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**Iberian expansion over the oceans:  
law and politics of *mare clausum* on the threshold of Modernity  
(XV-XVI centuries)**

ABSTRACT: Oceangoing navigation played a major role in the development of the law of the sea during the Early Modernity. The vastness of the oceans precluded straightforward solutions and stretched to their limit pre-existing ideas concerning the legal status of the sea. In the beginning, the tense political rivalry between Portugal and Castile dominated legal discourses concerning the oceans, with the Holy See playing a cumbersome role. At the end of the fifteenth century, the Iberian countries found a compromise and coordinated their endeavours. Throughout the sixteenth century, they sought to exclude other Europeans from sailing to the Indies. Hence, this contribution shall investigate Iberian claims over the oceans, which largely provided the premises to Grotius' *Mare Liberum* (1609) and to the scholarly diatribe between the supporters of the principles *mare liberum* and *mare clausum*.

KEYWORDS: Early Modernity, international law, oceans, *mare liberum*, *mare clausum*, law of the sea, *ius navigationis*

TABLE OF CONTENTS: 1 Introduction – 2. Iberian seaborne expansion - 3. Legal titles involved - 3.1. Early papal bulls and prior discovery - 3.2. Treaty of Alcaçovas - 3.3. The bulls of Alexander VI - 4. The Treaty of Tordesillas - 4.1. Contents - 4.2. Aftermath- 5. Conclusions - 6. Selected bibliography.

## 1. *Introduction*

The oceans cover more than three-fifths of the surface of the globe. They represent the connecting links between the continents and an enormous source of wealth. A consistent share of global trade flows through maritime routes stretching around the globe. Since the beginning, political entities felt the need to define the legal status of the oceans, or at least to legally justify national agendas concerning them<sup>1</sup>. For the Europeans of the fifteenth and sixteenth centuries, the legal approach to the oceans formed an unprecedented challenge. If for the Roman and medieval jurists the Mediterranean had been a vague object of investigation, in which it was easy to lose the orientation, the endless expanses of the oceans gave rise to much greater questions. The categories developed over the centuries by Roman law scholars and the *ius commune* doctrine took the European continent as spatial reference and seemed at first sight unsuitable for the new geographical horizons of the Age of Discovery<sup>2</sup>.

The law of the sea was a minor concern to the legal speculation of Roman jurists, who, on the other hand, provided solid grounds for the further developments of the western legal tradition in so many areas<sup>3</sup>. The Romans generally listed the sea among the *res communes omnium*, ‘common property of humankind’, which remained *extra commercium* and open to all men to use<sup>4</sup>. The Roman legal speculation concerning the sea was crystallised in the Justinian *Institutiones*. This work stated that by natural law the air, the sea and its shores are common to the entire humanity. The *Digest* confirmed the definition almost to the letter<sup>5</sup>.

However, the *Corpus Iuris*: ‘did not really explain the idea of common property’<sup>6</sup>. Indeed, the Roman Empire was not the appropriate forum for the development of a comprehensive international law of the sea. Already during the late republic, the Romans had acquired more dominion over the

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<sup>1</sup> D. J. Bederman, *The Sea*, in *The Oxford Handbook of the History of International Law*, edited by B. Fassbender & A. Peters, Oxford, 2012, pp. 359-379. See also L. Benton, *A Search for Sovereignty, Law and Geography in European Empires, 1400-1900*, Cambridge 2012, pp. 104-106.

<sup>2</sup> A. A. Cassi, *Ius commune tra vecchio e nuovo mondo*, Milano 2004, p. 85.

<sup>3</sup> For further details, see D. Gaurier, *Droit maritime romain*, Rennes 2004. See also J. Theutenberg, *Mare Liberum et Mare Clausum*, in “Arctic”, vol. 37, n. 4, 1984, p. 481.

<sup>4</sup> W. G. Grewe, *The Epochs of International Law*, Berlin-New York 2000, p. 129.

<sup>5</sup> Inst., 2.1.1; D., 1, 8, 2.

<sup>6</sup> R. Perruso, *The Development of the Doctrine of Res Communes in Medieval and Early Modern Europe*, in “The Legal History Review”, vol. 70, Issue 1, 2002, p. 69.

Mediterranean Sea than whatever nation before them. They evocatively referred to the Mediterranean as ‘our sea’, using the formulas *Mare Nostrum* or *Mare Internum*. These formulas symbolised a largely political and military claim and did not extend to a legal and theoretical level<sup>7</sup>. In conclusion, the importance of Roman legal thought concerning the law of the sea did not originate from the depth of its speculations and the number of legal cases on the subject. Its role was to bequeath to future generations of European jurists the concepts of *res communis omnium* and *Mare Nostrum*. From those *formulae* would eventually derive the basic principles of *mare liberum* and *mare clausum*.

Throughout the Middle Ages, European seafarers preferred to sail within sight-distance from the coasts with the notable exception of the Vikings. In the Mediterranean Sea, the influence of Roman law endured and continued to represent a valuable source of legal concepts. In the thriving Italian city-states of the late Middle Ages, a number of scholars addressed the international practice of their times, especially with regard to the claims put forward by Venice and Genoa over the Adriatic and Tyrrhenian seas. Authors such as Bartolus of Sassoferrato and Baldus de Ubaldis generally viewed the expansion of state authority towards coastal seas as legally acceptable<sup>8</sup>. Across the Northern seas, Roman law achieved less influence and the legal developments were mostly original. Generally, the jurists of the countries bordering the Baltic Sea and the North Sea did not show particular interest in defining the legal status of the seas. As a result, customary rules and state practice became relevant, especially concerning the interplay between the Nordic kingdoms and the Hanseatic League. Throughout the Middle Ages, both the Europeans and the Arabs considered the Atlantic, the ‘green sea of darkness’, unnavigable<sup>9</sup>. However, during the fifteenth century, European captains eventually perfected their sailing techniques, and vessels of higher quality and seaworthiness were developed. This combination ultimately led to the exploration of the entire globe<sup>10</sup>.

<sup>7</sup> A. Raestad, *La mer territoriale, études historiques et juridiques*, Paris 1913, p. 4.

<sup>8</sup> ‘Bartolus of Saxoferrato on the Extension of Jurisdiction in the Territorial Sea’, Tyber., 55, in W. G. Grewe, *Fontes Historiae Iuris Gentium*, I, Berlin-New York 1992, I, pp. 692; ‘Baldus de Ubaldis on the Legal Situation in the Territorial Sea’, *Comm. I (D., 1, 8, 2)*, fol. 51, *ivi*, cit., pp. 693. For further details, see G. Calafat, *Une mer jalouse. Contribution à l’histoire de la souveraineté (Méditerranée, XVIIe siècle)*, Paris 2019, pp. 17-60; Raestad, *La mer territoriale*, cit., pp. 12-13.

<sup>9</sup> J. R. S. Phillips, *The Medieval Expansion of Europe*, Oxford 1998, pp. 147-148. For further details, see R. Mauny, *Les navigations médiévales sur les côtes sabariennes antérieures à la découverte portugaise (1434)*, Lisboa 1960.

<sup>10</sup> J. H. Parry, *Europe and a Wider World, 1415-1715*, London 1979, pp. 13-25; J. Goldstone, *Why Europe? The Rise of the West in World History, 1500-1850*, New York 2009, pp. 26-29. See

## 2. Iberian seaborne expansion

Portugal was one of the Iberian states emerging from the complex historical phenomenon of the *Reconquista*. Until the fifteenth century, it remained a relatively poor and peripheral component of the European state system<sup>11</sup>. However, from the early decades of the fifteenth century, Portuguese seafarers began to challenge the open waters of the Atlantic. They hoped to reach the Far East and its precious goods, as well as to end the traditional pre-eminence of Italian and Muslim intermediaries on long-range Euro-Asian trade. In addition, they sought new trade routes to bypass the threat posed by the Ottoman Empire and to attack the Muslims in North Africa from the rear<sup>12</sup>. The geographical position of the kingdom, naturally stretched towards the Ocean, represented another important variable. A member of the Portuguese royal family, Prince Henry the Navigator (1394-1460), assumed a leading role in the first wave of explorations along the African coasts<sup>13</sup>.

