Over the Bounded Main

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Any discussion about boundaries at sea has to begin with the question: How useful could such an arcane subject as maritime borders and border making possibly be to the study of world history?

The short answer is: *Very* useful. In fact, the linguistic map of the world in the 21st century—when Spanish and Portuguese are the dominant languages across most of Latin America and are found as well in various countries in Africa and Asia—makes almost no sense without an understanding of a variety of legal instruments developed roughly 550 years ago.

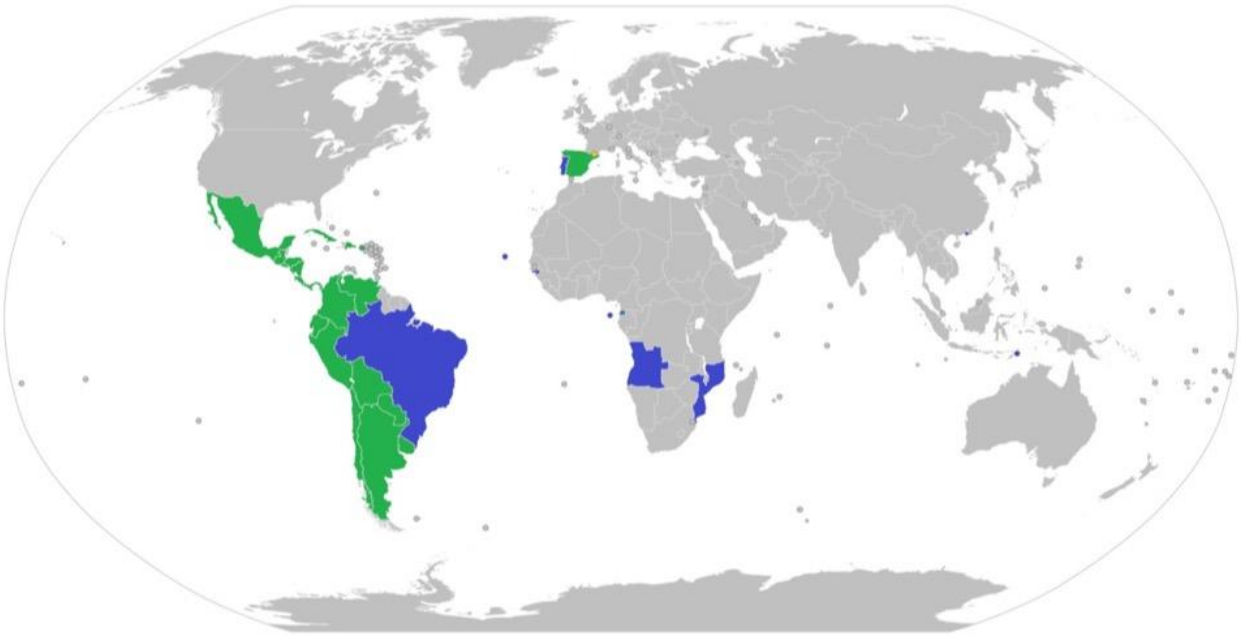

Figure 1/ The Iberophone World. Green: Spanish; blue, Portuguese. https://upload.wikimedia.org/wikipedia/commons/4/48/Iberofonia.png. Cristiano Tomás, CC BY-SA 4.0, via Wikimedia Commons.

In addition, the large scale of sea frontiers makes them easier to see than many land borders, and it is also easier to distinguish them according to whether they illustrate issues of colonialism, geopolitics, the environment, trade, and so on.

Broadly speaking, maritime laws diffused more rapidly and sometimes more widely than strictly land-based laws. To take only one example, the Ordinances of the Consulate of Bilbao of 1737 served as a model for the commercial codes of nineteen countries in Latin America and the Philippines.[1] Moreover, as we shall see, the rationale for boundaries marked on the sea also have a great deal of legal influence on inland territories.

Finally, some of the most contentious borders in the world today are found on the oceans, especially in the Arctic, the South China Sea, and along the boundaries between exclusive economic zones—EEZs—and the high seas. How this situation came to be has deep historical roots.

