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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

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\(^1\). 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\(^2\).

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\(^3\). 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\(^4\). 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\(^5\).

However, the *Corpus Iuris*: ‘did not really explain the idea of common property’\(^6\). 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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5. Inst., 2.1.1; D., 1, 8, 2.
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. 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 Tyrrenian seas. Authors such as Bartolus of Sassoferrato and Baldus de Ubaldis generally viewed the expansion of state authority towards coastal seas as legally acceptable. 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. 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.

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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\(^{11}\). 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\(^{12}\). 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\(^{13}\).

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\(^{14}\). 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\(^{15}\). In 1446, 3 February, Henry received a further grant,


\(^{14}\) 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.

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. 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.

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 ilhas percam pera o dicto jsante ho naujo ou naujos que leuarem e a mercadaria que trouuerem’. 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.

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. 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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17 Dias Dinis, *Monumenta Henricina*, vol. IX, cit., pp. 121-123;
18 Ivi; Godinho, *Documentos*, I, cit., pp. 201-204.
the seas\textsuperscript{21}.

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\textsuperscript{22}. 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 \textit{Almirante da India}\textsuperscript{23}. King Manuel I of Portugal (1495-1521) immediately wrote to the Castilian court magnifying the achievements of his \textit{descobridores}, claiming the discovery of India (\textit{Y\'india})\textsuperscript{24}. 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 \textit{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 \textit{cartaz\'es}, 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\textsuperscript{25}. 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 \textit{cartaz\'es}, 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\textsuperscript{26}.

\textsuperscript{23} The \textit{carta} in question is dated January 10, 1502. See Coelho, \textit{Alguns documentos}, cit., pp. 127-128.
\textsuperscript{24} ‘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, \textit{The Portuguese Seaborne Empire}, cit., pp. 48-49.
\textsuperscript{26} Anand, \textit{Origin and Development of the Law of the Sea}, cit., pp. 57-62; Boxer, \textit{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.\(^{27}\) 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 posesión*, 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.”\(^{28}\)

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.\(^{29}\)

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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’\(^\text{30}\). 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\(^\text{31}\). 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\(^\text{32}\). 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’\(^\text{33}\). Three years later, King Edward I of Portugal (1433-1438) asked the same pope to lift


\(^\text{33}\) Coelho, *Alguns documentos*, cit., p. 7.
the ban concerning the colonisation of the Canary Islands\textsuperscript{34}. 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 \textit{bullae} sanctioning European seaborne expansion\textsuperscript{35}.

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’\textsuperscript{36}. More specifically, in West Africa, the Portuguese kings strongly referred to the right of prior discovery (\textit{inventio}) and occupation (\textit{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 ripe the benefits of their subjects’ endeavours\textsuperscript{37}. 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\textsuperscript{38}. 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’\textsuperscript{39}. Hence, Castile initially opposed Portuguese closed sea policies, and

\textsuperscript{34}‘Letter from King Duarte I of Portugal to Pope Eugenius IV, August 1436’, in Dias Dinis, \textit{Monumenta Henricina}, cit., vol. V, pp. 254-258.


\textsuperscript{36}Grewe, \textit{The Epochs of International Law}, cit., p. 257.

\textsuperscript{37}A. García-Gallo, \textit{Las bulas de Alejandro VI y el ordenamiento jurídico de la expansión portuguesa y castellana en África e Indias}, Madrid 1958, pp. 589-590.

\textsuperscript{38}M. Escamilla, \textit{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, \textit{Ius commune tra vecchio e nuovo mondo}, cit., pp. 95-96.

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.

A further step was reached when Pope Nicholas V issued the bull Romamus 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 Alfonso V of Portugal. 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. 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.

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. Mamadou Hébié underlines that the bull 1455 did not intend to transfer sovereignty, or any territorial rights, in itself. That being

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40 For instance, supposedly pro Spanish was the bull Dudemcum, 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.

41 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; Días Dinis, Monumenta Henricina, vol. XII, cit., pp. 254-258.

42 Davenport, European Treaties, cit. doc. 1, p. 21; Diffie, Foundations of the Portuguese Empire, cit., p. 75.

43 Maloni, Control of the Seas, cit., p. 477.

44 Davenport, European Treaties, I, cit., doc. 1, p. 25.

45 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. 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. Eventually in 1479, the belligerents reached a comprehensive settlement to solve their ‘serious disputes, questions, discussions, and differences’. 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. In the second one, the king of Portugal recognised the sovereignty of

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

47 For Isabella’s proclamation, see ‘Seguro á los Marineros de Palos para contratar libremente por mar y tierra’, in M. F. de Navarrete, in *Colección de los viajes y descubrimientos*, II, (Documentos de Colón 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.