Soon Castilian adventurers became the main competitors of the Portuguese, and a sort of ‘race to the East’ began between the two kingdoms. The first area interested by Portuguese endeavours was West Africa with its already developed gold and slave trades<sup>14</sup>. As early as 22 October 1443, Prince Henry obtained from his brother and regent Pedro de Aviz exclusive rights of navigation beyond ‘do cabo Bojador’ and towards Guinea, confirmed in the same year by the pope<sup>15</sup>. In 1446, 3 February, Henry received a further grant,

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also P. E. Steinberg, *The Social Construction of the Ocean*, Cambridge 2001, pp. 62-63; B. W. Diffie, *Foundations of the Portuguese Empire, 1415-1580*, Minneapolis 1977, pp. 123-124.

<sup>11</sup> For further details, see: A. de Sousa, *Portugal*, in *The New Cambridge Medieval History, VII, 1415-1500*, edited by C. Allmand, Cambridge 1998, pp. 627-644.

<sup>12</sup> C. H. Parker, *Global Interactions in the Early Modern Age*, New York, Cambridge 2010, pp. 72-73. See also P. Brummett, *Ottoman Sea power and Levantine Diplomacy in the Age of Discovery*, Albany 1994.

<sup>13</sup> The reference work remains C. R. Boxer, *The Portuguese Seaborne Empire, 1415-1825*, London 1969. See also M. Newitt, *A History of Portuguese Overseas Expansion 1400-1668*, London 2004; P. E. Russell, *Prince Henry ‘The Navigator’: A Life*, New Haven 2001.

<sup>14</sup> The dynastic union between Castile and Aragon materialised with the marriage between the respective heirs, Isabella and Ferdinand, in 1469. This brought about the progressive formation of Spain.

<sup>15</sup> See the text of the *carta* in J. R. Coelho, *Alguns documentos do Archivo Nacional da Torre do Tombo*, Lisboa 1892, pp. 8-9. See also Diffie, *Foundations of the Portuguese Empire*, cit., p. 59; W. Blake, *European Beginnings in West Africa, 1454-1478*, Westport 1969, pp. 16-25.

which forbade anyone to go to the areas beyond Bojador, without Henry's license and without paying him the Fifth customarily paid to the Crown<sup>16</sup>. Furthermore, in the abovementioned document the same orders applied to whoever desired to sail towards the Canary Islands, since 'no ships ever went to those islands' before Henry's expeditions<sup>17</sup>.

Whoever sailed past cape Bojador or to the Canaries without a license would lose both ship and cargo in favour of the *infante*: 'E os que ssem sseu mandado passarem aas dictaa jlhas percam pera o dicto jfante ho naujo ou naujos que leuarem e a mercadaria que trouuerem'<sup>18</sup>. For instance, in 1454 a Genoese, who had been trading in Guinea without a licence, was captured aboard a Castilian caravel. He had his hands cut off as punishment. Significantly, in the same period (1449) the King of Castile granted to the Duke of Medina Sidonia a trade monopoly covering the region between Agadir and Cape Bojador. In the same year, Alphonso V of Portugal (1438-1481) renewed to Henry the monopoly from Cape Cantin to Cape Bojador, an overlapping area<sup>19</sup>.

In the context of this Hispano Portuguese rivalry, the American continent was discovered, 'almost per accident' in 1492 by a Castilian-sponsored expedition looking for a western route towards the Indies<sup>20</sup>. In 1487, Bartolomeo Diaz had already reached the Cape of Good Hope for the first time. However, it was only in 1497 that Vasco da Gama finally reached Calicut in India, circumnavigating Africa and then crossing the Indian Ocean. The latter was at the time one of the most trafficked sea areas, sailed by merchants of various nationalities. A 'customary code of rules' regulated the coexistence between them. A number of prosperous polities ruled the coasts of India, Hindu and Muslim societies possessing highly developed international relations as well as commercial and maritime usages. Some of these customs had been compiled in written maritime codes, such as those of Malacca and Macassar. They did not envisage extensive state jurisdiction on

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<sup>16</sup> A. J. Dias Dinis, *Monumenta Henricina, colectânea documental relativa ao Infante D. Henrique*, Coimbra 1960-1974, vol. IX, pp. 121-123; V. M. Godinho, *Documentos sobre a expansão portuguesa*, Coimbra, 1944, I, pp. 201-204; Coelho, *Alguns documentos*, cit., pp. 9-10.

<sup>17</sup> Dias Dinis, *Monumenta Henricina*, vol. IX, cit., pp. 121-123;

<sup>18</sup> Ivi; Godinho, *Documentos*, I, cit., pp. 201-204.

<sup>19</sup> For the text, see Godinho, *Documentos*, III, cit., pp. 72-76; Dias Dinis, *Monumenta Henricina*, vol. X, cit., pp. 11-12; Coelho, *Alguns documentos*, cit., p. 13-14.

<sup>20</sup> J. H. Parry, *The Spanish Seaborne Empire*, London 1971, pp. 22-23; D. Buisseret (ed.), *The Oxford Companion to World Exploration*, Oxford 2007, p. 286; B. Vincent, *1492. L'année admirable*, Paris 1997, pp. 52-72.

the seas<sup>21</sup>.

Da Gama and his successors immediately sought to insert themselves in this fulcrum of spice and other lucrative trades, overcoming potential rivals with the superior armament of their ships<sup>22</sup>. Already in 1499, Da Gama claimed the entire Indian Ocean on behalf of the king of Portugal. Indeed, he had found out that the great Asian powers, such as Ming China, considered the seas as not subjected to their jurisdiction. Soon after the king rewarded Da Gama with, among other things, the title of *Almirante da India*<sup>23</sup>. King Manuel I of Portugal (1495-1521) immediately wrote to the Castilian court magnifying the achievements of his *descobridores*, claiming the discovery of India (*Yndia*)<sup>24</sup>. The Portuguese negotiated trade agreements with the stronger rulers, while imposing treaties on the weaker ones, often exploiting regional rivalries to their advantage. They immediately seized strategic bases, such as Goa in India (1510) and Malacca in Malaysia (1511), as well as a considerable share of seaborne trade from Arab and Indian Muslim merchants. Those harbours formed the nucleus of the *Estado da India*, the Empire of the Portuguese Indies.

From their bases, the Portuguese patrolled the Indian Ocean and compelled seafarers to acquire the so-called *cartazes*, documents granting safe conduct in return for a payment to the Crown of Portugal. Even though the Portuguese were never in the position to control the entirety of Asian trade, they became a significant actor<sup>25</sup>. The ultimate goal consisted in diverting the spice trade towards the newly established Cape route, excluding other Europeans from the region, as well as in forcing Asian merchants to buy *cartazes*, somehow acknowledging their claims of dominion over the high seas. Throughout the sixteenth century, the Portuguese maintained a prominent position in the Indian Ocean basin<sup>26</sup>.

<sup>21</sup> C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies, (16th, 17th and 18th Centuries)*, Oxford 1967, p. 64.

<sup>22</sup> R. P. Anand, *Origin and Development of the Law of the Sea, History of International Law Revisited*, Leiden-Boston 1983, pp. 47-60; Parry, *Europe and a Wider World*, cit., p. 24.

<sup>23</sup> The *carta* in question is dated January 10, 1502. See Coelho, *Alguns documentos*, cit., pp. 127-128.

<sup>24</sup> 'Carta de El-Rei D. Manuel para os reis de Castella dando-lhes parte da descoberta da India...', *ivi*, pp. 95-96. See also Boxer, *The Portuguese Seaborne Empire*, cit., pp. 48-49.

<sup>25</sup> For more about the *cartaz* system, see R. Maloni, *Control of the Seas: the Historical Exegesis of the Portuguese Cartaz*, in "Proceedings of the Indian History Congress", Vol. 72, Part I (2011), pp. 476-484. See also Benton, *A Search for Sovereignty*, cit., pp. 104-106; Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies*, cit., pp. 64-65.

