

Commerce on Trial: Neutral Rights and Private Warfare in the Seven Years' War

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Introduction

Merchants, however amiable they are in uniting the Bonds of universal Society, notwithstanding the Separation of Countries, Climates, Manners, Religions and Governments, however useful they are in softening the natural Wants and Miseries of Mankind, or in controuling the fatal consequences that flow from the Ambition of Princes, and in extending over the World the Connections of Humanity, yet as they form a kind of separate Republic of themselves, independent of the several Governments under which they live, their Connections in one Relation often jar with their Duties in another, since they make a Link of that Chain in which the Enemies of their Country are not the less united.¹

So wrote English lawyer James Marriott at the height of the Seven Years' War in an open letter to the Dutch merchants then living in England. Though the Dutch were neutrals in the war, he argued, their trading activities united them in an enterprise that transcended the state and at times conflicted with its interests: international commerce. To Marriott, the very commercial activities that drew societies together by promoting peace and prosperity also created "a separate Republic" of commerce whose interests frequently collided with those of nation-states. The global commercial warfare of the Seven Years' War, unprecedented as it was in scale, demanded that the traditional position of the neutral trader be reconceived and adapted to the modern commercial economy, an economy governed by market forces that were in many ways beyond political control, and to an international system in which the economies of different states were increasingly integrated through trade. The Seven Years' War posed the question: was it possible for a merchant to be truly neutral when the fruits of his labours could help or harm the belligerents?

1 James Marriott, *A Letter to the Dutch Merchants in England* (London: M. Cooper, 1759), pp. 15–16.

This paper recounts the revolution in the law of neutrality that occurred during the Seven Years' War, placing it in the context of contemporary debates on commerce and neutral rights theory. The Seven Years' War saw the emergence of what were to become two seminal maritime doctrines. One was the Rule of the War of 1756 and the other the Doctrine of Continuous Voyage. These doctrines effectively limited the commercial rights of neutrals to those available in time of peace, thus qualifying the traditional rule of privileged neutrality that free ships make free goods. They mark the beginning of the modern era in neutral rights and have remained in effect down to the present. The Doctrine of Continuous Voyage made the legitimacy of neutral trade dependent not just on its content but also on the purpose and intent of the shipper. A sea voyage to or from enemy territory that included several intermediate stops in neutral ports would be considered a single, continuous voyage encompassing all its ports of call.² The combined effect of these doctrines was that neutral ships could no longer engage in trade with belligerent ports that had been closed to them in peacetime.

The Doctrine of Continuous Voyage and the Rule of the War of 1756 thus marked a revolution in both the substantive content of the law of neutrality and the philosophical trajectory of neutral rights jurisprudence, codifying into law the proto-positivist theories of Cornelius van Bynkershoek at the expense of Grotian just-war theory. They emerged at a time when international trade had become both an object and weapon of war, in an era when trade had become what David Hume felicitously described as "an affair of state."³ As the modern commercial economy emerged in the seventeenth and eighteenth centuries, so too did political economy in the truest sense of the phrase. The modern commercial state was one in which political and commercial life were closely connected. Indeed it was one in which the vigour and security of the state itself depended on the vigour and security of its commerce. Contemporary political philosophers were acutely aware of this,⁴ and while they grappled with the implications of this economic transformation in the realm of political philosophy, jurists, advocates and diplomats grappled with its implications for the rights of neutral traders in the arena of international affairs.

Julian Corbett, the great historian of the Seven Years' War, observed, "in the study of the functions of a fleet a chart is useless. It cuts off our vision just where the most obscure and difficult part of the study begins. For it is behind the coast-line that are at work the dominant factors by which the functions of a fleet are

2 Herbert Whittaker Briggs writes that the "doctrine of continuous voyage has been defined as an application of the general rule of law *dolus non purgatur circuitu* – that a person is not permitted to do by indirection what he is forbidden to do directly." Herbert Whittaker Briggs, *The Doctrine of Continuous Voyage* (Baltimore: Johns Hopkins Press, 1926), p. 11. Hence in time of war, stops a ship makes in neutral ports before visiting an enemy port may be deemed intermediate stops rather than independent voyages. They become stops made *en route* to an enemy port in a single continuous voyage. James W. Gantenbein, *The Doctrine of Continuous Voyage Particularly as Applied to Contraband and Blockade* (Portland OR: Keystone Press, 1929), pp. 1–4.

3 For discussion, see Istvan Hont, *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective* (Cambridge MA: Harvard University Press, 2005), pp. 8–22, 185–94.

4 Hont, *Jealousy of Trade*, pp. 8–22, 185–94.

determined.”⁵ The reverse could be said of the rules of neutral trade that emerged during the Seven Years’ War. To understand their origins, one must look beyond the prize courts and the pronouncements of Doctors’ Commons to the activities of the fleets themselves. In addition to political pamphlets and judicial decisions of the period, heavy reliance has been placed on the records of the British Admiralty, all of which reflect the processes of decision (and indecision) that produced the neutral rights revolution of the Seven Years’ War. Particular attention is paid to the manner and context in which statesmen, jurists, and pamphleteers invoked the Law of Nations to bring about a fundamental change in international law that went well beyond refurbishing existing doctrines of neutrality. In abandoning historic conceptions of neutrality in favour of ideas promoted in the writings of Cornelius van Bynkershoek, Great Britain in effect abandoned the natural law conception of neutral rights completely. What followed, no pun intended, amounted to a sea change in the maritime relations of commercial states under international law.

This chapter first discusses the legal imperatives raised by the commercial warfare of the Seven Years’ War, with particular attention to the manner in which the independence of British prize courts came to be seen as essential to both free government and commercial prosperity. The paper then focuses on the contest between the Netherlands and Great Britain over neutral trading rights. This phase of the conflict had far-reaching ramifications because the Netherlands enjoyed a privileged neutral status under treaties concluded by the two nations in the late seventeenth century. The Dutch moreover were prepared to defend their neutral rights vigorously against claims that they were trading *for* the enemy rather than *with* him. Finally, the paper examines the role played by the jurisprudence of Cornelius van Bynkershoek in legitimating the highhandedness of the British Admiralty in intercepting Dutch ships and challenging the treaty regime governing Dutch trading rights. Historically, these developments mark a fundamental shift in international law from its natural law foundations toward modern legal positivism.

Privatising Commercial Warfare

There can be no clearer proof of the extent to which commerce had become integrated into affairs of state during the eighteenth century than its use as a weapon in war. During the Seven Years’ War, destroying the enemy’s commerce was as effective a strategy as destroying his armies and arsenals, strangling him slowly by denying him the resources needed to sustain the war effort. This was by no means a novel strategy. The great maritime wars of the seventeenth century were

⁵ Julian S. Corbett, *The Seven Years’ War: A Study in British Combined Strategy* (London: The Folio Society, 2001), p. 2.

waged in accordance with this very principle.⁶ But what distinguished commercial warfare during the Seven Years' War from its prosecution in any earlier struggle was the sheer scale of the conflict. The bounds of the Seven Years' War were coterminous with European *imperium*, spanning the world's oceans and waged on three continents, prefiguring the total wars of the twentieth century in their scale.⁷ Whereas the commerce-destroying warfare of the seventeenth century had been, as Alfred Thayer Mahan memorably described it, "unsubstantial and evanescent"⁸ because it could not be meaningfully sustained far from its base of operations in the home country, by the eighteenth century the great commercial powers of Europe had highly developed ports in the far reaches of their empires from which to prosecute the destruction of commerce. For the first time in the history of western warfare, *guerre de course*, or commerce-destroying, became a fully integrated strategic component in a truly global conflict. The full consequences of this were felt not only by the belligerent powers of Europe, but by the neutral powers as well.

The most effective way to destroy the enemy's trade was not by prowling the open seas for his ships, but by patrolling his coastlines and maintaining tight blockades. By 1758 the British blockade of French colonial ports had become so effective that France opened its colonial trade, a trade long closed to all but French-flagged ships, to the ships of neutral nations.⁹ Blockade, as enforced in the eighteenth century, did not necessarily mean that no ships could pass through the British patrols. It meant only that French ships and neutral vessels carrying contraband could not enter French ports.¹⁰ This presented neutral states with lucrative opportunities. Not only could they carry on their customary peacetime trade in time of war, but they could also profit handsomely from the newly opened colonial trade from which they had formerly been excluded. This confounded the

6 Jan Glete, *Warfare at Sea, 1500–1650: Maritime Conflicts and the Transformation of Europe* (London: Routledge, 1999); Roger Hainsworth and Christine Churches, *The Anglo-Dutch Naval Wars, 1652–1674* (Gloucestershire: Alan Sutton Publishing, Ltd., 1998); J. R. Jones, *The Anglo-Dutch Wars of the Seventeenth Century* (London: Longman, 1996).

7 Paul Kennedy has persuasively argued that "the Seven Years War can lay a far stronger claim to the title of the first world war than many others before or since[.]" Paul M. Kennedy, *The Rise and Fall of British Naval Mastery* (New York: Humanity Books, 2006), p. 98. Franz Szabo's recently published history of the Seven Years' War not only shows how the war was a precursor to the total wars of the twentieth century, but how German expansionism of the last century mirrored Prussian expansionism of the eighteenth. Franz A. J. Szabo, *The Seven Years War in Europe 1756–1763* (London: Longman, 2008).

8 A. T. Mahan, *The Influence of Sea Power upon History: 1660–1783* (New York: Hill & Wang, 1962), p. 116.

9 It was not until late 1759 that the ports of France were sealed under blockade in the wake of the Battle of Quiberon Bay. Fred Anderson, *The Crucible of War: The Seven Years' War and the Fate of Empire in British North America, 1754–1766* (New York: Vintage, 2001), pp. 381–3.