49 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. 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’.

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 direitamente a estes regnros soomemte pertença’. 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 naturalmente). The king ended the document affirming that this harsh treatment would provide an example.

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. 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’. Indeed, after the abovementioned treaty, the Portuguese could legally

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50 Davenport, European Treaties, I, cit., doc. 3, p. 44.
51 Coelho, Alguns documentos, cit., p. 44.
52 ‘Carta de El-Rei D Affonso V para os capitães dos navios enviados pelo principe seu filho a Guiné tomaren os navios estrangieros que encontrarem fóra dos limites marcados pelas capitulações de paz feitas entre Portugal e Castella’ in Coelho, Alguns documentos, cit., p. 45.
53 Ivi, p. 46. See also A. de Sousa, Portugal, cit., p. 643.
54 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 *ins 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.\(^{55}\)

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, come Señores que son de las dichas mares Océanas’.\(^{56}\) 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.\(^{57}\)

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.\(^{58}\) Moreover, the two parties interpreted in a very different

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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. The papacy again played a central role. Pope Alexander VI, originally from Spain, issued in 1493 a series of bulls, the so-called Bolas 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. 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.

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’. 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.

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

59 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.


61 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.


63 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. 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. 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.

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. 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...’.

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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 ninguna 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...’69. 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 Portogal, 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 Portogal70.

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’71. 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

69 ‘Carta patente, prohibiendo que vaya á las Indias ningún navio ni persona..., 23 May 1493’, ivi, cit., pp. 61-63.
70 “Carta Patente nombrando a D. Cristóbal Colon por Capitan General de la Armada que iba a las Indias, 28 May 1493”, ivi, pp. 73-74.
71 ‘Instrucciones dadas a los embajadores castellanos que se envían a Juan II de Portugal, 3 November 1493’ in García-Gallo, Las bulas, appx. 20, cit., pp. 817-819.
islas de Canaria contra Guinea”72.

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 explorations73. 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 bulls74.

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 Fez75. 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 islands76. 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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72 Ibid.


74 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.


76 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.\(^{77}\)

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.\(^{78}\) 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.\(^{79}\) 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’.\(^{80}\)

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

\(^{77}\) For the initial Spanish negotiating position, see García-Gallo, *Las bulas*, appx. 20, pp. 817-819: ‘quell mar Océano se partesice entre nos [e] él por una línea 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’.


\(^{80}\) 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\(^8\). 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\(^8\). 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\(^8\). 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\(^8\).

For almost half a century, the other European countries seemed to acquiesce 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


towards Brazil in the late 1520s. 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.

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.”
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”.

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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85 ‘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.
86 ‘First Letters Patent granted by Henry VII to John Cabot and His Sons, 5 March 1496’,
87 The phrase is reported in J. Lang, Francais 1er, ou le reve 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.
88 M. Acerra, Le modele francais: la recherche par l’Etat de la predominance maritime, realises et echecs,
in The Sea in History, cit., III, cit., pp. 482-483. With regard to French expeditions in the
northern Atlantic, see R. Litalien, Les Francais en Amerique du Nord au XVIe siecle: partenaires
at concurrents, in Champlain ou les portes du Nouveau Monde, Cinq siecles d’echanges entre le Centre-
Ouest francais et l’Amerique du Nord, edited by M. Augeron & D. Guillemet, La Creche 2004,
pp. 51-56; G. Wallerick, Les tentatives coloniales de la France en Amerique aux XVIe et XVIIe s.,
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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. That said, from the analysis of the abovementioned documents, it appears that both governments believed they lawfully held an *ins 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. 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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illegal trade, piracy, and privateering\(^1\). 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 exclusendi alios* put forward by Iberian jurists, that created the logical background to piracy\(^2\).

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 seaways\(^3\). 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*)\(^4\). In 1564, an author named Fernando Vázquez y Menchaca (1512-

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\(^3\) 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.

1569) openly questioned Iberian oceanic claims in the treatise *Controversiarum illustrium aliurmque 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. 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*. 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.

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. It

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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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