<sup>26</sup> Anand, *Origin and Development of the Law of the Sea*, cit., pp. 57-62; Boxer, *The Portuguese*

By contrast, in the western Atlantic, the Spanish found out they were the only ones disposing of heavy seagoing vessels. Therefore, it was easier for them to consider that sea area as something similar to a gigantic *res nullius*. Soon a lengthy dispute will arise concerning the rights Castile could claim over the Americas, as well as to the rights of the natives<sup>27</sup>. With regard to adjacent oceans, the situation seemed initially relatively uncomplicated, and the royal couple formed by Isabella I of Castile and Ferdinand II of Aragon took various steps to monopolise those sea areas and acquire legal titles valid *erga omnes*. In 1513, Vasco Núñez de Balboa became the first European to reach the shores of the Pacific Ocean, “the Southern Sea”, after crossing the Isthmus of Panama. Once there, he proceeded with a *toma de posesion*, claiming the ocean and the adjacent lands as Spanish possessions. As Balboa solemnly walked into the waters, the procedure he employed did not differ from how explorers used to claim possession of newly discovered islands and territories at the time:

He was in complete armour, with a shining helmet on his head, breastplate, greaves, and gauntlets. [...] drawing his sword and taking in his left hand a banner upon which was painted the arms of Castile and Aragon, he waded into the tide, [...] waving both banner and sword, shouted in a loud voice: “Long live the high and mighty sovereigns of Castile! Thus in their names do I take possession of these seas and regions; and if any other prince, whether Christian or infidel, pretends any right to them, I am ready and resolved to oppose him, and to assert the just claims of my sovereigns”<sup>28</sup>.

Everything happened under the careful eyes of the notary of the expedition, Andres de Valderrabano. He duly documented the events in order to confirm what had happened and prove the acquisition of possession. Finally, all the members of the expedition who were there signed the document<sup>29</sup>.

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*Seaborne Empire*, cit., pp. 39-64. For an overview, see A. R. Disney, *The Golden Age*, in *A History of Portugal and the Portuguese Empire: From Beginnings to 1807*, Cambridge 2009, pp. 143-171.

<sup>27</sup> For a recent and critical historiographical reflection, see T. Duve & H. Pihlajamäki (eds.), *New Horizons in Spanish Colonial Law: Contributions to Transnational Early Modern Legal History*, Frankfurt Am Main: Max Planck Institute for European Legal History, 2015.

<sup>28</sup> F. A. Ober, *Vasco Núñez de Balboa*, New York 1906, pp. 179-180. Cf. Cassi, *Ius commune tra vecchio e nuovo mondo*, cit., pp. 119-120. For further details, see F. Morales Padrón, *Descubrimiento y toma de posesión*, in *Anuario de Estudios Americanos*, XII, Sevilla 1955, pp. 321-380.

<sup>29</sup> *Ibid.*; H. Kamen, *Spain's Road to Empire*, London 2009, p. 85 (Kindle version).

### 3. *Legal titles involved*

#### 3.1. *Early papal bulls and prior discovery*

As already mentioned, at the end of the Middle Ages, the principle of the freedom of the seas was not the most predominant one. Many seafaring states in the previous centuries had seized control over certain maritime areas of interest. The rulers of the Iberian kingdoms decided to enforce similar *mare clausum* policies on a far greater scale, ‘over the open, unlimited oceans of the world, the immensities of which were only just becoming apparent’<sup>30</sup>. They wanted to prevent the other Europeans from sailing through the oceans, as well as to trade overseas and settling themselves there. It must be underlined that the early modern legal discourse concerning the sea remained strictly intertwined with those related to trade and acquisition of sovereignty over territories, as shown for instance by the *toma de posesion* of Núñez de Balboa. From the beginning, the ‘law’ represented an essential component of all exploring endeavours. A notary was usually present in each expedition.

One of the most important titles was the *donatio apostolica*, contained in pontifical *bullae* of concession of privileges over ‘new lands and waters’. This appeared to be in line with a widespread medieval law of nations *praxis*. European princes used to seek papal approval or confirmation, in relation to military expansion against non-Christian people, in order to make their actions more authoritative and legitimate vis-à-vis other Christian rulers<sup>31</sup>. The kings of Portugal naturally sought to convince the papacy of their crusading spirit, explaining how their expeditions towards Africa and the Atlantic aimed at enlarging the boundaries of Christendom<sup>32</sup>. For instance, Pope Eugene IV issued on 5 January 1433 the bull *Rex regum* addressing all Christian princes to join forces with Portugal in the attack against the ‘mouros de Africa’<sup>33</sup>. Three years later, King Edward I of Portugal (1433-1438) asked the same pope to lift

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<sup>30</sup> Grewe, *The Epochs of International Law*, cit., p. 257.

<sup>31</sup> S. C. Neff, *Justice among Nations. A History of International Law*, Cambridge 2014, pp. 107-111; M. Hebiè, *Souveraineté territoriale par traité, une étude des accords entre puissances coloniales et entités politiques locales*, Paris 2015, p. 43; L. Rojas Donat, La potestad Apostólica en las Bulas Ultramarinas Portuguesas y Castellanas, in “Revista de estudios históricos-jurídicos”, n. 29 (2007), pp. 407-420.

<sup>32</sup> See C. R. Raymond, *Prince Henry of Portugal and the African Crusade of the Fifteenth Century*, in “The American Historical Review”, vol. 16, n. 1 (1910), pp. 11-23.

<sup>33</sup> Coelho, *Alguns documentos*, cit., p. 7.



the ban concerning the colonisation of the Canary Islands<sup>34</sup>. Portuguese arguments proved effective in a period dominated by the fear of the unstoppable rise of the Ottoman Turks. Therefore, several fifteenth century pontiffs emanated *bullae* sanctioning European seaborne expansion<sup>35</sup>.

It worth noting that at the time a certain degree of confusion existed between titles to territory and titles to dominion over the seas: ‘The foundations of the Hispano-Portuguese claims to dominion over the oceans of the world were identical with the legal titles on which the overseas colonial acquisitions of these two nations were based’<sup>36</sup>. More specifically, in West Africa, the Portuguese kings strongly referred to the right of prior discovery (*inventio*) and occupation (*occupatio*) as further legal grounds for excluding others from the seas and newly discovered regions. Indeed, these arguments also covered the adjacent seas and even the open ocean. Since Portuguese seafarers were opening new maritime routes with great expenses and sacrifices, Lusitanian kings felt entitled to alone reap the benefits of their subjects’ endeavours<sup>37</sup>. On the other hand, Castilian monarchs claimed parts of Morocco and West Africa on the assertion that being the successors of the Visigoth Kings, they held rights to the region of Roman Mauritania, and by extension also over the Canary Islands and the surrounding seas. It was an argument based on an embryonic principle of state succession<sup>38</sup>. King John II of Castile (reigned 1406-1454) claimed for his country ‘the ancient and exclusive right of sailing in the seas of Guinea’, and threatened war if the Portuguese did not stop their southward journeys.

A number of expeditions sailed from Andalusian ports towards West Africa. In the words of Alonzo de Palencia, a Castilian chronicler, the Portuguese were ‘cruelly preventing all others from cruising off those coasts’<sup>39</sup>. Hence, Castile initially opposed Portuguese closed sea policies, and

<sup>34</sup> ‘Letter from King Duarte I of Portugal to Pope Eugenius IV, August 1436’, in Dias Dinis, *Monumenta Henricina*, cit., vol. V, pp. 254-258.

<sup>35</sup> Hebiè, *Souveraineté territoriale par traité*, cit., pp. 34-54. For further details, see C. M. de Witte, *Les bulles pontificales et l'expansion portugaise au XV<sup>e</sup> siècle*, in “Revue d'histoire ecclésiastique”, vol. 48 (1958), pp. 683-718.

<sup>36</sup> Grewe, *The Epochs of International Law*, cit., p. 257.

<sup>37</sup> A. García-Gallo, *Las bulas de Alejandro VI y el ordenamiento jurídico de la expansión portuguesa y castellana en África e Indias*, Madrid 1958, pp. 589-590.

<sup>38</sup> M. Escamilla, *Le siècle d'or de l'Espagne, apogée et déclin, 1492-1598*, Paris 2015, p. 45. The Castilians would later employ arguments similar to those of the Portuguese once they opened new routes of their own with Columbus expeditions. Cf. Cassi, *Ius commune tra vecchio e nuovo mondo*, cit., pp. 95-96.

<sup>39</sup> A. de Palencia, *Cronica de Enrique, IV*, pp. 127-128, quoted in Blake, *European Beginnings in West Africa*, cit., pp. 19-20; Diffie, *Foundations of the Portuguese Empire*, cit., p. 59.

the traditional rivalry between the two neighbouring kingdoms re-emerged in a new context. However, Spanish arguments did not involve a general claim for the freedom of the sea, since Spain had closed sea ambitions of his own. A diplomatic triangle between Portugal, Spain and Rome ensued, with different popes taking shifting positions between Castilian and Portuguese interests. However, until the end of the fifteenth century, Portugal remained the primary beneficiary of pontifical interventions<sup>40</sup>.