10 For discussion of eighteenth-century understandings of the lawful scale of blockade, see Richard Pares, *Colonial Blockade and Neutral Rights, 1739–1763* (Philadelphia: Porcupine Press, 1975), pp. 163–5. The scale of a naval blockade could vary according to the orders issued by the Admiralty. During the Seven Years' War, Admiral Hawke permitted any neutral vessels to enter enemy ports so long as they were not carrying contraband. Corbett, *Seven Years' War*, p. 381.

British, who found their obligation to respect the neutral's right to trade in direct conflict with their war goals and naval strategy.

One of the fiercest struggles Britain fought during the Seven Years' War took place on the waters of the West Indies, for it was from French Caribbean colonies that France obtained many of the materials needed to wage war.¹¹ Sugar, cotton, indigo, and coffee not only helped feed and clothe France's civilian and military populations, but also helped sustain a commercial economy increasingly feeling the strain of war. Commerce-destruction was not just a matter of destroying the enemy's trade, but also of damaging his credit. If creditors could not rely on regular deliveries of cargo, and ship insurers were exposed to liability for the risk of ships' capture and condemnation, commerce destruction could destabilize the entire credit system of a country.¹² With the goal of maximum disruption (if not destruction) of the enemy's economy in sight, Britain imposed tight blockades on French colonial ports and aggressively seized French ships and cargoes on the high seas. But the British Navy alone could not interdict French trade routes the world over and wage effective naval warfare at the same time.¹³ Having a robust merchant marine, Britain was able to call upon the assistance of privateers in intercepting French commerce. The arrangement not only improved the efficiency of the Royal Navy but also proved highly lucrative for the crown and for privateers, who shared the proceeds from the sale of condemned ships and cargo.¹⁴

Privateering was an effective way for governments to privatise commercial warfare, leaving fleets free to concentrate on enemy sea power. English privateering in some respects predated the emergence of the Royal Navy.¹⁵ King Henry IV began licensing merchants to act as privateers as early as 1406 as a means of supplementing the royal fleet.¹⁶ The Admiralty would issue letters of marque authorising private ships to undertake on the high seas certain activities

11 Henry Lawrence Gipson, *British Empire before the American Revolution* (New York: Caldwell, 1954), vol. 8, pp. 65–7.

12 Corbett, *Seven Years' War*, pp. 639–40.

13 A.T. Mahan calculated that at the outbreak of war, the British Navy outnumbered the French Navy two to one. Britain had 130 ships of the line to the France's 63, of which 18 were in poor condition. Mahan, *Influence of Sea Power upon History*, p. 257. See also Kennedy, *Rise and Fall of British Naval Mastery*, pp. 99–100. Jeremy Black, *The British Seaborne Empire* (New Haven: Yale University Press, 2004), pp. 121–2.

14 Pares, *Colonial Blockade and Neutral Rights*, pp. 1–17. Privateering was so lucrative that during the Seven Years' War sailors in the Royal Navy were known to desert the Service in order to join the crews of privateer vessels. Gipson, *British Empire before the American Revolution* (New York: Caldwell, 1967), vol. 7, p. 70.

15 In the early 1500s, when European maritime powers were just beginning to assemble permanent royal navies, fleets of privateers were an efficient way to help project state power onto the seas. Glete, *Warfare at Sea*, pp. 40–53. Privateers were so effective that by the early seventeenth century, Spain's privateering fleet was between five and six times the size of the armada. R. A. Stradling, *The Armada of Flanders: Spanish Maritime Policy and European War, 1568–1668* (Cambridge: Cambridge University Press, 2003), p. 218.

16 R. G. Marsden, *Documents Relating to the Law and Custom of the Sea* (London: Navy Records Society, 1915), vol. 1, pp. 115–18.

otherwise prohibited by the customary law of the sea. Although officered and manned by civilians, privateers could wreak havoc on enemy shipping. They could also interdict and seize neutral vessels thought to be participating in contraband trade. Captured vessels would be brought to the nearest port having a prize court for adjudication of the status of the capture. The very existence of privateering represented a serious derogation from traditional notions of freedom of the high seas, but it was an expedient that the great maritime powers found useful and sometimes indispensable during most of the early-modern period.¹⁷

In Britain, privateers also relieved taxpayers of some of the burden that global warfare placed on the public debt. James Marriott praised them thus:

Men who subscribe their Fortunes to aid the Necessities of the State, deserve and receive its favours. When that is done in the ordinary Loans, the Equipments are the Equipments of the Government; the Losses are the Losses of the Community, the Particulars who have given aid, are secure in the Public Credit, and the Faith of Parliament. But when private persons, commissioned by the State to make War upon its Enemies, equip and maintain, they are liable to every loss from the Inclemency of the Winds and Seas, and the Superiority of the Enemy, while the Advantages they receive are dearly earned, at the expence of their single Treasure; and their Blood is spilled for the General Service, without the hopes of Honour or Advancement.¹⁸

Marriott's observation surely resonated with a contemporary audience familiar with the eighteenth-century debate over the enormous public debt incurred in the course of Britain's commercial wars.¹⁹ Indeed, it evoked Daniel Defoe's description of credit as a virtuous and stabilising force in political life: "*Credit* is not dependant on the Person of the Sovereign, upon a Ministry, or upon this or that Management; but upon the Honour of the Publick Administration in *General*, and the Justice of

17 There is a tendency among historians and lawyers alike to equate privateering with piracy, an equation both inaccurate and unhelpful. The mistake is understandable. Abuses by privateers have been well-documented and, in the case of Sir Francis Drake, become the stuff of folklore. Paul E. J. Hammer, *Elizabeth's Wars: War, Government and Society in Tudor England, 1544–1604* (New York: Palgrave Macmillan, 2003), pp. 80–8, 110–11, 135–7. John Cummins, *Francis Drake: Lives of a Hero* (London: Weidenfeld & Nicolson, 1995). By the time the practice of privateering was abolished by the Declaration of Paris of 1856, the phrase "privateer practice" had become synonymous with misconduct. W. H. Smyth, *The Sailor's Lexicon* (New York: Hearst, 2005), p. 544. Nevertheless, the differences between the pirate and the privateer were pronounced. Pirates were stateless, lawless criminals, while privateers were expected to operate by and under the laws of their commissioning state. When they did not, privateers were frequently held accountable in the courts of justice of their commissioning state and/or their governments agreed to pay damages for their depredations through diplomatic channels. Pirates, on the other hand, were and remain *hostes humani generis*, enemies of all humankind. Maintaining this distinction is important not only for the sake of historical accuracy, but because of the example that the regulation of privateering can provide to an age where outsourcing wartime activities to private security companies has become the norm. Mercenaries are no longer shades from the past; they have become modern battlefield realities.

18 Marriott, *Letter to the Dutch Merchants*, p. 28.

19 J. G. A. Pocock, "Neo-Machiavellian Political Economy: The Augustan Debate over Land, Trade and Credit," *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, ed. J. G. A. Pocock (Princeton: Princeton University Press, 1975), pp. 423–61.

Parliament in Particular, in keeping whole the Interest of those who have ventured their Estates upon the Publick Faith[.]”²⁰

The privatisation of commercial warfare meant the privatisation of expenses that would otherwise have been borne by the public. Privateers undertook enormous personal risks that would normally have been borne by the state, but without the many credit advantages normally at the disposal of government. In order to create incentives for civilians to risk their private resources on helping wage a public war, the political community had to put the credit of its courts behind them. A privateer had to be assured that if he staked his life and property on a capture at sea, he could count on a fair hearing when he brought his prize into port. Thus while in war “Negotiations, Conventions, Explanations and other Methods of putting an End to these Contests, may be entered into by the Two Nations [...] things will, and must run in the usual, and legal Channels of Justice” for the privateers.²¹ Their rights had to be adjudicated by judges in the courts, not by diplomats in the council chambers.

But how could the British government persuade neutrals that its prize courts were unbiased in their dispensation of justice, and that privateers would not be awarded a “home-court” advantage? The law of nations and treaty law should, at least in theory, have provided a stable and predictable body of law for the resolution of prize disputes, regardless of the state to which the court belonged.²² In practice, though, the application of different doctrines of neutral trading rights from jurisdiction to jurisdiction prevented such a system of law from developing. Thus while an English lawyer might argue that British prize courts were “not less the Courts of the Captured, than of the Captor”,²³ a member of the Dutch States General might reasonably disagree and argue that the outcome of prize cases “should not depend on the opinion of a judge, but should be settled according to the mutual consent of the two powers.”²⁴

What the British prize courts did have in common with their continental counterparts, though, was their reliance on the civil law. Until 1876, when admiralty

20 Cited in Pocock, “Neo-Machiavellian Political Economy”, p. 455. By contrast, in 1742 David Hume argued that far from promoting public virtue, the public debt vitiated government: “The source of degeneracy, which may be remarked in free governments, consists in the practice of contracting debt, and mortgaging the public revenues, by which taxes may, in time, become altogether intolerable, and all the property of the state be brought into the hands of the public.” David Hume, *Essays Moral, Political, and Literary*, ed. Eugene F. Miller (Indianapolis: Liberty Classics, 1987), 1.XII.11.

21 Marriott, *Letter to the Dutch Merchants*, p. 28.

22 A classic text on the law of admiralty notes, “By the law of nations and treaties, every nation is answerable to the other for all injuries done by sea or land, or in fresh waters, or in any port. Mutual convenience, eternal principles of justice, wise policy, and the consent of nations, have established a system of procedure, a code of law, and a court for the trial of prizes. Every country sues in those courts of the others, which are all governed by one and the same law, equally known to each.” Arthur Browne, *A Compendious View of the Civil Law, and of the Law of the Admiralty* (2nd ed., London: J. Butterworth 1802), pp. 224–5.

