political communities?

Some of the most important contributions to this topic in the period were made by natural law thinkers. Moreover, they did so at a time during which the European world was moving in precisely the opposite direction to that of free trade.

Prior to the eighteenth century, the dominant economic framework of post-medieval Western Europe was essentially mercantilism. This was a way of economic thinking and acting which held that nations became rich by encouraging exports and restricting imports (LaHaye, 2021). Governments acted to protect merchants from foreign competition by imposing tariffs and quotas on imports, as well as granting monopolies on the production of particular goods or trade routes to particular merchants. Trade by sea was especially restricted under mercantile arrangements. While it was rare for states to ban outright the importation of goods and services from abroad, governments introduced a number of restrictions that served to minimize competition.

In 1650 and 1651, for example, England introduced the Navigation Laws (LaHaye, 2021), which sought to prevent foreign-owned ships from engaging in coastal trade within the English realm. The same laws required any trade between English colonies and the mother country to be conveyed on colonial or English ships. Those seeking to break into these protected markets often found that their only recourse was to engage in smuggling.

Established merchants who benefited from these arrangements typically returned the government's favours. They acquiesced in the raising of taxes and the paying of customs dues that provided funding for, among other things, wars undertaken by European states to make territorial acquisitions around the globe, establish colonies, and expand and defend them.

These measures had implications for how sovereign states treated each other and for merchants who wanted to trade with each other across state boundaries. Here what was called “the law of nations” became important, not least because it became a primary reference point for scholastic thinkers who believed that there were limits on what the state could do to regulate trade between sovereign states.

The *ius gentium*

The origins of the idea of the law of nations—the *ius gentium*—are to be found in Greek and Roman philosophers and lawyers. In the *Institutes* of the Roman jurist Gaius (130–180), the *ius gentium* is closely associated with the natural law:

Every people that is governed by statutes and customs observes partly its own peculiar law and partly the law common to all mankind. That law which a people establishes for itself is peculiar to it, and is called *ius civile* as being the special law of that state, while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* as being the law observed by all mankind. Thus the Roman people observes partly its own peculiar law and partly the common law of all mankind. (Poste, 1904: 1)

For Gaius, the *ius gentium* is thus ultimately derived from the *ius naturale* insofar as the origins of the former lie in the latter.

Roman law, however, also articulated a second sense of *ius gentium* (Nichols, 1962: 57–58) that seems closer to the idea of a universal positive law rather than natural law. In the ancient world, many of the laws applicable to a person were associated with the state to which he owed allegiance rather than where he lived. An Athenian citizen living in Corinth, for instance, might be subject to many Athenian laws and could often legitimately request to be judged in Athens for a crime committed in Corinth. Not surprisingly, this created complications for the legal authorities in Corinth and Athens, but also resentments between them.

This situation was further complicated by the fact that more and more people were subject to the jurisdiction of not only particular states, but were also citizens of Rome. It was on this basis that Saint Paul, for instance, was able to escape from the jurisdiction of both the Jewish religious authorities in first century Judea as well as that of King Herod Agrippa II (Rome's client ruler of several territories in modern-day Israel) by appealing his case to the Roman Emperor on the grounds that Paul possessed Roman citizenship.

To address potential conflicts between different jurisdictions, a Roman body of law had emerged by the first century B.C. that was applicable to everyone across the Empire, regardless of whether they held citizenship of one or more states or were living in a different jurisdiction to that from where they derived their particular citizenship. This Roman law embraced *all* the tribes, city-states, or peoples (*gentibus*) within the Empire and was considered as distinct from and more authoritative than the *ius civile* (the law specific to a particular state).

Following Rome's fall, the bishop and scholar Isidore of Seville (560–636) played a major role in preserving, codifying, and clarifying the two senses of the *ius gentium*. He listed a number of institutions (such as peace treaties and the treatment of prisoners in wartime) that he regarded as belonging to the law of nations (Isidore, 1472/1911: 5.6). He added that this law was so called because it was in force among almost all peoples (Isidore, 1472/1911: 5.9).

The medieval treatment of *ius gentium* differed slightly from that of the Roman jurists. While Aquinas agreed with Gaius's distinction between *ius civile* and *ius gentium* (ST I-II, q.95, a.2, 4), his references to the *ius gentium* specified that it was that aspect of positive law that was immediately derived by deduction from the natural law and which was universally applicable across jurisdictional boundaries (ST I-II, q.95, a.2, 4).