A further step was reached when Pope Nicholas V issued the bull *Romanus pontifex* (8 January 1455), which englobed and enlarged a previous document of 1452. It officially sanctioned Portuguese monopoly of navigation along the coasts of West Africa as well as towards the East Indies, deciding the Castilian-Portuguese dispute in favour of King Alphonso V of Portugal<sup>41</sup>. The declared aim was to reward Portugal for the fight initiated by Henry the Navigator and the Portuguese kings in North Africa against the Muslims<sup>42</sup>. Nevertheless, what is especially relevant here is the nature of the privileges bestowed on the Portuguese. The Portuguese were entitled to close the area they had explored and to impose the payment of licences to those eventually interested in following their wake<sup>43</sup>.

The bull expressly mentioned the ‘islands, lands, ports and seas (*maria adiacentia*)’ that were to be exclusively exploited by Portugal. Portuguese authorities could punish all interlopers, who would also face excommunication<sup>44</sup>. Mamadou Hébié underlines that the bull 1455 did not intend to transfer sovereignty, or any territorial rights, in itself<sup>45</sup>. That being

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<sup>40</sup> For instance, supposedly pro Spanish was the bull *Dudum cum*, issued by Pope Eugenius IV in 1436 (July 31). It bestowed upon King John of Castile the right to ‘conquest of Africa’. See Blake, *European Beginnings in West Africa*, cit., p. 23. The letters wrote by the Iberian kings (1345) to Pope Clement VI, concerning the Canaries, were also part of this ‘diplomatic triangle’. See García-Gallo, *Las bulas*, appx. 3-4, pp. 747-751.

<sup>41</sup> For the text, see F. G. Davenport, *European Treaties Bearing on the History of the United States and its Dependencies to 1648*, Washington 1917, I, cit., doc. 1, pp. 9-26; Dias Dinis, *Monumenta Henricina*, vol. XII, cit., pp. 254-258.

<sup>42</sup> Davenport, *European Treaties*, cit. doc. 1, p. 21; Diffie, *Foundations of the Portuguese Empire*, cit., p. 75.

<sup>43</sup> Maloni, *Control of the Seas*, cit., p. 477.

<sup>44</sup> Davenport, *European Treaties*, I, cit., doc. 1, p. 25.

<sup>45</sup> Indeed, the Portuguese were required to occupy or conquer the areas and seas in question. The act of papal concession was a precondition, granting the *ius ad occupationem*. Afterwards, Portugal had to forge the title to territorial right. Thus, the bull implied a twofold acquisitive title: on the one hand, *inventio* and *occupatio*, on the other hand the pontifical donation. The *donatio* intended to convert the *de facto* acquisition into a rightfully held legal position. See Hébié, *Souveraineté territoriale par traité*, cit., p. 51; Cassi, *Ius commune*

said, the Portuguese interpreted from the beginning the *Romanus pontifex* as allowing the exclusion of all other Christians from the seas south of Cape Bojador (*ius excludendi alios*).

### 3.2. *Treaty of Alcaçovas*

In spite of the clear position taken by the papacy, Castile continued to claim Guinea in the following years. Andalusian expeditions sailed towards West Africa from Seville and Cádiz. Consequently, various diplomatic crises arose between the two Iberian countries, with Castilian authorities asking reparations for the vessels seized by Portugal south of Cape Bojador. In 1475, king Alphonso V of Portugal invaded Castile in the context of the War of the Castilian Succession. He claimed he was defending the right to the throne of his betrothed, Princess Joanna, against Queen Isabella's usurpation<sup>46</sup>. As a reaction, Castilians entered in force the Guinean trade in order to gain a better share of its wealth. In June 1478, Isabella sanctioned unrestricted trade towards the 'Mina de Oro'. This entailed intense naval warfare in the Atlantic. In 1478, a Portuguese naval squadron defeated a Castilian fleet near Mina in Guinea<sup>47</sup>. Eventually in 1479, the belligerents reached a comprehensive settlement to solve their 'serious disputes, questions, discussions, and differences'<sup>48</sup>.

More specifically, two treaties were concluded in the Portuguese city of Alcaçovas. The first one dealt with dynastic matters, and Alphonso V eventually accepted Isabella's accession to the throne, withdrawing his own claim<sup>49</sup>. In the second one, the king of Portugal recognised the sovereignty of

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*tra vecchio e nuovo mondo*, cit., pp. 108-111; De Witte, *Les bulles pontificales et l'expansion portugaise*, cit., vol. 48, p. 702; L. F. Thomaz, *Factions, Interests and Messianism: The Politics of Portuguese Expansion in the East, 1500-1521*, in "Indian Economic and Social History Review", vol. 28 (1991), pp. 97-100.

<sup>46</sup> For further details, see V. A. Álvarez Palenzuela, *La guerra civil castellana y el enfrentamiento con Portugal, (1475-1479)*, Alicante 2006.

<sup>47</sup> For Isabella's proclamation, see 'Seguro á los Marineros de Palos para contratar libremente por mar y tierra', in M. F. de Navarrete, in *Coleccion de los viajes y descubrimientos...*, II, (*Documentos de Colon y de las primeras poblaciones*), Madrid 1859, pp. 429-433. See also Diffie, *Foundations of the Portuguese Empire*, cit., p. 151; Blake, *European Beginnings in West Africa*, cit., p. 52.

<sup>48</sup> For the text of the treaty and its English translation, see Davenport, *European Treaties*, I, cit., doc. 3, p. 37. For the Portuguese version, see Coelho, *Alguns documentos*, cit., pp. 42-43.

<sup>49</sup> A. B. Sánchez Prieto, *La intitulación diplomática de los Reyes Católicos: un programa político y una lección de historia*, in "III Jornadas Científicas sobre Documentación de la Época de los Reyes

Castile over the Canary Islands, finally putting an end to the dispute concerning them. In return, the ‘Catholic Monarchs’ (*Reyes Católicos*) solemnly promised to respect Portuguese monopoly of navigation from an imaginary limit running south of the Canaries. Therefore, Portugal secured the exclusive right of navigation towards Guinea, Cape Verde, Madeira and the Azores. Moreover, the Catholic Monarchs agreed on actively forbidding their subjects from entering the Portuguese exclusive sea area<sup>50</sup>. On their part, in a document dated 6 March 1480, the king and the crown prince of Portugal reiterated their promise non-to question Castilian rights and possessions in the Canary Islands. The aim was to forge a stable peace between the two Crowns, ‘para que esta paz sea firme, estable, para siempre duratura’<sup>51</sup>.

The king of Portugal realised that his position had grown stronger than ever after the conclusion of the treaty. He intended to take full advantage of the new status of Guinea, which now lawfully belonged to his kingdom, ‘que directamente a estes rregnos soamente pertence’. He soon sent a peremptory order to his captains cruising in the Atlantic. In the document, dated 6 April 1480, he commanded that the crews of all interloping vessels captured south of the Canaries (*pera baixo e adjante contra Guinea*) were to be summarily thrown into the sea, in order to let the trespassers ‘die a natural death’, (*todos ser e sejam deytados ao mar, pera que mouram logo naturalmemte*). The king ended the document affirming that this harsh treatment would provide an example<sup>52</sup>. One month later Alphonso V granted all rights concerning trade in Guinea and fisheries in the adjacent seas (*pescaria dos seus mares*) to his son, Prince John. Whoever wanted to sail in the area had now to pay licences to him<sup>53</sup>. The chronicler Alonzo de Palencia reported that the Portuguese used to torture and kill the Castilians ‘whom they caught beyond the Canaries’, commenting that ‘in order to instil constant horror in the rest, they used to cut off the legs and arms of others’<sup>54</sup>.

Indeed, after the abovementioned treaty, the Portuguese could legally

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Católicos”, Madrid 2004, cit., p. 293; A. Domínguez Ortiz, *La España de los Reyes Católicos*, in *España, tres milenios de Historia*, Madrid 2007, p. 130.

<sup>50</sup> Davenport, *European Treaties*, I, cit., doc. 3, p. 44.

<sup>51</sup> Coelho, *Alguns documentos*, cit., p. 44.

<sup>52</sup> ‘Carta de El-Rei D Affonso V para os capitães dos navios enviados pelo principe seu filho a Guiné tomaren os navios estrangeiros que encontrarem fóra dos limites marcados pelas capitulações de paz feitas entre Portugal e Castella’ in Coelho, *Alguns documentos*, cit., p. 45.