23 James Marriott, *The Case of the Dutch Ships Considered* (London: R. & J. Dodsley, 1759), p. 36.

24 Extrait du Registre des Resolutions de Leurs Hautes puissances, Les Seignurs Etats generaux des provinces Unies des pais bas. Du Jeudi le 25 Janvier 1759, (p. 5). State Papers, Holland, 84/482. London. Public Records Office. Original: “ne doit pas dépendre de l’opinion de juge mais qu’elle doit uniquement être réglée par le consentement mutuel des deux Puissances”.

jurisdiction was absorbed into the High Court of England and Wales, the British courts of admiralty were civil law courts that coexisted with the common law courts. Justinian's Institutes carried more legal weight than Coke's Institutes in British courts of admiralty.²⁵ And just as common lawyers in the nineteenth century cited the oracular authority of Coke and Blackstone, so admiralty lawyers of the eighteenth century cited Grotius and Bynkershoek. In training and expertise, admiralty lawyers in England had more in common with their continental counterparts than they did with the common lawyers of their homeland. Thus the admiralties of Europe's great maritime powers spoke to one another in the same legal language; their problem was that they communicated different messages.

The British government viewed the problem of Dutch commerce as primarily legal rather than diplomatic. Dutch shippers, they argued, had legal obligations for which British prize courts were the best forum of adjudication. Historically, prize law had developed through cases involving private individuals (namely, the ship and cargo owners) as respondents, and a representative of the captor (the Royal Navy) as claimant. Thus prize courts tended to view the cases before them primarily as private property disputes and incidentally as matters of state policy. If the captures of the Seven Years' War had simply been a matter of intercepting enemy cargo for defensive purposes, most prize cases could probably have been resolved diplomatically. But heavy reliance on privateering injected another set of interests into prize cases: those of the privateer. This complicated matters considerably, for the interests of English privateers were primarily financial and coincided with those of the state only insofar as both stood to profit from condemnation proceedings.

The fiercely independent nature of judicial power in eighteenth-century Britain cannot be discounted in evaluating prize proceedings. While the Admiralty courts' prize jurisdiction came from the Crown, that is precisely where the Crown's influence over prize proceedings ended. The influence of Parliament was similarly limited. It might issue prize commissions and enact legislation governing the allocation of prize proceeds, but the actual process of adjudication was completely in the hands of prize court judges. The consequences of this separation of powers cut both ways. On one hand, colonial prize courts dispensed justice by their own lights without overt political interference. This meant at best rough and ready justice; at worst, it meant no justice at all.²⁶ In case of the latter, an appeals process was in place that led ultimately to the Lords Commissioners of Prize Appeals, a special committee of the Privy Council composed of lawyers and statesmen. While military events and

25 If anything, there was great tension between the Admiralty and Coke, who advocated the absorption of admiralty jurisdiction into the common law courts. Nicholas J. Healy, David J. Sharpe, and David B. Sharpe, *Cases and Materials on Admiralty* (4th ed., St. Paul MN: Thompson West, 2006), pp. 3–4.

26 The examples of colonial proceedings enumerated by Richard Pares border on the farcical. "The Vice-Admiralty court at Minorca seems to have been a perfect bear-garden," he writes. "Judge Font complained that captors carried away prizes which he had acquitted; one of their agents unloaded a cargo without taking any legal steps to have it condemned, and sold it in spite of a prohibition from the court." Pares, *Colonial Blockade and Neutral Rights*, p. 83.

diplomatic sensitivities at times coloured their decisions, the Lords Commissioners had to provide reasoned decisions based on existing law. In their judicial capacity at least, they were not directly subject to royal influence. This was certainly not the case in France, where the King himself was the ultimate arbiter of prize appeals.

The relative independence of the British prize courts was a source of ongoing tension between the Dutch and British governments. When Dutch agents sought the Crown's intervention on their behalf in prize disputes, royal officials responded that the Crown had no jurisdiction in such matters. Aggrieved parties had to appeal adverse prize decisions, a cumbersome business requiring much patience and costly legal representation in London.²⁷ As far as Dutch merchants were concerned, a simple word to the King appealing to his sense of justice would have been far more efficient. But British officialdom was adamant. Any appeal had to be made to the Lords Commissioners of Prize Appeal because, as the British Ambassador to the Hague put it, the King of England "was ty'd up by the Laws, now in being, and [...] without a Legal Trial, His Majesty could not give up the Pretensions of any Captor[.]"²⁸

Independent prize courts were seen as essential pillars upholding both the liberty and commercial prosperity of Britain. Charles Jenkinson wrote,

it must always be the Interest of England to protect the just Rights of Commerce, and to support those Principles which promote the Labours of Mankind, since she herself can only be Great from the virtuous Industry of her People. To obtain the largest Extent for the Exertion of this, is the Point to which all her Policy should tend; and if ever, forsaking these Maxims, she should seek to enlarge her Power by any Acts of Ambitious Injustice, may she then, for the Welfare of the human Race, cease to be any longer great or powerful! Her Courts of maritime Jurisdiction are more wisely calculated to preserve the Freedom of Navigation than those of any other Country; as they are not subject to the Controul of her executive Power, the Passions of her Princes or Ministers can never influence the Decisions of them[.]²⁹

The idea that courts independent of arbitrary influence were essential to the preservation of political liberty had a long history in Britain. During the seventeenth century, it was the stuff that revolutions were made of. But what is unique to the

27 British authorities were wholly unsympathetic to Dutch complaints about the grinding inefficiencies of the appeals process, stating, "if It is too troublesome or too expensive for private Persons to prosecute criminally, or to follow an appeal to the Lords Commissioners, surely it might have been worth the while for the States General themselves to have incurred so small a Change, before they taxed the justice of the whole Nation[.]" SP 84/482, Holderness to Yorke, 28 November 1758. The British were likewise unsympathetic to complaints that privateering was making the cost of insurance almost prohibitive for Dutch traders. SP 84/482, Yorke to Holderness, 22 September 1758; SP 84/482, Yorke to Holderness, 31 October 1758.

28 SP 84/482, Yorke to Holderness, 19 December 1758.

29 Charles Jenkinson, *Discourse on the Conduct of the Government of Great Britain with Respect to Neutrals in the Present War* (Dublin: Hulton Bradley, 1759), p. 54. Jenkinson was elected MP for Cocker mouth in 1761 and served as Under-Secretary of State during the final years of the Seven Years' War. He subsequently became a Privy Councillor and served as President of the Board of Trade from 1786–1803.

debate over the British prize courts during the Seven Years' War is the claim that their independence is not only essential to political liberty, but also to robust international commerce. If the rights of international commerce were to be put on trial in time of war, they would have to be afforded fair and impartial justice.

During the War of the Austrian Succession, which had prepared the way for the Seven Years' War, David Hume observed "that commerce can never flourish but in a free government[.]" The reason was "not because it is there less *secure*, but because it is less *honourable*. A subordination of ranks is absolutely necessary to the support of monarchy. Birth, titles, and place, must be honoured above industry and riches. And while these notions prevail, all the considerable traders will be tempted to throw up their commerce, in order to purchase some of those employments, to which privileges and honours are annexed."³⁰ Jenkinson's argument in support of the prize courts follows in this vein: prize courts free from royal interference are also free from overweening ambition and avarice, the very qualities that vitiate commerce and poison industry. For as Jenkinson explained, "the System of Humanity is no where perfect, but in respect to Nations its Weakness is most apparent; the softer Ties of Natural Affection among these have little Effect [...] what Nature hath left imperfect; Ambition or Avarice will augment the Evil, Moderation may prevent it; every little Inconvenience must be patiently suffered, where a superior Right makes it necessary[.]"³¹ From the standpoint of the Dutch, prize proceedings may have amounted to more than a "little Inconvenience." But when it came to Britain's "superior right" to defend itself in war-the overarching reason of state that informed British wartime policy-they would have to suffer the workings of English justice, no matter how objectionable they found it.

The Problem of Dutch Neutral Trade

Sorely pressed by the British blockade, France began inviting neutral merchant ships to carry on the French West Indian trade on its behalf.³² The opportunity was a boon to Dutch merchants in particular because of the privileged status they enjoyed as neutrals under a 1674 treaty entered upon the conclusion of the Third Anglo-Dutch War.³³ Under Article VIII of the Treaty of Navigation and Commerce

30 Hume, *Essays Moral, Political, and Literary*, 1.XII.11.

31 Jenkinson, *Discourse on the Conduct of the Government*, pp. 55–6.

32 France also invited Dutch ships to trade for its Canadian territories, but without a Dutch foothold in North America the devices used in the West Indies were of little use. Jonathan R. Dull, *The French Navy and the Seven Years' War* (Nebraska: University of Nebraska Press, 2005), p. 143. The assumption of the French West Indies trade by the Dutch was vexing enough to the British. Secretary of State Holdernesse complained that St. Eustatius and Curaçao, once little more than "barren settlements[.]" were now transformed into "grand magazines for the Produce of Martinico and St. Domingo" with "vast fleets [] now sailing continually from those insignificant Ports laden with Enemy's Property." SP 84/483, Holdernesse to Yorke, 9 February 1759.

33 Treaty of Navigation and Commerce, 10 December 1674, *The Consolidated Treaty Series*, ed. Clive R. Parry (Dobbs Ferry NY: Oceana 1969), vol. 13, p. 255.

between England and the Netherlands, all goods found on Dutch ships would “be accounted clear and free, although the whole lading, or any part thereof, by just title of propriety, shall belong to the enemies of his Majesty[.]”³⁴ The treaty firmly established the privilege of free ships, free goods for the Dutch.³⁵ Also, Article VII provided that the customary rule of “infection” would not apply to Dutch ships. Under the rule, the presence of any contraband was presumed to contaminate all goods aboard a neutral ship (and, indeed, the ship itself) with its illicit character. Consequently, everything would be subject to condemnation as prize property. But the Treaty provided that free ships “shall not, upon pretence of their being infected by such prohibited goods [namely, contraband as defined by Art. III of the treaty], be detained, much less confiscated for lawful prize.”³⁶ Dutch traders could thus afford to take the risk of transporting contraband goods for France without fearing the forfeiture of their own ships and cargoes.