One of the first steps towards defining the sea in a legal sense is to name more or less discrete bodies of water by name. The concept of the Seven Seas[2] is of profound world historical significance and great antiquity. The oldest known reference to the Seven Seas comes from a Sumerian hymn of 2300 BCE, and the concept spread to the Mediterranean, where it was known to the Phoenicians and Greeks. Arab and Iranian mariners also came to distinguish seven discrete seas between the Persian Gulf and the South China Sea.

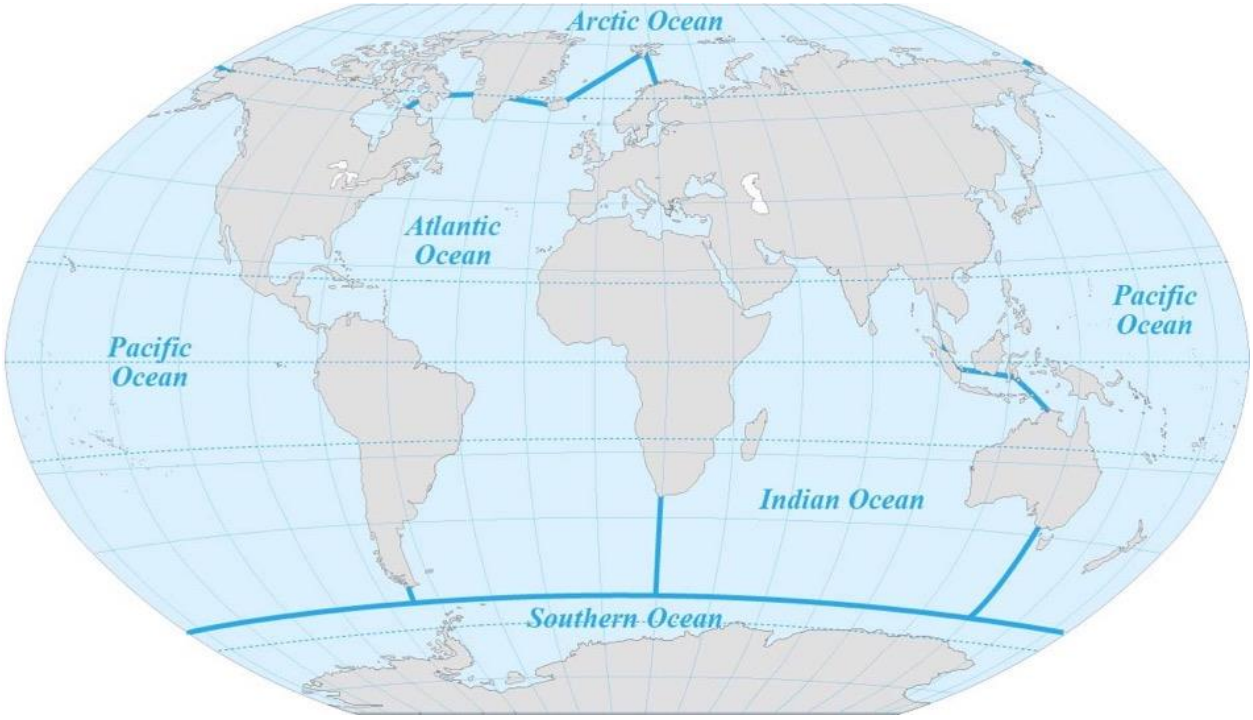

Figure 2. The Erstwhile Seven Seas. https://upload.wikimedia.org/wikipedia/commons/6/6d/World_map_ocean_locator-en.svg. Pinpin, CC BY-SA 3.0, via Wikimedia Commons.

During the European age of expansion, the Seven Seas came to be identified with the North and South Atlantic, the North and South Pacific, and the Indian, Arctic, and

Antarctic Oceans. Interestingly, the International Hydrographic Organization recognizes only five principal seas: the Arctic, Atlantic, Indian, Pacific, and Southern Oceans.[3] Although the Seven Seas neither were, nor are, legal constructions, the act of delineating and naming bodies of water is a necessary precursor to the establishment of legal demarcations.