For Aquinas, an example of this is contracts. Contracts had been introduced into society because they were proven to serve the well-being of individuals and communities (ST II-II, q.77 a.1c). To that extent, contract law was a matter of positive law rather than natural law. Yet contract law was also unquestionably based on the principle known as *pacta sunt servanda* (agreements are to be performed). This principle was so essential for justice and order in *any* human community that, Aquinas argued, it (like property) should be understood by all peoples as immediately deducible from principles of natural law (ST I-II, q.95 a.4c and ad.1; and II-II, q.57, a.3c and ad.1). It thus belongs to the *ius gentium* rather than the *ius civile*.

Like Aquinas, Suárez maintained that the *ius gentium* was somewhere between natural and positive law. It was, he said, “a mean between natural and human law, and very much closer to the former” (Suárez, c.1612/2012b: II, 17, 1). He divided, however, the contents of *ius gentium* into two groups.

The first group was those laws that were part of the domestic law of most states, such as laws governing property and domestic commerce (Suárez, c.1612/2012: II, 20, 7). The second group was those laws that were common in the way they coordinated relationships *between* peoples (laws *inter nationes*). Examples included the laws governing war and international commerce (Suárez, c.1612/2012b: II, 19, 8). These, Suárez held, were most worthy of the title of *ius gentium* (Suárez, c.1612/2012b: II, 19, 8). Vitoria had made a similar point when he shifted the emphasis of *ius gentium* from *inter omnes homines* [between all men] to *inter omnes gentes* [between all peoples] (Vitoria, 1557/1917: rel. I, sect III).

It was the almost completely universal character of the *ius gentium*, Suárez held, that invested it with a moral status more authoritative than other laws and an authority very close to that of natural law. According to Suárez, the *ius gentium* emerged through “practice itself and by tradition” and “without any special meeting or consent of all peoples at a particular time.” Its universal usage, however, was derived from the fact that the *ius gentium* “is so close to nature and so suited to all nations and the fellowship between them that it would have been almost naturally propagated along with the human race itself, and thus it was not written, because it was laid down by no lawgiver, but prevailed by usage” (Suárez, c.1612/2012b: II, 20, 1).

Clearly Suárez regarded the *ius gentium* as an instance of customary law and tradition rather than formal prescription (Suárez, c.1612/2012b: III,

2, 6). Nevertheless, in light of people's propensity to disagree about so many things, agreement about something across the divisions of nations and peoples was, in Suárez's view, significant proof of the innate reasonability of a law (Suárez, c.1612/2012b: II, 19, 50).

Suárez also made the crucial point that the *ius gentium* bound people together over and above sovereign states. The *ius gentium*'s provisions thus extended to everyone—"even foreigners and members of any nation whatsoever" (Suárez, c.1612/2012b: II, 10, 9). This did not mean that humanity in its entirety had at some time consented to the content of the *ius gentium*. Rather, all peoples were expected to have independently recognized its content by virtue of their possession of reason. Widespread failure within a given political community to know the *ius gentium* thus was considered proof of that society's corruption or barbarism.

These arguments underwent further modification following the rise of the modern state with its particular claim to sovereignty and the increasing instances of war between such states after the Reformation. The effect was to generate an appropriation and rethinking of the principles of the *ius gentium* as part of the public international law designed to govern relations between sovereign states after the 1648 Treaty of Westphalia. This Treaty, which brought an end to the Thirty Years War that had devastated Europe, formally established the principles crucial to modern international relations, especially the principle of non-interference in the domestic affairs of sovereign states and the inviolability of the borders of those sovereign states.

Hugo Grotius played a major role in this rethinking by seeking to codify "a body of law that is maintained between states" that was conceptually distinct from the civil law of states and also grounded in "the law of nature and nations" (Grotius, 1625/2005: I, Prolegomena, 17-18, 39-41). Pufendorf likewise insisted that the *ius gentium* was more than just convention. He accepted Grotius' argument that the law of nations was, strictly speaking, the law between states as opposed to the natural law shared by all humanity (Pufendorf, 1672/1998: bk.II, ch.III, 23), but also stressed that it was very close to the latter.