In short, the 1674 Treaty of Navigation and Commerce created every incentive and eliminated every deterrent for the Dutch to undertake trade for the French given the conditions of the Seven Years’ War. For the first time, Dutch ships were welcome at French colonial ports in order to trade in French goods. And when those ports were rendered inaccessible by a British blockade, small French boats laden with commercial goods would slip through the blockade to meet Dutch trading vessels in the territorial waters of Dutch colonies. There, the goods would be loaded onto Dutch vessels bound for the Netherlands. The process, known as transshipping, caused British pamphleteers to lash out against the neutral Dutch for having “aided and counselled the Enemy, in every Method that might complete his Voyages through their Medium, with Safety, as they hoped, to him, and Impunity to themselves.”³⁷

Thus Britain felt trapped by a treaty concession of its own making. Under the protection of *free ships, free goods*, French trade in colonial goods survived through a neutral proxy. At first, the most logical response for the British might have been to fight treaty with treaty: to respond to the Dutch invocation of the Treaty of 1674 by invoking English rights under the Anglo-Dutch Treaty of Alliance of 1678. Under that agreement, the parties were bound in “strict alliance” both in peace and in war. Under Article IV, the parties pledged themselves to mutual defense by sea and by land. Most significantly, Article V stipulated, “The party not attacked shall break with the aggressor within two months after the rupture, using all means to

34 *Consolidated Treaty Series*, ed. Parry, p. 255.

35 This doctrine held that non-contraband enemy goods aboard a neutral ship were to be considered free and thus not subject to confiscation. The doctrine was activated on a treaty-by-treaty basis during the seventeenth century as a means of circumventing the prevailing doctrine of *robe*, a rule established by Francis I that held that “*la robe d’ennemy confisque celle d’amy*”. Geoffrey Butler and Simon Maccoby, *The Development of International Law* (London: Longmans, 1928), pp. 269–71.

36 Treaty of Navigation and Commerce, 10 December 1674, p. 255.

37 Marriott, *Case of the Dutch Ships Considered*, p. 24.

bring things to an accommodation.”³⁸ Joseph Yorke, the British Ambassador to the Hague, tried repeatedly to get the Dutch to contribute forces under this treaty to no avail. Britain was the aggressor in this war, the Dutch claimed, and the treaty’s contribution requirement was therefore not triggered.³⁹

But if the English believed that the treaty’s alliance requirements were indeed triggered and repudiated, why did they not treat the Dutch as enemies and thus treat Dutch trade as enemy trade? That is, why not confiscate it all, from ship to cargo? Richard Pares gives a very persuasive answer: by putting the Dutch in a position where they had clearly reneged on a treaty obligation, the British could renege in turn on their obligations under the Treaty of 1674.⁴⁰ A further answer is that friendship was far more lucrative to the parties than enmity. There was a strong Anglophile party in the States General, so notwithstanding the difficulties Britain encountered in dealing with Dutch trade, an Anglophile Netherlands was infinitely preferable to one overrun by France. Furthermore, in a curious way the very purpose of the Anglo-Dutch Treaty of Alliance had become obsolete during the Seven Years’ War. The Protestant fear of a French invasion of the Netherlands was allayed by the fact that the French were more interested in turning the neutral status of the Dutch to their advantage than in conquering them.⁴¹ However, the State Papers for Holland suggest still another reason Britain may not have wished to press their claims under the Treaty of 1678 too forcefully. The fact is that in some ways the British profited from the very trade they sought to suppress. Just as the Dutch were more useful to the French as neutral traders than as subjects, they were also more useful to the English as neutral traders than as enemies.

On 17 August 1759, Joseph Yorke received instructions from Secretary of State Holderness instructing him to inquire into intelligence received at Whitehall. “[T]he Court of France,” he wrote, “is Endeavouring to procure 400 Pieces of Cannon

38 Treaty of Defensive Alliance, 3 March 1678, *The Consolidated Treaty Series*, ed. Clive R. Parry (Dobbs Ferry NY: Oceana, 1969), vol. 14, p. 311.

39 Corbett, *Seven Years’ War*, pp. 55, 59, 65–6.

40 Pares, *Colonial Blockade and Neutral Rights*, pp. 243–6, 266–8. The tone of these claims is encapsulated in an exchange between Holderness and Hendrik Hop, the Dutch representative in London, which occurred in September 1756. Hop approached the Secretary of State demanding the release of several ships captured by the British man of war, the *Rochester*. The States General had previously issued a memorial pursuant to this case, but England had yet to issue a reply. Holderness told Hop that he would have to continue waiting, for “it could not [...] but appear extraordinary to the King, to find the States so very importunate for an answer [...] when they seemed in no Haste to give One to That [which Yorke] had presented, reclaiming the defensive alliances equally in Force with the Treaty of 1674.” SP 84/475, Holderness to Yorke, 8 September 1756. This would become a recurring theme in British correspondence and literature of the period. In a dispatch to Yorke, Holderness wrote, “if the Treaty of 1678 remained unexecuted, That of 1674 was, of course, annulled: and though His Majesty, out of Friendship to the States General, has not yet rigorously exerted his Right, yet the Right Itself is neither impeached nor impaired by this friendly Delay[.]” SP 84/482, Holderness to Yorke, 29 November 1758. See also, Marriott, *Case of the Dutch Ships Considered*, pp. 24–29 (“The Dutch therefore, as a Republic, having done no one Act towards complying with the several Duties which are placed to their account by the Spirit and by the Letter of every subsisting Treaty [...] can [not] claim a Privilege founded only upon one Treaty.”)

41 Alice Clare Carter, *Neutrality or Commitment: The Evolution of Dutch Foreign Policy, 1667–1795* (London: Edward Arnold, 1975), pp. 78–9.

from Sweden; That it is intended they should be embarked at [Karlskrona] on Dutch Bottoms, which are to be freighted at Amsterdam, & sent to Sweden for that Purpose. One Grille a Merchant at Stockholm, and his Brother, likewise a Merchant at Amsterdam, are the Persons concerned in this Affair.”⁴² After preliminary investigation, Yorke put the Dutch government on notice that if it failed to prevent its subjects from carrying on this trade, Britain would be forced to stop and inspect *all* Dutch ships, regardless of whether they were suspected of being involved in trade to the French West Indies. He told Dutch Grand Pensionary Steyn of France’s determination “to make an arsenal of [his] Country”⁴³ and warned that if Steyn failed to take every possible measure to ensure that his countrymen repudiated this illicit trade England would have no choice but to treat the Dutch as enemies.⁴⁴

Steyn took immediate action. The Dutch Admiralties were prohibited from granting passports for cannon coming from Sweden, and the Chamber of Burgomasters at Amsterdam warned the City’s merchants that “if such an affair was known upon the Exchange, and any Interruption happened to the Navigation of the Republick upon it, they might expect to have their Houses pulled down about their Ears.”⁴⁵ Yorke, for his part, kept abreast of the ships arriving in Amsterdam from Sweden. “There is one ship arrived [...] with Cannon, which I watch narrowly,” he wrote, “and am persuaded, no steps can be taken with that bulky Commodity, without my being exactly informed of it[.]”⁴⁶ But then came the rub: Yorke was not prepared to take any public measures against the ship or its cargo unless forced to “because we are continually purchasing Effects of the same hostile Nature in this Country, for Our own use, and by being too hasty, the King’s Service might suffer; The Apprehension of what may happen to their Navigation by disobliging us, is a solid Argument with these People, and of that I have a full Right to make all the use I can, after all the Complaisance his Majesty has had for the Republick.”⁴⁷ In short, the British needed Dutch shipments of munitions as much as the French in order to sustain their war effort. To make enemies of the Dutch under these circumstances might cut off one of Britain’s own vital supply lines.

Amid this tangle of conflicting interests, negotiations between Britain and the Netherlands frequently ground to a halt as quickly as they later resumed. Three years of exasperated negotiations between Yorke and Dutch officials are vivid

42 SP 84/485, Holderness to Yorke, 17 August 1759.

43 SP 84/485, Yorke to Holderness, 18 September 1759.

44 SP 84/485, Yorke to Holderness, 18 September 1759.

45 SP 84/485, Yorke to Holderness, 21 September 1759.

46 SP 84/485, Yorke to Holderness, 25 September 1759.

47 SP 84/485, Yorke to Holderness, 25 September 1759.

proof of this.⁴⁸ Because neither government was able to renegotiate the terms of the Treaty of 1674, the British instead resolved to give the scope of *free ships, free goods* as narrow a construction as possible. The doctrine's applicability to enemy ports in Europe was not disputed; its applicability to colonial ports, ports which had not been open to Dutch trade at the time the treaty was concluded was another matter. So if the Dutch were now to undertake a new trade in French colonial goods, Britain argued, they would have to do so in good faith, trading *with* the enemy and not *for* him.