<sup>53</sup> Ivi, p. 46. See also A. de Sousa, *Portugal*, cit., p. 643.

<sup>54</sup> Alonzo de Palencia, *Cronica de Enrique*, IV, cit., p. 128, quoted in Blake, *European Beginnings in West Africa*, cit., pp. 16-20.

enforce their rights against Castilian subjects, within the legal regime established ad Alcaçovas. Portugal could now consolidate its primacy in the region, and the restriction of the *ius navigationis* represented a crucial aspect of it. Thus, Castile challenged Portuguese *mare clausum* position but could not prevail and eventually acknowledged it. However, Ferdinand and Isabel could console themselves with the undisputed sovereignty over the Canaries<sup>55</sup>.

The treaty signed in 1479 caused another far-reaching development. The Catholic Monarchs, who still desired to gain access to the Indies, realised that the only way to achieve that without encroaching Portuguese maritime monopoly was sailing westward. Therefore, they accepted to finance Columbus' expedition in the famous 'capitulaciones de Santa Fe'. The document alluded to the royal couple as lords of the Ocean Sea, 'vuestras altezas, como Señores que son de las dichas mares Océanas'<sup>56</sup>. Among other privileges, Columbus was granted jurisdiction over the seas of the 'New World' with the title of *Almirante del mar Océano*, 'Admiral of the Ocean Sea'. The instructions given to the Genoese for his first voyage reaffirmed the prohibition to sail towards Guinea or India via the southern route<sup>57</sup>.

### 3.3. *The bulls of Alexander VI*

With the discovery of America, the agreement concluded in Alcaçovas suddenly became obsolete, and the Iberian rivalry became more intense than ever. Indeed, there was no certainty on the identity of the islands reached by Columbus, and whether they lied or not in the exclusive Portuguese area of interest. Columbus on his way back stopped in Lisbon in 1493 and had talks with an angry John II of Portugal, whose first reaction was to claim the lands discovered by the Genoese seafarer and to fit out a war fleet to take possession of them<sup>58</sup>. Moreover, the two parties interpreted in a very different

<sup>55</sup> Blake, *European Beginnings in West Africa*, cit., pp. 52-56; L. Rojas Donat, *Dos análisis histórico-jurídicos en torno al descubrimiento de las Indias: la accesión y la ocupación*, in "Revista de estudios históricos-jurídicos", n. 19, 1997, pp. 153-155; M. Newitt, *A History of Portuguese Overseas Expansion*, cit., pp. 37-38.

<sup>56</sup> For the text, see 'Capitulaciones entre los Senores Reyes Catolicos y Cristobal Colon, 17 April 1492', in Navarrete, *Coleccion de los viajes*, II, cit., pp. 11-13; A. García-Gallo, *Manual de historia del derecho español*, II, *Antología de fuentes del antiguo derecho*, Madrid 1984, p. 634. Cf. Cassi, *Ius commune tra vecchio e nuovo mondo*, cit., p. 87.

<sup>57</sup> García-Gallo, *Las bulas*, cit., pp. 589-590.

<sup>58</sup> H. Vander Linden, *Alexander VI and the Demarcation of the Maritime and Colonial Domains of Spain and Portugal, 1493-1494*, in "The American Historical Review", vol. 22, n. 1 (1916), p. 12.

way the provisions of the 1479 treaty. From the Spanish point of view, it applied only to the Eastern Atlantic and West Africa, not impeding Castilian expeditions to the West. This interpretation focused on a literal reading of the treaty. On the other hand, the Portuguese government maintained that the agreement had set an implicit line, which prevented the Castilian from sailing south, notwithstanding the latitude taken into consideration. However, John II soon realised he had to act carefully to avoid open confrontation with Isabella and Ferdinand, whose power was steadily increasing.

The Spanish monarchs on their part moved swiftly to fill in their advantage the legal vacuum, at the same time trying to avoid a new conflict with Portugal<sup>59</sup>. The papacy again played a central role. Pope Alexander VI, originally from Spain, issued in 1493 a series of bulls, the so-called *Bulas Alejandrinas*. Even though the pope declared to act ‘*motu proprio et ex certa scientia, de nostra mera libertate*’, he was duly taking into consideration Spanish petitions<sup>60</sup>. The bulls in question are the *Inter caetera* and *Eximiae devotionis*, both dated 3 May; the *Inter caetera* of 4 May and finally the *Dudum siquidem* dated 25 September<sup>61</sup>.

Many pages have been written trying to define the exact nature of these documents. However, as Grewe noted their legal meaning and nature: ‘remains controversial up the present day’<sup>62</sup>. What is certain is that they were rather in favour of Spanish interests, breaking with the traditional support granted by the Holy See to Portugal. More broadly, these documents are tokens of the transitional period between the medieval law of nations and more modern conceptions regarding international relations<sup>63</sup>.

The bull *Inter caetera* dated 4 May 1493, is generally considered the most

<sup>59</sup> For instance, see ‘Instrucciones dadas a los embajadores castellanos que se envían Juan II de Portugal, 3 noviembre 1493’, in García-Gallo, *Las bulas*, appx. 20, pp. 817-819. See also ‘Carta mesangera de los Reyes al almirante Colon... 12 June 1493’, in Navarrete, *Coleccion de los viajes*, II, cit., p. 88.

<sup>60</sup> See Davenport, *European Treaties*, vol. 1, cit., doc. 5, p. 59. M. Tedeschi, *Le bolle alessandrine*, cit., pp. 131-132. For further details see: Á. F. de Córdova Miralles, *Alejandro VI y los Reyes Católicos; Relaciones político-eclesiásticas (1492-1503)*, Roma 2005.

<sup>61</sup> Vander Linden, *Alexander VI and the Demarcation*, cit., pp. 1-4. For a detailed overview of the documents and their legal background, see García-Gallo, *Las bulas*, cit.

<sup>62</sup> Grewe, *The Epochs of International Law*, cit., p. 236; T. Duve, *Treaty of Tordesillas*, in *Max Planck Encyclopedia of Public International Law*. Online edition [www.mpepil.com], Oxford 2013; Cassi, *Ius commune tra vecchio e nuovo mondo*, cit., p. 105. For further details, see: P. Prodi, *Alessandro VI e la sovranità pontificia*, in *Alessandro VI e lo Stato della Chiesa*, edited by C. Frova & M. G. Ottaviani, Roma 2003.

<sup>63</sup> García-Gallo, *Las bulas*, cit., p. 544; Vander Linden, *Alexander VI and the Demarcation*, cit., p. 2; Hebiè, *Souveraineté territoriale par traité*, cit., p. 55.

important. It partially repeated the contents of the first *Inter caetera*. However, it introduced a new method for delimiting areas of influence<sup>64</sup>. The bull drew a north-south demarcation line running one hundred leagues west of the Azores and Cape Verde Islands. More specifically, it granted an exclusive competence to Spain to the West of the said line. The document did not explicitly mention Portugal and its African-Indian privileges; it only delimited Spanish area of expansion. However, the new provision was less favorable to Portugal, whose maritime routes running around Africa could be endangered by such a demarcation line<sup>65</sup>. The pope granted to Castile:

...all rights, jurisdictions, and appurtenances, all islands and mainlands found and to be found, discovered and to be discovered towards the west and the south, by drawing and establishing a line from the Arctic pole, namely the north, to the Antarctic pole, namely the south [...] the said line to be distant one hundred leagues towards the west and south from any of the islands commonly known as the Azores and Cape Verde<sup>66</sup>.

The practical result of the demarcation was a Spanish monopoly on navigation on an enormous region, of which very little was known at the time. All interlopers would face excommunication. The bull of 4 May overlapped previous documents and specified that it did not intend to question the legitimacy of already granted concessions (namely to Portugal). The literal meaning, ‘we give, grant to you and your heirs, in perpetuity, together with all their dominions, and all rights, jurisdictions...’ suggests the intention to provide in itself a title of acquisition of sovereignty<sup>67</sup>. Furthermore, Isabel and Ferdinand interpreted these documents as granting them exclusive rights to the west of the line.

The analysis of their letters to Columbus confirms this impression. For instance, in May 1493, they wrote to him confirming his privileges (*el dicho oficio de nuestro Almirante del dicho mar Océano*), while claiming dominion over the Atlantic ‘...de la dicha línea al Occidente, es nuestro é nos pertenece...’<sup>68</sup>. The

<sup>64</sup> Vander Linden, *Alexander VI and the Demarcation*, cit., p. 9; Cassi, *Ius commune tra vecchio e nuovo mondo*, cit., p. 87.