In his highly influential *The Law of Nations* (1758), Emer de Vattel added the further qualification that nations and individuals were distinct entities. This subsequently results, Vattel wrote, in each having "very different obligations and rights" (Vattel, 1758/2008: Preliminaries, 6). Discerning

these differences involved “the art of thus applying [the law of nature] with a precision founded on right reason” (Vattel, 1758/2008: Preliminaries, 6). This was particularly true when it came to commercial relations between states which, from Vattel’s standpoint, increasingly formed the subject matter and focus of the law of nations.

Trade between nations

The urgency with which natural law scholars invested their discussions of the nature and scope of the law of nations owed much to the expansion of international commerce. Writing in the late sixteenth century, the jurist and historian Bartolomé de Albornóz described commercial activity as

the nerve of human life that sustains the universe. By means of buying and selling the world is united, joining distant lands and nations, people of different language, laws and ways of life. If it were not for these contracts, some would lack the goods that others have in abundance and they would not be able to share the goods that they have in excess with those countries where they are scarce. (Albornóz, 1573: VII, 29)

Looking at the commercial life of Seville, Spain, Mercado saw a society in which a “banker traffics with a whole world and embraces more than the Atlantic, though sometimes he loses his grip and it all comes tumbling down” (Mercado, 1571/1975: bk.2, ch.2, fol.15).

Reflecting on these circumstances, many scholastic thinkers started to ask how natural law and the law of nations might apply to questions arising out of the fact of this spread of trade across the globe. When Vitoria studied interactions between Spain and its newly acquired colonies, he argued that “Spaniards have a right to travel into the lands” of the Indians, though they were not permitted to harm the Indians. Such a right, he argued, was “derived from the law of nations, which is either natural law or derived from natural law.” Vitoria went on to state that the same *ius gentium* held that foreigners “may carry on trade, provided they do not harm to citizens.” He also insisted that the rulers of the Indians could not “hinder their subjects from carrying on trade with the Spanish; nor... may the princes of Spain prevent commerce with the natives” (Vitoria, 1557/1917: 151-153).

Suárez embraced Vitoria's principle of freedom to trade and promoted it as a right arising from the law of nations. "A state," Suárez wrote, "might conceivably exist in isolation and refuse to enter into commercial relations with another state... but," he added, "it has been established by the *ius gentium* that commercial intercourse shall be free, and it would be a violation of that system of law if such intercourse were prohibited without reasonable cause" (Suárez, c.1612/2012: II, 347).

The natural law thinker who was most focused on trade and argued strongly in favour of free trade was Grotius, most particularly in his 1609 book *Mare Librum* [The Free Sea]. He criticized Portuguese efforts to establish a monopoly on trade with the East Indies and maintained that no-one had a right to exclude others from the open seas. "Under the law of nations," Grotius wrote, "all men should be privileged to trade freely with one another." It was subsequently impermissible for any state, he insisted, to inhibit another state's subjects from trading with its subjects, precisely because the "right to engage in commerce pertains equally to all peoples" (Grotius, 1609/2004: I, 218).

Grotius's most important book, *On the Rights of War and Peace*, repeats these key arguments: "No one, in fact, has the right to hinder any nation from carrying on commerce with another nation at a distance" (Grotius, 1625/2005: II, 199). While he did not exclude requiring merchants to pay taxes to help cover the costs of various public expenses associated with trade, Grotius opposed the imposition of any tax that has nothing to do with paying for the costs of trading the good. Justice, he argued, "does not permit the imposition of any burdens that have no relation to the merchandise actually in transit" (Grotius, 1625/2005: II, 199). This meant that the government could not, for example, impose a tariff on trade with the objective of trying to make imports more expensive. It could, however, impose a tariff if the objective was to pay for the maintenance of roads and harbours that facilitated trade.

In both Pufendorf and Vattel, we see some modifications to the positions advanced by Vitoria, Suárez, and Grotius. Pufendorf affirmed the right to trade along the lines established by Grotius: "it is highly inhuman," he stated, "to deny a native of our world the use of those good things which the common Father of all men has poured forth." These words reflect the principle of common use. Nonetheless, he also argued that the state may regulate trade. Pufendorf, for example, details several exceptions, most of which gravitate around possible harms that might befall a country (Pufendorf, 1660/2009:

368). This shift also owed something to the Treaty of Westphalia's emphasis upon the full power of sovereign states to control who and what crossed their borders.