Article III the Treaty of 1674 prescribed an objective standard against which to measure the good faith of Dutch traders. In order to enter the territorial waters of either country, a ship would have to show a sea-brief (passport) containing the name of the ship, and the name and nationality of its owner. In order to justify stops at enemy ports, the ship would also have to show its bills of lading (coquets), documents from customs officers at the vessel's port of departure describing its cargo. If the ship's bills of lading demonstrated that it was carrying contraband, the ship could be landed and searched by officers of the admiralty. But under no circumstances was the captor's crew to open, move or inspect the cargo at sea.⁴⁹

The trouble with this provision, at least from the British standpoint, was that suspect goods included only contraband as defined by the treaty. Coffee, sugar, cotton, and other French colonial goods were not among the articles then deemed contraband. By the admission of Holderness himself, this was one of the most problematic aspects of the treaty, but one whose limits the British would vigorously test. In a letter to Yorke of 28 November 1758, he wrote:

But there still remains one Point, which will, I fear, of all others, be the most difficult to adjust to mutual satisfaction; I mean, the Necessity there is of a stricter Examination of the good Faith of the Dutch Navigators, than is consistent with the literal Sense of the Treaty of 1674 or with the present Pretensions of the Dutch; and it is much to be lamented, that the various deceits, which some of the Dutch Traders have put into Practice, should make a vigorous Examination absolutely necessary, though perhaps to the Detriment of the fair Trader; and yet, necessary as it is that the Dutch Ship should be subject to Visitation, and even to be brought into Port for Examination, where there are strong suspicions of Fraud.⁵⁰

48 Alice Clare Carter, *The Dutch Republic in Europe in the Seven Years' War* (Coral Gables FL: University of Miami Press, 1971), pp. 97–102; Alice Clare Carter, "How to Revise Treaties Without Negotiating: Common Sense, Mutual Fear and the Anglo-Dutch Trade Disputes of 1759," *Studies in Diplomatic History: essays in memory of David Bayne Horn*, eds. Ragnhild Hatton & M. S. Anderson (Hamden CT: Archon Books, 1970), p. 214.

49 Treaty of Navigation and Commerce, 10 December 1674, p. 255. Bills of lading had three legal functions: (1) as an acknowledgement or a receipt for goods; (2) as evidence of a contract by a shipowner for the transport of goods, and; (3) as a means of establishing property in goods. W. P. Bennet, *The History and Present Position of the Bill of Lading as a Document of Title to Goods* (Cambridge: Cambridge University Press, 1914), pp. 5–8, 16. The forms for British and Dutch bills of lading are appended to the 1674 Anglo-Dutch Treaty of Navigation and Commerce.

50 SP 84/482, Holderness to Yorke.

Dutch merchants were unwilling to allow the British any visitation rights more expansive than allowed by the letter of the 1674 treaty. So when diplomacy failed to settle the question of British visitation rights, Holderness decided to allow the Lords Commissioners of Prize Appeal to settle it instead.⁵¹

It is here possible to fill a gap in Pares's account of neutrality in the Seven Years' War: why a sudden swarming of privateers occurred in the waters of the St. Eustatius-Holland trade route in 1758–1759. Pares writes, "There is no saying what prompted [the privateers] then. I can find no general order for the purpose in the Admiralty records, nor is it easy to point to any circumstance which caused the privateers to take up the practice. It became common within a few months, and almost universal after the condemnation of the *Maria Teresa's* cargo in the High Court of Admiralty on August 17, 1758."⁵² The answer is not to be found in the Admiralty records but in a report from Doctors' Commons included in the State Papers and republished by Reginald Marsden in his volumes of documents on the law of the sea.⁵³

The document is an advisory opinion of 3 May 1757 on the question of whether the King, on advice of the Privy Council, might prohibit privateers from stopping and seizing non-French ships or French goods found on those ships. Doctors' Commons, as the seat of the civil law profession in England, wielded substantial influence over the practice of admiralty law.⁵⁴ The authors of this particular opinion included Solicitor General Charles Yorke, Advocate General George Hay, and Advocate of the Admiralty Dr. John Bettsworth. The very people who advised the Lords Commissioners on matters of law were also advising practicing attorneys, and so their opinions shaped everything from courtroom advocacy to state policy. To the question of whether the Crown might prohibit privateers from capturing non-French ships, the law officers answered, "If his Majesty was to order all captains of private ships of war not to seize or detain the ships of any other nation than those belonging to the French king or his subjects, his Majesty, we apprehend, would circumscribe the authority given by Parliament to attack, surprise, seize, and take generally any goods belonging to the French."⁵⁵ But the law officers went one step

51 Tara Helfman, "Neutrality, the Law of Nations, and the Natural Law Tradition: A Study of the Seven Years' War", *Yale Journal of International Law* 30 (2005), pp. 554–58.

52 Pares, *Colonial Blockade and Neutral Rights*, p. 211.

53 "Report of law officers and civilians as to the legality of a proposed Instruction to privateers not to seize ships and goods of enemies other than the French, having regard to the prize Act, 3 May 1757", *Documents Relating to the Law and Custom of the Sea*, ed. R. G. Marsden (London: Navy Records Society, 1916), vol. 2, pp. 381–82.

54 Doctors' Commons had yet to become the "cosey, dozey, old-fashioned, time-forgotten, sleepy-headed little family-party" described in *David Copperfield*. Indeed, Dickens has the title character comment, "it would be quite a soothing opiate to belong to it in any character – except perhaps as a suitor." Charles Dickens, *David Copperfield*, (New York: P.F. Collier & Son, 1911), Part 1, p. 352. As civilian jurisdiction over matrimonial, testamentary, and admiralty cases was eroded by statute in the nineteenth century, so too was the authority and vitality of Doctors' Commons. See e.g. G. D. Squibb, *Doctors' Commons* (Oxford: Oxford University Press, 1977).

55 *Reports of Cases Determined by the High Court of Admiralty and on Appeal Therefrom*, ed. Reginald G. Marsden (London: William Clowes & Sons, Ltd. 1885), p. 204.

further, addressing whether the Crown had the power to prohibit privateers from stopping and seizing the ships of privileged neutrals. The officers stated, “we are of opinion that such an Instruction may be lawfully given, and consistently with the Act of Parliament given to seize or detain any ships and vessels of such nations as are entitled to the privilege of carrying enemies’ goods by particular treaties with his Majesty.”⁵⁶

This may have come as promising news to Dutch merchants, but it also sent a clear signal to privateers: while the crown reserved the right to limit their conduct with respect to neutral ships, it was not going to do so in the near future. From the time the opinion was handed down in May 1757 to the time aggressive privateering began in the St. Eustatius trade in late 1757, the Crown promulgated no orders limiting the conduct of privateers with respect to Dutch ships. Here, the Crown’s silence sent a permissive signal to British privateers: capture what you will, but remember that you do so only at the pleasure of His Majesty. It was in the shadow of this opinion that the Dutch ships, the *Maria Teresa* and the *Novum Aratrum* were captured and adjudicated. In these two cases, the Lords Commissioners of Prize Appeal stopped short of doing away with *free ships, free goods* altogether.

In 1758, the *Maria Teresa* set sail from Amsterdam to Cork, where it took on a cargo of provisions. It then set sail for St. Eustatius, where it put part of its cargo onto barques off shore and unloaded the rest in port. It also took on cargo from those barques. The ship was captured and brought to the Court of Admiralty for condemnation on the charge that it had been trading with France. Notwithstanding the fact that there was no proof that the barques with which the *Maria Teresa* had traded were French, the Court of Admiralty condemned the cargo and the ordered the ship restored to its Dutch owners. The claimants appealed to the Lords Commissioners and, on 29 March 1759, the lower court’s ruling was overturned. In the absence of evidence that the barques were French, the Commissioners ruled, the cargo had to be restored to its Dutch claimants.⁵⁷ In this way the Lords Commissioners placed the burden of proving a cargo’s enemy nationality squarely upon the captor and the *free ships, free goods* doctrine was not called into question.

Thus when presented with a timely opportunity to prohibit privateers from capturing neutral ships pursuant to an opinion of Doctors’ Commons, the King declined to do so. With the States General demanding that the King call off his privateers, the Crown’s silence in the wake of the *Maria Teresa* incident sent a clear signal to the Dutch and to the privateers: Dutch traders in the West Indies would remain fair game. But there was now a downside for the captors. If privateers

⁵⁶ *Reports of Cases Determined by the High Court of Admiralty*, ed. Marsden, p. 204.

⁵⁷ *Reports of Cases Determined by the High Court of Admiralty*, ed. Marsden, p. 204. News of the ruling was received warmly in the Netherlands. Yorke wrote that the decision “upon the ship Maria Theresa, has given so universal a Satisfaction in this country, that it is hardly to be imagin’d, and they declare every where, that after this Proof, they have had of the Equity and Friendship of the British Nation, they shall be very glad to come to any reasonable Terms of Accommodation.” Yorke to Holderness, 6 April 1759; PRO, State Papers, Holland, 84/484. The spirit of accommodation was short-lived, however, as the case did not resolve the underlying problems relating to neutral trade.

brought seized ships to the prize courts without being able to prove the origin of the cargo, all their efforts and expense would have been for naught. Capturing vessels on the high seas was no easy enterprise, and the risks involved in taking a ship at sea only to lose it at port were usually not worth taking.