<sup>65</sup> L. Weckmann, *Las Bulas Alejandrinas de 1493 y la teoría política del Papado medieval. Estudio de la supremacía papal sobre islas*, México 1959, p. 35; Hebiè, *Souveraineté territoriale par traité*, cit., p. 67; García-Gallo, *Las bulas*, cit., p. 544.

<sup>66</sup> Davenport, *European Treaties*, cit., vol 1, doc. 7, p. 77; Coelho, *Alguns documentos*, cit., pp. 65-68.

<sup>67</sup> Hebiè, *Souveraineté territoriale par traité*, cit., pp. 58-59.

<sup>68</sup> ‘Confirmación del título dado á Cristóbal Colon de Almirante...’, in Navarrete, *Colección de los viajes*, II, cit., pp. 67-73.

monarchs intended to exclude others from the newly discovered regions as well as close the seas located west of the Alexandrine line. For instance in a letter dated 23 May 1493, they wrote to Columbus: ‘... prohibimos, é mandamos que ningunas ni algunas personas no fuesen osadas de ir ni fuesen á las dichas Islas é Tierra firme de las Indias sin nuestra licencia é mandado...’<sup>69</sup>. On the other hand, the Catholic Monarchs reiterated the ban to their subject to sail towards Guinea:

Ni vosotros, ni alguno de vos non vayades á la Mina, ni al trato de ella que tiene el Serenísimo Rey de Portugal, nuestro Hermano, porque nuestra voluntad es de guardar é que se guarde por nuestros súbditos é naturales lo que cerca de la dicha Mina tenemos capitulado é asentado con el dicho Rey de Portugal<sup>70</sup>.

In conclusion, even though the Alexandrine bulls did not mention the seas as their primary object, it seems rather clear that the prohibition to discover and settle new lands involved a significant limitation to the freedom of navigation. The Atlantic constituted the necessary antecedent to the Americas as well as to West Africa and India. Who was to control its routes would also gain the best chances to dominate the New Worlds. Moreover, the *raja* outlined in the second *Inter caetera* was essentially a maritime boundary. Lastly, the bull *Romanus pontifex*, the treaty *Alcaçovas* as well as many documents issued by Isabel and Ferdinand, all mentioned the seas in their provisions.

The instructions they prepared for their envoys at the Portuguese court provide another relevant example. In the document, dated 3 November 1493, the Catholic Monarchs maintained the need for drawing a line to delimit two separate areas of influence in the Atlantic. Moreover, they referred to the seas west of the line as their possession, ‘e que todos los mares, islas, tierras restantes que se hallaren desde la dicha línea derecha al poniente hasta el norte, sean nuestros’<sup>71</sup>. They confirmed their interpretation of the treaty of 1479 as limited to the eastern Atlantic and Guinea, refusing to acknowledge the extensive interpretation of it put forward by John II: ‘por que nos tenemos per cierto que no pertenece al dicho Rey, nuestro hermano, en todo el Mar Océano...’. Therefore, from their point of view, Columbus’ voyage had not violated any Portuguese right since he had taken a route far away from Guinea and the south-eastern Atlantic, ‘tanto que no pasase de las dichas

<sup>69</sup> ‘Carta patente, prohibiendo que vaya á las Indias ningún navio ni persona..., 23 May 1493’, *ivi*, *cit.*, pp. 61-63.

<sup>70</sup> ‘Carta Patente nombrando a D. Cristobal Colon por Capitan General de la Armada que iba a las Indias, 28 May 1493’, *ivi*, pp. 73-74.

<sup>71</sup> ‘Instrucciones dadas a los embajadores castellanos que se envian a Juan II de Portugal, 3 November 1493’ in García-Gallo, *Las bulas*, appx. 20, *cit.*, pp. 817-819.



islas de Canaria contra Guinea<sup>72</sup>.

#### 4. *The Treaty of Tordesillas*

##### 4.1. *Contents*

The pope's dispositions utterly displeased the Portuguese King John II and his government. Indeed, Castile could now not only claim Columbus' discoveries, but all undiscovered land not covered by the Alcaçovas treaty of 1479 and this could put in danger further Portuguese explorations<sup>73</sup>. It is significant that they did not put into question the legitimisation of the papal intervention in itself, since the Portuguese also based their privileges on pontifical acts. Instead, they asked their Spanish homologous to open direct negotiations. As a result, in 1494 (2 July), Spain and Portugal signed the famous Treaty of Tordesillas. John II and the royal couple Isabel of Castile and Ferdinand of Aragon sought to settle the recurrent frictions concerning navigation in the Atlantic. The agreement superseded the provisions of the Treaty of Alcaçovas and earlier papal bulls<sup>74</sup>.

More precisely, two treaties were concluded, the most famous concerned the partition of the Atlantic, while the second one focused on West African fisheries and the kingdom of Fez<sup>75</sup>. A new demarcation line (*raya*) was established which divided the Atlantic Ocean from North to South, a sort of meridian extending 370 leagues west of the Cape Verde islands<sup>76</sup>. It was much more westward than the initial line proposed by the Spanish during the negotiations. Therefore, all islands and lands, discovered or to be discovered, to the West of the line mentioned above would belong to the Spanish Crown, whereas those to the East would belong to the Portuguese Crown. John's

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<sup>72</sup> Ibid.

<sup>73</sup> See Vander Linden, *Alexander VI and the Demarcation*, cit., pp. 18-21; *El Tratado de Tordesillas y su época: Congreso internacional de historia*, edited by L. A. Ribot García, A. Carrasco Martínez, L. Adao da Fonseca, Junta de Castilla y León, 1995; J. Varela (ed.), *El Tratado de Tordesillas en la cartografía histórica*, Valladolid, V Centenario del Tratado de Tordesillas, 1994.

<sup>74</sup> For the text and its English translation, see Davenport, *European Treaties*, cit., doc. 9, p. 84. For the original text, see García-Gallo, *Las bulas*, appx. 21, cit., pp. 818-823; Coelho, *Alguns documentos*, cit., pp. 69-80; Navarrete, *Colección de los viajes*, II, cit., pp. 147-161.

<sup>75</sup> Duve, *Treaty of Tordesillas*. For the second treaty, see Coelho, *Alguns documentos*, cit., pp. 80-90.

<sup>76</sup> Therefore, the line previously set by Pope Alexander VI in the bull *Inter Caetera* was moved 170 leagues to the West. See Vander Linden, *Alexander VI and the Demarcation*, cit., pp. 18-21.

negotiators insisted on a line so far to the West chiefly because Portuguese sailors had already understood the importance of the wind system of the Atlantic<sup>77</sup>.

A traditional interpretation of both the bulls and the treaty maintains that these documents were only concerned with territorial rights over lands and islands, not taking into consideration at all the seas, left in a sort of legal vacuum. A careful reading of the treaty, as well as of its context, proves instead the remarkable links between the issues of defining the legal status of the oceans and the legal discourse concerning overseas expansion<sup>78</sup>. The agreement sought to the partition of the Atlantic, and only indirectly of the lands found across its immensities. Therefore, the parties recognised the ocean as an indispensable line of communication between Europe and the other continents, as well as the ontological antecedent to the colonisation of the Americas<sup>79</sup>. The Portuguese and the Spanish agreed on limiting their respective freedom of navigation and solemnly swore that they would not send vessels towards each other sphere of influence for purposes of exploration, ‘de oy en adelante no embiaran navios algunos [...] a descubrir e buscar tierras ni yslas algunas, ni a contratar, ni rrescatar, ni conquistar en manera alguna’<sup>80</sup>.

#### 4.2. *Aftermath*

The implementation of the treaty was far from simple, and the parties continued to hold intense diplomatic negotiations during the first decades of the sixteenth century. However, overall the treaty of Tordesillas succeeded in normalising the relations between the two kingdoms. Portugal at the

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<sup>77</sup> For the initial Spanish negotiating position, see García-Gallo, *Las bulas*, appx. 20, pp. 817-819: ‘quell mar Oçéano se partiese entre nos [e] él por una linea tomada desde las Canarias contra el poniente por ramos en línea derecha, e que todos los mares, islas tierras, desde la dicha línea derecha al poniente hasta el norte, sean nuostros’.