Writing almost a century later, Vattel was particularly conscious of how the acceleration of trade across borders was transforming relations between states. He was also aware that many were starting to question the efficacy and justice of the dominant mercantile system. His approach to the topic of trade was to begin by grounding the right to trade across boundaries in the principle of common use. "All men," he writes, "ought to find on earth the things they stand in need of" (Vattel, 1758/2008: bk.2, ch.2, s.21). Vattel particularly stressed the observation that no nation or people could procure everything it needed from its own resources:

It is seldom that nature is seen in one place to produce every-
thing necessary for the use of man: one country abounds in corn,
another in pastures and cattle, a third in timber and metals, &c.
If all those countries trade together, as is agreeable to human
nature, no one of them will be without such things as are useful
and necessary; and the views of nature, our common mother, will
be fulfilled. (Vattel, 1758/2008: bk.2, ch.2, s.21)

This is what Vattel called the foundation "of the general obligation incumbent on nations reciprocally to cultivate commerce" (Vattel, 1758/2008: bk.2, ch.2, s.21). On this basis, he repeated Grotius's condemnation of Portugal's earlier attempts to establish a monopoly on trade in the Far East (Vattel, 1758/2008: bk.2, ch.2, s.24). Vattel further condemned "monopoly" as being "in general... contrary to the rights of the citizens" (Vattel, 1758/2008: bk.1, ch.8, s.97).

To underscore the point, he stated that "Every nation ought, therefore, not only to countenance trade, as far as it reasonably can, but even to protect and favor it" (Vattel, 1758/2008: bk.2, ch.2, s.22). This freedom, according to Vattel, implies limits to what states can do vis-à-vis liberty to trade across boundaries:

Freedom... is implied in the duties of nations, that they should support it as far as possible, instead of cramping it by unnecessary

burdens or restrictions. Wherefore those private privileges and tolls, which obtain in many places, and press so heavily on commerce, are deservedly to be reprobated, unless founded on very important reasons arising from the public good.... Every nation, in virtue of her natural liberty, has a right to trade with those who are willing to correspond with such intentions; and to molest her in the exercise of her right is doing her an injury. (Vattel, 1758/2008: bk.2, ch.2, s.23)

Vattel did not, it should be cautioned, see this natural right to trade as absolute. “The obligation of trading with other nations,” Vattel commented, “is in itself an imperfect obligation” (Vattel, 1758/2008: bk.2, ch.2, s.25). There are instances, he states, when a nation ought to decline a commerce which is disadvantageous or dangerous (Vattel, 1758/2008: bk.2, ch.2, s.25; see also bk.1, ch.8, s.98). The state’s obligation to provide for the nation’s necessities (such as national defense) and uphold the sovereignty with which it has been invested by the Treaty of Westphalia might mean that governments may occasionally have to regulate the trade of particular goods (like military technology) in ways that departed from a strict free trade position. But for Vattel, free commerce between nations should be the norm. People have a natural right to trade inside and between countries, and while the state may regulate that right, such a right cannot be suppressed.

Conclusion

Within 18 years of the publication of *The Law of Nations*, Adam Smith’s *Wealth of Nations* made a systematic case for free trade primarily based on empirical observations concerning comparative advantage and a penetrating critique of mercantilism. Though certainly aware of the writings on trade by Grotius and Pufendorf (and, likely, Vitoria and Suárez), Smith did not approach the topic from the standpoint of natural law, the law of nations, notions of *ius*, or commutative and distributive justice. Nor does the *Wealth of Nations* set out to establish a natural right to trade as a general ethical or legal proposition.

What matters, however, is that natural law thinkers writing about commerce between nations developed a principled case for free trade based on natural law claims about liberty and the nature and ends of property. As observed, they were very cognizant of the more strictly economic dimensions

of free trade. But they did not begin their arguments with reflections on cost-benefit or utility. It is not that such considerations are necessarily incompatible with natural law arguments for limited government, rule of law, and private property. Scholastic thinkers did, however, believe that one could and should write about economic topics like trade between nations from the standpoint of reasoning that is concerned with truth and justice.