A different situation arose in the case of the *Novum Aratrum*, which challenged the doctrine of *free ships, free goods* altogether. While navigating the sea lanes just off St. Eustatius, the *Novum Aratrum* took on cargo out of three barques. From two it took on sugar, the origin of which was unspecified, and from the third it took on coffee that had come from either Martinique or Guadalupe. The ship subsequently stopped at St. Eustatius, where Dutch laders put aboard a cargo destined for Amsterdam. The circumstances of the ship's capture are unclear, but captured it was and brought to England for adjudication before the Court of Admiralty. No documentation was available aboard the ship to prove the ownership of most of the cargo and, with the exception of a small amount of property laded at the port of St. Eustatius, no one was willing to come forward to claim it. Thus the nationality of the cargo was mixed, some French and some Dutch, embodying the very predicament that one pamphleteer of the Seven Years' War deplored: "the properties of Dutchmen and Frenchmen have become as inseparably blended as their national characters, in the American world, have long been equivocal."⁵⁸

From a procedural standpoint, this left the admiralty judge in an interesting predicament: how was he to treat an undocumented mixed cargo aboard a neutral ship? The prize court's response at trial was surprising. Rather than adjudge the nationality of the cargo on the basis of its final destination (Amsterdam), the court determined its nationality on the basis of its *origin*. The trial judge issued an interim order restoring the ship to its Dutch owners but requiring that the cargo be held in England until the claimants distinguished which parts of it were taken from the shore of St. Eustatius and which from the barques from French colonies. The claimant, who is not identified on the record, made no such showing and so, according to the report of the case, on 24 February 1759 "the Judge pronounced that *all* the goods in said ship taken ought to be presumed to belong to the French King or his subjects, and condemned the same to the captor (emphasis added)."⁵⁹

This unprecedented outcome may have been the result of a legal strategy that backfired for the claimants. It is possible that the claimants made a risky calculation at trial: if they complied with the Court's order and distinguished the origins of the ship's cargo, surely only the cargo that had originated in the French Indies and had been brought to the *Novum Aratrum* on French barques would be confiscated. But if they did not disclose the respective origins of the cargo, the court might be forced to release the entire cargo on the basis of the traditional rule that the nationality of goods was to be determined by their destination and not their origin. The possibility

⁵⁸ Marriott, *Case of the Dutch Ships Considered*, p. 20.

⁵⁹ *Reports of Cases*, ed. Marsden, p. 205.

that the court would apply an entirely new rule that, absent proof of its neutrality, the *entire* cargo belonged to the enemy was totally unexpected.

But it did not take long for the Lords Commissioners to overturn the judgment. In a hearing on 24 May 1759, which Dutch envoy to England Mr. van de Poll personally observed,⁶⁰ the Lords ruled “that the direction given by the Judge of the Admiralty, 11th October 1758, and the several continuances thereof, were irregular and erroneous[.]”⁶¹ The Lords instructed that part of the cargo (presumably whatever had been taken on from the port at St. Eustatius) be restored to the claimants and the origins of the remainder be pleaded and proven within a month. In effect, the goods taken on at the Dutch colony were presumptively Dutch property while the nationality of the goods taken on from the barques was to be re-adjudicated, buying time for the Admiralty and the Ambassadors alike.

Back in The Hague, Yorke was watching the case as closely as the interested merchants. He was cautiously optimistic that the Dutch would receive the ruling favorably. He wrote: “Upon the whole, I believe the People here will not be dissatisfied, tho’ I see where the Shoe pinches, which is the Hopes that they had, and some still may entertain, that the French Effects, which came from their Islands, before England had declared itself, would be sufficiently cover’d by their Bottoms[.]”⁶² The Court had effectively upheld a presumption that undocumented goods laded onto a neutral ship in a neutral colony were neutral goods and therefore not subject to confiscation. This was entirely consistent with the traditional rule of *free ships, free goods*. But the Court of Appeals left open the more sensitive question of the status of French goods laded immediately off the coast of a neutral colony. Were goods laded just off the coast of St. Eustatius to enjoy the same privilege of presumptive neutrality as goods laded directly from the shore of the colony?

The Court’s May 1759 decision left the latter question open to the relief of some and the consternation of others. Yorke explained:

The sentiments are [...] divided upon the sentence given by the Lords of Appeal, upon the Ship the Novum Aratrum. At Rotterdam they seem better satisfied than at Amsterdam, for they say in the latter that if the Captor could not prove the Effects to be French Property, they ought to be released, even supposing the Distinction between French and Dutch Property, to have been admitted by both Sides, for what was past. But in this Case, where the Bottom was Dutch, in a voyage to and from a Dutch settlement, without any previous Declaration on the part of England, some Indulgence should be shewed their Merchants, who did not imagine that trade to be obnoxious to England, that where the Presumption is in their Favor, which they suppose upon the Captor’s producing sufficient Proof, they think their Goods ought to be released, otherwise they can have no Rule to go by, and the Captors may keep them in Suspence, and Increase their Expence, till the Ships and Cargoes are no longer worth suing for. They are at the

60 SP 84/484, Yorke to Holderness, 1 June 1759.

61 *Reports of Cases*, ed. Marsden, p. 205.

62 SP 84/484, Yorke to Holderness, 29 May 1759.

same time extremely pleased with the Decision of the Court, upon what is put on Board out of Barks, and off the Shore of their Islands.⁶³

The trouble was that no one came forward to plead and prove the ownership of the remaining cargo. Not until a year later, on 1 July 1760, did the Lords finally restore the remainder of the cargo to the claimant. In fact, it was the proctor who prosecuted the case who agreed to the arrangement. The reason for this complete about-face on the status of French goods on Dutch ships arose not in the courtroom but on the battlefield. A great deal had changed between 1758 and 1760. By 1759 Britain had all but crushed the French navy and the French merchant marine were paralyzed within blockaded harbors.⁶⁴ In the spring of that year, Britain captured the islands of Guadeloupe and Marie Galante.⁶⁵ With the French Caribbean trade all but gone, the Lords Commissioner could afford to be more conciliatory than before in dealing with the Dutch. Thus the rule that had defined Dutch privileged neutrality did not die. Rather, its strength was diluted by concurrent developments.

Trading For the Enemy

While the British courts of admiralty were adjudicating the scope of neutral trading rights, Yorke was grappling with “the Impossibility of obtaining Peace for Europe, if even our Friends, under a Pretence of Neutrality carr[y] on all the Trade of our Enemies.”⁶⁶ For Britain, the problem was not the historic right of neutral merchants to trade their own goods with belligerents in time of war but rather the newly claimed right of neutral traders to carry the enemy’s colonial trade. As Charles Jenkinson explained,

The Liberty of Navigation in fair Construction, can mean no more than the Right of carrying to any Mart unmolested, the Product of one’s own Country or Labour, and bringing back the Emoluments of it; But can it be Lawful that you should extend this right to my Detriment; and when it was meant only for your own Advantage, that you should exert it in the Cause of my Enemy? [...] If you mean, that your own Commerce ought to be Free, the Right is not in the least denied you; but if under this Disguise you intend to convey Freedom to the Commerce of the Enemy, what Policy or what Justice can require it. [...] But can any Right from hence arise, that you should take Occasion from the War itself to constitute a new Species of Traffic, which in Peace you never enjoyed, and which the Necessity of One Party is obliged to grant you, to the Detriment, perhaps the Destruction, of the Other?⁶⁷

63 SP 84/484, Yorke to Holderness, 1 June 1759.

64 James C. Riley, *The Seven Years’ War and the Old Regime in France: The Economic and Financial Toll* (Princeton: Princeton University Press, 1986), pp. 80–3.

65 Szabo, *Seven Years War in Europe*, p. 256.

66 SP 84/482, Yorke to Holderness, 15 December 1758.

67 Jenkinson, *Discourse on the Conduct of the Government*, pp. 22–23.

This new state of affairs required that Britain reconsider the prevailing neutral rights regime by revisiting the very meaning of neutrality.

Richard Lee, who might charitably be described as a translator of Bynkershoek or, less charitably, as “an inferior hack writer of the Seven Years’ War,”⁶⁸ injected into the debate a useful intellectual framework within which to think about the problem of privileged neutrality. His 1759 *Treatise of Captures in War* was carefully patterned after the first book of Cornelius van Bynkershoek’s *Questions of Public Law* and, for the most part, the texts are identical. But where differences do occur, they are striking. Most notable is an original passage that Lee inserted into Bynkershoek’s text in which he characterized the contemporary problem of Dutch neutrality as follows:

though the *neutral* power may justly be allowed to trade *with* the enemy, under certain restrictions; yet it cannot possibly be conceived to be lawful to trade *for* him under sanction of their name. [...] Such is the present practice of the Dutch, who not only carry Provisions to the Enemy, but also assist them in bringing the Produce of their American colonies to Europe in Dutch vessels; and when they are detected and the cargoes condemned, they complain of depredations, and what not? But however highly they may complain, they are certainly acting against the Rules of Neutrality, and may, therefore, be very justly prevented by seizing the ships and condemning the cargoes whenever they appear to be the property of the enemy.⁶⁹

The Dutch, he argued, were not engaging in a genuine exchange of commercial goods (trading with the enemy) but had assumed a carrying trade on behalf of France by undertaking a colonial trade that the French could no longer carry out themselves (trading for the enemy.)