<sup>78</sup> A view supported by Grewe and Gidel. See Grewe, *The Epochs of International Law*, cit., p. 257; G. Gidel, *Le droit international public de la mer*, Paris 1932, vol. I, p. 202.

<sup>79</sup> Davenport, *European Treaties*, I, cit., doc. 9, p. 96. Cf. Cassi, *Ius commune tra vecchio e nuovo mondo*, cit., p. 91.

<sup>80</sup> García-Gallo, *Las bulas*, cit., appx. 21, p. 821; Davenport, *European Treaties*, cit., doc. 9, p. 89. As secondary disposition, Portugal granted to Spanish ships free passage through the seas under its dominion, since the latter needed to sail across Portuguese waters to get to their own sphere of influence. In return, Spanish ships could not explore those areas and had to keep the route as straight as possible. Moreover, if they were to discover new lands, they had to surrender them to Portugal. See Davenport, *European Treaties*, cit., doc. 9, p. 97.

beginning of the sixteenth century reached the apex of international prestige, while Spain became the centre of the international relations in Europe. Its international standing augmented exponentially with the accession to the throne of Charles of Hapsburg in 1516<sup>81</sup>. The seaborne expansion played a central role in this development.

Already in 1501, the Spanish crown formally prohibited the passage of foreigners to the Americas without license especially granted by the government. However, Castilian authorities did not always enforce the ban strictly. Especially Charles V showed a certain degree of flexibility on the matter. For example, in 1534, due to the lack of experienced Spanish pilots, he authorised the recruitment of foreign pilots residing in Spain<sup>82</sup>. In 1503, the Spanish government set up in Seville the first organ of colonial administration, the *Casa de la Contratación de las Indias*. For many decades, all ships bound to the Indies had to set off from Seville, and the same applied to those returning to Spain<sup>83</sup>. On the other hand, the Portuguese were rather successful in strengthening their positions in the Indian Ocean. The treaty of Tordesillas also formed the starting point for the partition of the Pacific Ocean between the two Iberian countries, contained in the treaty of Saragossa, signed in 1529 between Charles V and John III of Portugal<sup>84</sup>.

For almost half a century, the other European countries seemed to acquiescence the Iberian duopoly, while Spain and Portugal rigorously enforced their exclusive rights. Navigation to their new possessions and the carrying on of any trade there without a royal license were punishable by death and confiscation of goods. Iberian authorities considered the attacks against interlopers as mere law enforcement, not as acts of wars. For instance, Portuguese authorities treated harshly French vessels that dared to sail

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<sup>81</sup> For further details, see P. Kennedy, *The Rise and Fall of the Great Powers*, London 1988, especially chapter II, pp. 31-72. See also T. J. Mandle, *The Renaissance of Empire in Early Modern Europe*, Cambridge 2014; R. Lesaffer, *Charles V, Monarchia Universalis and the Law of Nations*, in "Legal History Review", vol. 71, Issue 1-2 (2003), pp. 79-123.

<sup>82</sup> "Provisión para que ninguna persona pueda ir á descubrir ni á lo descubierto, sin licencia de sus Altezas, 3 September 1501" in de Navarrete, *Colección de los viajes y descubrimientos*, II, cit., pp. 286-289. See also S. de Madariaga, *The Rise of the Spanish American Empire*, Westport 1975, pp. 307-309. For a critical overview, see M. B. Villar García & P. Pezzi Cristóbal (Eds.), *Los extranjeros en la España moderna: actas del I Coloquio Internacional. Celebrado en Málaga del 28 al 30 de noviembre de 2002*, vol. 1, Málaga 2003, pp. 73-99.

<sup>83</sup> Parry, *The Spanish Seaborne Empire*, cit., p. 54; J. H. Elliot, *Imperial Spain, 1469-1716*, London 2002, pp. 182-183; M. Bustos-Rodríguez, *Le commerce colonial et le développement des ports et des flottes commerciales espagnoles*, in *The Sea in History*, vol. III, edited by N. A. M. Rodger, Suffolk 2017, pp. 40-43.

<sup>84</sup> Davenport, *European Treaties*, I, cit., doc. 16, pp. 169-198; Duve, *Treaty of Tordesillas*.

towards Brazil in the late 1520s<sup>85</sup>. In other words, there were no systematic diplomatic actions aimed at refuting the Hispano-Portuguese closed sea policies in the aftermath of the partition. This attitude was in part due to the political situation in Europe at the time. For instance, England in the 1490s was just starting to recover from the War of the Roses. The letters of license granted by Henry VII of England to the explorer Giovanni Caboto (John Cabot) testified the will of the English king to respect both Spanish discoveries in the continent and sovereignty in the Caribbean Sea<sup>86</sup>.

On the other hand, Spanish sovereigns showed on several occasions a flexible attitude towards the expeditions launched by other Europeans towards North America. French rulers protested against the line set out in the Treaty of Tordesillas and issued statements defining the sea as common for all, but little more. For instance, King Francis I (1515-1547) ironically affirmed: “Le soleil luit pour moi comme pour les autres. Je voudrais bien voir la clause du testament d’Adam qui m’exclut du partage du monde”<sup>87</sup>. He had already backed some oceanic expeditions, such those lead by Jacques Cartier in northern Atlantic, whose declared aim was to discover an alternative route towards China and Japan (1531). However, at the time, French policies focused on Italy and the fight against Habsburg encirclement in Europe remaining dominated by a “continental bias”<sup>88</sup>.

## 5. Conclusions

The political balance of power between the kingdoms of Castile and Portugal largely shaped the legal approach to the oceans until the second half

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<sup>85</sup> ‘Relazione di Francia del clarissimo Marino Giustiniano, 1535’, in *Relazioni degli ambasciatori Veneti al Senato*, edited by E. Alberi, Firenze 1839, Serie I, vol. I, p. 182. See also Theuthenberg, *Mare Liberum et Mare Clausum*, cit., p. 490.

<sup>86</sup> ‘First Letters Patent granted by Henry VII to John Cabot and His Sons, 5 March 1496’, in H. P. Biggar, *The precursors of Jacques Cartier, 1497-1534*, London 2016, cit., doc IV, p. 9.

<sup>87</sup> The phrase is reported in J. Lang, *François Ier, ou le rêve italien*, Paris 1997, p. 77. See also *European Perceptions of Terra Australis*, edited by A. Hiatt, C. Wortham & A. M. Scott, London 2012, p. 111.

<sup>88</sup> M. Acerra, *Le modèle français: la recherche par l’Etat de la prédominance maritime, réussites et échecs*, in *The Sea in History*, cit., III, cit., pp. 482-483. With regard to French expeditions in the northern Atlantic, see R. Litalien, *Les Français en Amérique du Nord au XVIe siècle: partenaires at concurrents*, in *Champlain ou les portes du Nouveau Monde. Cinq siècles d’échanges entre le Centre-Ouest français et l’Amérique du Nord*, edited by M. Augeron et D. Guillemet, La Crèche 2004, pp. 51-56; G. Wallerick, *Les tentatives coloniales de la France en Amérique aux XVIe et XVIIe s.*, 2007. Available online: <https://hal.archives-ouvertes.fr/hal-00415743>.

of the sixteenth century. In the beginning, rivalry prevailed. Castile questioned Portuguese *mare clausum* policies and put forward contrasting claims. However, Castilian diplomats never referred to the freedom of the sea as their main argument. A phase of mutual recognition followed the Treaty of Tordesillas. The Iberians were at the time the main actors in oceanic exploration and from their point of view, the bilateral treaty of 1494 had solved the main issues in the Atlantic.

In the following decades, Castilian and Portuguese authorities persisted in their *mare clausum* policies, preventing other Europeans from sailing towards the East and West Indies whenever possible. Throughout the sixteenth century, they tried to impose their oceanic duopoly mainly in the state-practice and diplomatic arenas, not in the doctrinal one. Iberian jurists did not develop a specific and comprehensive *mare clausum* theory, not clarifying the exact legal position that Portugal and Castile were claiming<sup>89</sup>. That said, from the analysis of the abovementioned documents, it appears that both governments believed they lawfully held an *ius excludendi alios*, whether based on prior discovery, occupation, prescription, pontifical donation or other titles of acquisition of exclusive rights.