But why was this conduct contrary to neutrality? Did non-combatancy alone define neutrality, or was something more required? Here British pamphleteers began to revisit the very meaning of neutrality by way of Bynkershoek, who famously wrote that “the question of justice and injustice does not concern the neutral, and it is not his duty to sit in judgment between his friends who may be fighting each other, and to grant or deny anything to either belligerent through considerations of justice.”⁷⁰ To do so would be entirely contrary to the nature of neutrality, for to Bynkershoek the neutral was truly a *medius*, an entity literally caught in the middle.⁷¹ This conception of neutrality, which Lee echoed almost verbatim,⁷² was a direct challenge to the prevailing view advanced by Hugo Grotius in *The Rights of War and Peace*, which conceived of the neutral as *non hostes*, a non-enemy or

68 Pares, *Colonial Blockade and Neutral Rights*, p. 155.

69 Richard Lee, *A Treatise of Captures in War* (London: W. Sandby, 1759), pp. 142–3.

70 Cornelius van Bynkershoek, *Questions of Public Law*, tr. Frank Tenney (Oxford: Clarendon 1930), vol. 2, p. 61.

71 Bynkershoek, *Questions of Public Law*, vol. 2, p. 60.

72 Lee, *Treatise of Captures in War*, pp. 137–8.

non-belligerent. Grotius wrote, “it is the Duty of those that are not engaged in the War to sit still and do nothing, that may strengthen him that prosecutes an ill Cause, or to hinder the Motions of him that hath Justice on his Side. [...] But in a dubious Cause to behave themselves alike to both Parties[.]”⁷³

These differing views of neutrality stemmed from the writers’ different views of the state of war itself. To Bynkershoek, “war is by its very nature so general that it cannot be waged within set limits.”⁷⁴ It must be prosecuted on the assumption that the enemy deserves to be destroyed. “We make war,” he wrote, “because we think that our enemy, by the injury he has done us, has merited the destruction of himself and his people.” That said, “does it matter by what means we accomplish it?”⁷⁵ Thus Bynkershoek did not offer a conception of just war fought by morally just means. Any means employed in waging a war to “defend or recover one’s own’ (*jus suum*) were lawful.⁷⁶ In this spirit Bynkershoek wrote that, absent an agreement to the contrary, there is no ground upon which a sovereign state may interfere in the affairs of another. He explained, “[I]t is by no means right to interfere in another’s affairs. When neither friend has made any engagement with us why should princes, absolutely independent, stand or fall by our judgment? It is not our duty to avenge all the wrongs of every sovereign; it is sufficient for us to avenge our own and those of our allies.”⁷⁷ Thus the neutral lacks the moral authority to impose his sense of justice on the belligerents.

This theory of neutrality was particularly compelling to the British during the Seven Years’ War not only because of its implications for neutral trading rights, but because it avoided precisely the sort of self-multiplying war that Britain feared. Yorke explained that in the present conflict, the very balance of global power was at stake:

every impartial Person who examines the State of Our Force, by Sea and that of Europe, will be convinced that France could never have a fairer opportunity to awaken the jealousy of all Nations, against Our Power by Sea, & to tempt them to unite, to keep it within proper Bounds; I am sorry to see them gain so much Ground as they do, both [in the Netherlands] and in Denmark, and when once the Flame catches, it will soon spread much wider.

The British were acutely aware of the potential for the dispute over neutral trading rights to intensify the global conflagration already underway. As Yorke’s comment

⁷³ Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005), vol. III, p. 1525.

⁷⁴ Bynkershoek, *Questions of Public Law*, vol. 2, p. 16.

⁷⁵ Bynkershoek, *Questions of Public Law*, vol. 2, p. 16.

⁷⁶ Bynkershoek, *Questions of Public Law*, vol. 2, p. 17. However, Bynkershoek categorically prohibits perfidy on the ground that once belligerents enter into a compact, their legal status changes. They are no longer enemies and the rules governing their conduct must change accordingly. Bynkershoek, *Questions of Public Law*, vol. 2, p. 16.

⁷⁷ Bynkershoek, *Questions of Public Law*, vol. 2, p. 62.

demonstrates, the opening of the French colonial trade exacerbated the jealousy of trade of which Istvan Hont has ably written. “Jealousy of trade,” he explains, “was often a response to the neo-Machiavellian imperialism of free trade. It aimed at regaining political autonomy from market pressures, if not by military means, then by abandoning markets or by rigging them.”⁷⁸ With the French colonial trade suppressed, Britain dominated global commerce; and now that France was opening her colonial trade to neutral merchants, what was to stop neutral powers from joining the fray in order to guard their newfound trading rights?

Britain responded in two ways. First, it abandoned the Grotian view of neutrality, a view in which neutral rights expand and contract in accordance with the justice of the war, on the ground that it posed no less a threat to that delicate balance of global power than did the commercial designs of the neutral Dutch and Danes. The British adopted a view of neutrality akin to Bynkershoek’s, one in which,

It is the Duty [...] of those who are not concerned in the Dispute, to be extremely attentive to their Conduct, that they may not thereby contribute to render the Contest unequal: As far as Man is concerned, it is Force alone, on which the Decision depends; to add therefore by any means to the Power of one Party, is, manifest Injustice to the Other, and besides is highly injurious to the rest of Mankind; since it necessarily tends to spread Discord among Nations, and from a single Spark of Contention so light up a general Flame.⁷⁹

Second, Britain sought a juridically sound enforcement of the Treaty of 1674. On its face, the treaty supported the new trade in which the Dutch were engaged under the doctrine of free ships, free goods. But viewed through the prism of traditional rules of treaty construction, free ships, free goods was not compatible with the circumstances of the Seven Years’ War. To allow a neutral to take advantage of the privileged position afforded to him under treaty law under circumstances not contemplated at the time the treaty was concluded would be a breach of good faith. And for the Dutch to prize economic advantage over good faith was to succumb to Machiavellianism of the worst order.

The anti-Machiavellian tone of the reaction could not have been clearer than when Jenkinson wrote,

Those scandalous Maxims of policy, which have brought Disgrace both on the Name and Profession [of statecraft], took their Rise from the Conduct of the little Principalities of Italy [...] and their refined Shifts and Evasions formed into Systems by the Able Doctors’ of their Councils, have composed the Science, which the World hath called Politics, a Science of Fraud and Deceit [...] as if there could be no Morality among Nations, and

⁷⁸ Hont, *Jealousy of Trade*, p. 62.

⁷⁹ Jenkinson, *Discourse on the Conduct of the Government*, p. 3. Both Jenkinson and Marriott cited Bynkershoek heavily in their pamphlets. The advantage of using the arguments of a distinguished Dutch jurist to challenge Dutch claims could not have been lost on either the authors or their audience.

that Mankind, being formed into Civil Societies, and collectively considered, were set free from all Rules of Honour and Virtue.⁸⁰

To disregard good faith in public agreements by assuming the character of the enemy was to travel the slippery slope to Machiavellian politics. Marriott therefore urged as an antidote the application of the principle of *rebus sic stantibus*, a principle of treaty construction holding that an agreement could be deemed invalid or subject to renegotiation if new circumstances arose thwarting its purpose and intent. He argued that “a Commercial Treaty [...] extends no farther in its Obligation than to the general State of Commerce in existence, and view at the time of contracting [...]. What was not in being, nor probable to be foreseen, could not be in the View of the contracting Parties.” Because the French West Indies had not been open to the Dutch at the time the Treaty of 1674 was concluded, it could not be permitted now, least of all to the prejudice of England.⁸¹

The self-serving nature of this argument could not be clearer. The Dutch might just as easily have replied that for the British to prize their own economic advantage over their obligation to abide by their treaty obligations was no less Machiavellian. Only two decades before the Seven Years’ War Bynkershoek dismissed the doctrine of *rebus sic stantibus* as a juridically obsolete example of the worst sort of Machiavellian politics. He explained that under the doctrine,

compacts can be broken: (1) if a new condition has arisen suitable for reopening discussion; (2) if circumstances have come to such a pass that one cannot take action; (3) if the reasons that promoted the alliance have ceased to exist; (4) if the needs of the state or expedience demand a different course. [...] [Y]ou would hardly save yourself from Machiavellianism, if you would slink off to these dens of treachery with the itching soul of a prince. [...] Particularly that last exception which permits the breach of oath in case of the state’s needs and advantages, what else is it but the thing they call ratio status, a monster of many heads which almost no prince resists? And what are the three former exceptions but cloaks of treachery?⁸²

The arguments adduced by Bynkershoek and Jenkinson on this matter reveal the underlying tension between trade and defense during commercial war. For the Dutch, undertaking the carrying trade to the French West Indies was a means of preserving the wealth and security of their state. For the English, the destruction of that commerce was likewise a means of preserving the wealth and security of their state. In both cases, commerce was a reason of state of utmost importance to national survival in time of war. The only question was, whose national survival had priority?

80 Jenkinson, *Discourse on the Conduct of the Government*, p. 24.

81 Marriott, *Case of the Dutch Ships Considered*, p. 11.

82 Bynkershoek, *Questions of Public Law*, vol. 2, p. 190.

It is not surprising that Bynkershoek's discussion of *rebus sic stantibus* was conspicuously absent from Richard Lee's treatise, which turned instead to Bynkershoek's reasoned assault on free ships, free goods. Bynkershoek wrote that whatever the literal content of international agreements,

we must rather consider the dictates of reason than the phraseology of treaties. And in consulting reason, I cannot see why it should not be lawful to seize enemy goods found in neutral ships, for this is only taking what belongs to the enemy and falls to the victor by the laws of war. You may perhaps argue that it is impossible to seize enemy goods in a neutral ship without first seizing the ship, and that this act would involve a deed of violence against a neutral which would be as unlawful as attacking our enemies in a neutral port or carrying on depredations in neutral territory. In answer, I would remind you that it is entirely lawful to detain a neutral vessel in order to determine not only from her flag, which might be deceptive, but also from the documents found on board whether she really is neutral.⁸³

This was ultimately the line of reasoning that the British prize courts would employ in dealing with the captures of the Seven Years' War. But that, as discussed in the following section, would require a total reformulation of the traditional meaning of neutrality.

Translating Theory into Practice

The polemical literature cited in this paper did more than introduce the British public to the writings of Bynkershoek. The authors' purpose, as Marriott put it, was to publicize principles of neutrality affirmed by "Writers [...] of every country, and of the highest Authority, and by the common Usage of all Nations."⁸⁴ Their audience was Dutch as well as British, and two of the publications were translated into Dutch and circulated in Holland.⁸⁵ Just as the pamphlets introduced a British audience

83 Bynkershoek, *Questions of Public Law*, vol. 2, pp. 88–9. Cf. Lee, *Treatise of Captures in War*, Chapter 11.

84 Marriott, *Case of the Dutch Ships Considered*, p. 2.

85 The British State Papers for Holland show that British officials were acutely aware that despite their formal negotiations with members of the State General, they were really contending with what Yorke described as "a whole Country of Merchants and Advocates." SP 84/482, Yorke to Holderness, 29 December 1758. For Britain to gain any traction with them, she would have to appeal directly to aggrieved parties on the basis of reason and fairness. In 1759, as Anglo-Dutch relations approached a breaking point, Joseph Yorke wrote to the Secretary of State: "in order to open the Eyes of the Publick, as much as possible upon this Subject, I have had translated and published the best Pamphlets which have been written and published in England upon the King's right to annul the Treaty of 1674." SP 84/482, Yorke to Holderness, 2 January 1759. Although Yorke did not specify the pamphlets, James Marriott's *The Case of the Dutch Ships Considered* and Charles Jenkinson's *Discourse on the Conduct of the Government of Great-Britain in respect to Neutral Nations, During the Present War* are likely. These were the only English pamphlets published on the Anglo-Dutch trade dispute in time for Yorke to commission his translations. Numerous printings evidence their popularity. Marriott's pamphlet was first published in 1758 and was republished three times over the course of the following year. It was published once again in 1778, the year that Marriott was appointed judge of the High Court of Admiralty. Jenkinson, later Lord Liverpool, first published his pamphlet in 1758. It was republished twice in 1759 and again in 1794 and 1801. Both pamphlets endorsed the views of Cornelius Bynkershoek on the duties of neutrals in wartime.

to the writings of Bynkershoek, they also introduced a Dutch audience to the legal principles underlying British prize proceedings. For example, Lee's treatise includes a chapter titled "Of the Method of Trying Prizes taken in War," which directly addressed the procedural issues that so angered and confounded Dutch traders. The chapter explained the British system of prize appeals, emphasising the fairness and justice of the proceedings. Cases tried in the prize courts, Lee assured, would be decided "by the *Maritime Law of all Nations*, universally and immemorially received,"⁸⁶ He also recycled the oft-pressed argument that British prize courts were "not less the courts of the Captured, than of the Captor."⁸⁷

These writers continued an enterprise begun earlier in the High Court of Admiralty during the War of the Austrian Succession. In case after case during that conflict, the High Court of Admiralty released neutral ships found to be trading for the enemy, using Bynkershoek's words as an admonition of sorts. In the *Postillion of Bordeaux* (1744), for example, the Court warned that neutrals who commit unneutral acts become in effect belligerents. "If a friend lets out his ship upon an illicit Trade," the court declared, "he shall be treated as an enemy."⁸⁸ However, the Court was not yet ready to translate theory into practice. Not until the Seven Years' War would the time and circumstances be ripe for that. By then, Britain would have the naval might and political will to effect the doctrinal transformation that redefined the rights of neutrals in the centuries that followed. From the early days of the Seven Years' War, lawyers tested the resolve of the prize courts with respect to the neutral carrying trade of enemy goods. An advocate representing a certain James Colladon asked the King's Advocate George Hay for his opinion as to whether "any persons besides the subjects of France [could] trade to Martinico without its being deemed a contraband trade" and whether his Genevan client might trade there. On 18 September 1756, Hay replied in no uncertain terms that no one but French subjects might trade with Martinique.⁸⁹ The first condemnation of a Dutch ship during the Seven Years' War put teeth into the admonitions issued in the *Postillion* and by Hay. The *America*, a Dutch-flagged ship, delivered a French-owned cargo to the French Island of Santo Domingo, where it took on a cargo of colonial goods. Upon being stopped by a British privateer, the ship's master started jettisoning the ship's papers, destroying some of the bills of lading. The privateer captured the ship and brought it to harbour where it was condemned. The privateer was able to prove that the voyage was chartered by French merchants to trade with a French colony under French papers, and was therefore no longer bona fide Dutch. Upon appeal to the Lords Commissioners, the tribunal condemned both the ship and its

86 Lee, *Treatise of Captures in War*, p. 147.

87 Marriott, *Case of the Dutch Ships Considered*, p. 36.

88 High Court of Admiralty, 30/875. London. Public Records Office. The record of the case further notes, "All neutrals who does an act inconsistent with neutrality acts as an Enemyies [...] Brukerstock [sic]."

89 HCA 30/875, George Hay, King's Advocate, to Unknown Recipient, 18 Sept. 1756.

cargo as lawful prize on the ground that both were presumptively French, having assumed the nationality of the enemy by carrying his trade for him. The decision established what came to be known as the Rule of the War of 1756: that no neutral may undertake in wartime a trade closed to him in time of peace.⁹⁰

What condemned the *America* along with her cargo was not just her participation in the French carrying trade, but the fact that she was caught with French papers. The question of how to deal with Dutch ships carrying French colonial goods under Dutch papers was more complicated. The practice of transshipping enabled neutrals to avoid acknowledging intermediate stops made in French colonies while trading between the Dutch West Indies and the Continent. The only bills of lading a Dutch captain might keep as proof of his voyage were those issued in Dutch colonies. Thus the cargo's paper trail was apparently neutral in character. The first case that the Prize Commissioners decided on this point was not Dutch, but Spanish. The *Jesus Maria Joseph* took on a cargo from a French ship that sailed into Coruña, a Spanish port. The *Jesus Maria Joseph* was captured en route to San Sebastian, whence it was to sail to France. The ship was taken to a British port and its cargo was condemned as prize. On appeal, the Lords Commissioners upheld the condemnation of the cargo on the ground that the entire voyage "from the French Island to Corunna, from Corunna to San Sebastian, and thence to a port of Old France" constituted a single transportation of enemy goods aboard a neutral ship. Lord Hardwicke commented that notwithstanding the rights the Spanish enjoyed as neutrals under a treaty of 1667,⁹¹ the purpose of that treaty and others like it was "to leave the neutral with the same advantages, no better and no worse off in war than in peace."⁹²

In this way the Doctrine of Continuous Voyage and the Rule of the War of 1756 resolved a question posed earlier: whose right to self-preservation takes priority in a commercial war? The neutral state, whose wealth and power stand to benefit from participation in newly opened trades? Or the belligerent, whose very survival depends on its ability to destroy enemy commerce? The prize courts ruled on the side of the belligerent by formulating doctrines that effectively froze in time the rights of neutrals to their pre-war status. The crisis of neutrality during the Seven Years' War made it painfully clear that global commercial markets tended towards freedom, regardless of the belligerents' political and military imperatives. The more successful Britain was in crushing French commerce, the more opportunities France opened for neutrals to profit. By adopting Bykneshoek's morally sparse conception of neutrality and projecting it abroad through naval dominance, Britain

90 Pares, *Colonial Blockade and Neutral Rights*, pp. 197–8, 201–2. See also, O. H. Mootham, "The Doctrine of Continuous Voyage", *British Yearbook of International Law* 8 (1927), pp. 63–67.

91 The Anglo-Spanish Treaty of 1667 upheld the principle that unfree ships make unfree goods, but was silent on whether Spain enjoyed the rights of free ships, free goods. Pares, *Colonial Blockade and Neutral Rights*, pp. 175–6.

92 Pares, *Colonial Blockade and Neutral Rights*, p. 220.

saw to it that the neutral would not be allowed to profit at the expense of belligerents in time of war.

Conclusion

The Seven Years' War forced Britain to confront a fundamental question: whether neutral ships carrying on the enemy's trade could be characterized as truly neutral. The resulting Rule of the War of 1756 and the Doctrine of Continuous Voyage had the collective effect of codifying into law Bynkershoek's view that the proper function of the neutral is not to sit in judgment of the justice of the belligerents' claims, but to be a true *medius* favouring neither side. Under the Rule of the War of 1756, the neutral could not undertake in wartime commercial activities from which he had been barred in time of peace. Under the Doctrine of Continuous Voyage, the neutral could not use his flag and ports to carry on the enemy's trade. Either act would tip the scales at whose centre neutral status was precariously balanced. Britain's prize courts were uniquely suited to deal with the practical problems posed by the global commercial warfare of the Seven Years' War. The war was commercial not only in the sense that the parties sought to open up new markets for domestic manufactures and trade, but insofar as enemy commerce was perceived as a weapon of war that had to be stopped. Trade ceased to be an inherently neutral activity in time of war since its ultimate purpose was to strengthen the side that profited; if that side happened to be the enemy, trading on his behalf was tantamount to an act of war. The Seven Years' War thus represents a turning point of the historical development of neutral rights.

The Rule of the War of 1756 itself had historical precedents. Reginald Marsden has identified at least two earlier occasions on which admiralties applied the principle that a neutral may not undertake in time of war commercial activities from which he was excluded in time of peace. In a 1604 case the Dutch admiralty condemned two Spanish-flagged Venetian vessels carrying cargo from Spanish America to Spain, and in 1630 the English admiralty condemned neutral ships carrying on Spanish coastal trade.⁹³ Why then, once established, did the principle not endure as it did in the wake of the Seven Years' War? Again, the answer lies not in the courtroom but at sea. The Seven Years' War, unlike other wars before it, left Britain with the most powerful navy in the world and with an Admiralty determined to assert its rights aggressively, which it did in every war thereafter. The United States adopted the Doctrine of Continuous Voyage during the American Civil War, when British-flagged ships began running blockades on Confederate ports, and France followed suit during the Crimean War. Likewise, Japan adopted the rule during the Sino-Japanese War, and Italy adopted it during the Abyssinian War of the late nineteenth century. During the Seven Years' War Britain in effect set the

⁹³ Reginald Marsden, "Early Prize Jurisdiction and Prize Law in England, Part II", *English Historical Review* 98 (1910), pp. 244–45.

agenda for the debate on neutral rights in the coming century. When confronted with neutral trade inconsistent with its own war goals, every maritime power would adopt a similar stance.