However, in the sixteenth century, other political actors questioned the validity of the title based on Pontifical donation as the Protestant Reformation gained momentum. The ideal that the people of Europe constituted a unified *societas Christiana*, under the guidance of the Holy See, was destroyed<sup>90</sup>. Besides, as soon as the vastness and geopolitical potential of the oceans became evident, other nations such as France, England, and (later) the United Provinces inevitably challenged Iberian claims. In the beginning, through

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<sup>89</sup> Grewe, *The Epochs of International Law*, cit., p. 258. Only in 1625, Seraphim de Freitas, Portuguese friar and canon law professor at the University of Valladolid, published a detailed scholarly defence of Iberian *mare clausum* policies. See Seraphim de Freitas, *De iusto imperio Lusitanorum asiatico*, Valladolid, H. Morillo, [1625], French translation in A. G. de Grandpont, *Freitas contre Grotius sur la liberté des mers, justification de la domination portugaise*, Paris 1893. For an overview, see W. S. M. Knight, *Seraphim de Freitas: Critic of Mare Liberum*, Cambridge 1925, p. 4; C. H. Alexandrowicz, *Freitas versus Grotius*, in “The British Yearbook of International Law”, vol. 35 (1959); M. Brito Vieira, *Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden’s Debate on Dominion over the Seas*, in “Journal of the History of Ideas”, vol. 64, n. 3 (2003), pp. 361-377; A. Pagden, *The Burdens of Empire*, Cambridge 2015, pp. 153-170.

<sup>90</sup> R. Lesaffer, ‘The Grotian Tradition Revisited: Change and Continuity in the History of International Law’, in *British Yearbook of International Law*, 73, 2002, p. 113; idem, *Charles V, Monarchia Universalis and the Law of Nations*, cit, p. 98. For further details, see H. J. Berman, *Law and Revolution, II, The Impact of the Protestant Reformations on the Western Legal Tradition*, Cambridge 2006.

illegal trade, piracy, and privateering<sup>91</sup>. The fight against piracy lied at the origin of the Roman concept of *mare nostrum* as well as of later speculations *de iure commune* concerning jurisdictional claims over the Mediterranean Sea. Aldo Andrea Cassi suggests that in dealing with the oceans, it is appropriate to reverse the perspective. It was the partition of the oceans between Castile and Portugal, and the consequent *ius excludendi alios* put forward by Iberian jurists, that created the logical background to piracy<sup>92</sup>.

Admittedly, the lightning and elusive raids of the marauders of the sea showed for the first time the intrinsic weaknesses of oceanic claims, in fact, if not in law. From an early stage, the fact that Iberian authorities could not guarantee an effective and continuous control undermined the duopoly they had forged. Law enforcement became impossible in certain moments, such as the years 1552-1557, when Spanish authorities virtually lost control of the sealandes<sup>93</sup>. Therefore, a contrast emerged between formal claims covering the oceans and the harsh reality where marauders roamed freely, except for the main fortified colonial towns and the armed naval convoys.

In the second half of the sixteenth century, further challenges to Iberian *mare clausum* claims arose in the diplomatic and doctrinal arenas. Queen Elizabeth I of England became a vocal supporter of the freedom of the seas during her eventful reign (1558-1603). She staunchly refused to recognise *mare clausum* pretensions, challenging established sea powers multiple times. Interestingly, the first authors to address the extraordinary Hispano-Portuguese claims from a doctrinal point of view were prominent Spanish scholars. Some of them belonged to the famous school of Salamanca. This fact, far from being surprising, reflected the flourishing of Spanish culture during the sixteenth century, *el siglo de oro*.

The influential theologian Francisco de Vitoria (1483-1546) laid the groundwork for the freedom of the sea in the *Relectio de Indis* (*On the American Indians*)<sup>94</sup>. In 1564, an author named Fernando Vázquez y Menchaca (1512-

<sup>91</sup> Cassi, *Ius commune tra vecchio e nuovo mondo*, cit., pp. 101, 147-148; A. Perotin-Dumon, *The pirate and the emperor: power and the law on the seas, 1450-1850*, in *The Political Economy of Merchant Empires*, edited by J. D. Tracy, Cambridge 1991, pp. 196-227. For an overview, see D. Cordingly, *Storia della pirateria*, Milano 2003.

<sup>92</sup> Cassi, *Ius commune tra vecchio e nuovo mondo*, cit., p. 101.

<sup>93</sup> In the Caribbean, pirates started to use swift oared vessels, e.g. the *patache*, hard to intercept for heavier Spanish military vessels. See P. E. Hoffman, *The Spanish Crown and the Defense of the Caribbean, 1535-1585: Precedent, Patrimonialism, and Royal Parsimony*, Baton Rouge 1980, p. 69.

<sup>94</sup> Francisco de Vitoria, *On the American Indians*, in idem, *Political Writings*, edited by A. Pagden & J. Lawrance, Cambridge 2010, 1. 1-6, pp. 239-251. For an overview, see the recently published book by D. M. Lantigua, *Infidels and Empires in a New World Order. Early*

1569) openly questioned Iberian oceanic claims in the treatise *Controversiarum illustrium aliarumque usus frequentium libri tres* (*Three Books of Famous and Other Controversies Frequently Occurring in Practice*). He had studied under Francisco de Vitoria, and he is generally included in the Salamanca movement<sup>95</sup>. As a humanist and Roman law expert, he argued for the commonality of the sea based on the Roman definition of the sea as *res communis omnium*<sup>96</sup>. However, only with the publication of Hugo Grotius' pamphlet *Mare Liberum, sive de iure quod Batavis competit ad indicana commercia* (1609) the freedom of the sea became the centre of the doctrinal debate, forcing jurists and governments supporting the opposite principle *mare clausum* to react in order to defend their ideas as well as material interests<sup>97</sup>.

Hence, Iberian claims played a major role in triggering the emergence of the idea of the freedom of the sea, *mare liberum*, in legal argumentation. Spanish and Portuguese failure to maintain some degree of effective occupation over the oceans doomed their pretensions, while prior discovery ceased to be recognised as valid title per se. The elaboration of the principle of the freedom of the sea became instrumental in challenging the Iberian *mare clausum* status quo. Eventually, it also led to the acknowledgement that sea areas required a specific legal status, inherently different from that of territory. The physical nature of the oceans, so overwhelming compared to the seas traditionally sailed by Europeans, no doubt hastened this development<sup>98</sup>. It

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*Modern Spanish Contributions to International Legal Thought*, Cambridge 2020.

<sup>95</sup> G. van Nifterik, *Controversiarum illustrium...*, in *The Formation and Transmission of Western Legal Culture, 150 Books that Made the Law in the Age of Printing*, edited by A. Wijffels & others, New York 2016, n. 32, pp. 118-120; for the cultural and temporal context of the author's life, see S. Rus Rufino, *Fernando Vázquez y Menchaca*, in *Great Christian Jurists in Spanish History*, edited by R. Domingo & J. Martínez-Torrón, Cambridge 2018, pp. 157-162.

<sup>96</sup> Fernando Vázquez y Menchaca, *Controversiarum illustrium aliarumque usu frequentium libri tres*, II, 89, § 12-41. Valladolid, Cuesta, 1931-1934. This edition by D. F. Rodríguez Alcalde reproduces the original Latin edition from 1564, published in Venice (apud Franciscum Rampazetum). The editor also provided a Spanish translation.

<sup>97</sup> In English, "The Free Sea or a Disputation Concerning the Right which the Hollanders ought to have to the Indian Trade". See R. Feenstra, *Hugo Grotius Mare Liberum, 1609-2009: Original Latin Text and English Translation*, Leiden 2009. It is the most recent and rigorous instrument to examine Grotius' booklet; it refers to the 1609 version of the Latin text. Another edition is the seventeenth century translation by Richard Hakluyt of *Mare Liberum* edited by D. Armitage, Indianapolis 2004. The other English translation is dated 1916, by R. Van Deman Magoffin: *Hugo Grotius, The Freedom of the Seas: or, The Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, New York 1916. Magoffin's version refers to Elzevier edition of 1633.

<sup>98</sup> Cassi, *Ius commune tra vecchio e nuovo mondo*, cit., pp. 88-89.

soon became apparent that both Spain and Portugal could not effectively tame such endless pelagic expanses, and even less exclude increasingly numerous and aggressive competitors from sea routes leading to the Indies. In conclusion, Iberian claims succeeded in polarising ideas concerning the legal status of the sea to an all-new level compared to their late medieval precursors in the Mediterranean and northern European seas.

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