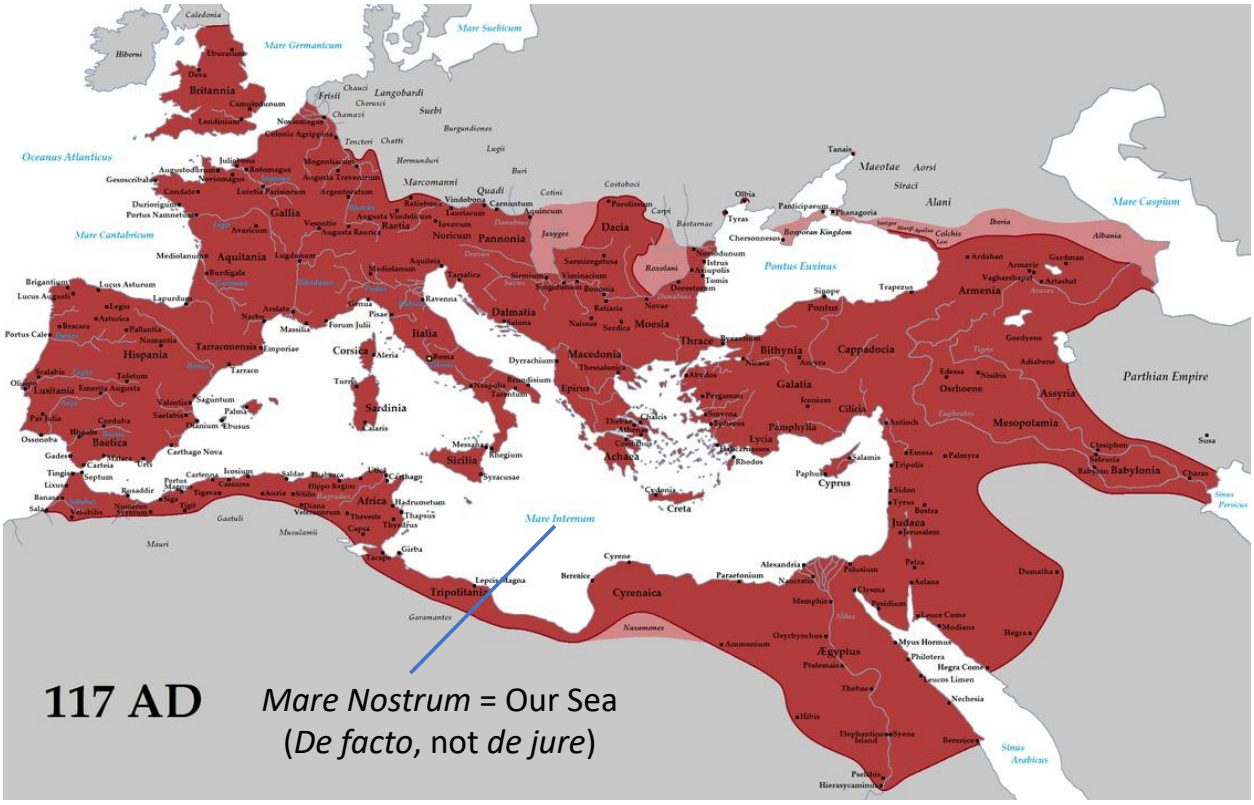

Figure 3. Mare Nostrum, in fact. https://upload.wikimedia.org/wikipedia/commons/0/00/Roman_Empire_Trajan_117AD.png. *Tataryn, CC BY-SA 3.0, via Wikimedia Commons.*

While the Romans had a concept of the Seven Seas, at the height of the empire, they referred to the Mediterranean as *Mare Nostrum*, Our Sea, because for centuries the entire Mediterranean shore was occupied by Rome. But *mare nostrum* was a statement of fact, not a legal doctrine, and Roman jurisprudence actually held that the seas were common property—"The sea is *res communis*, incapable of being appropriated"—that is, open to the common use of all men, an idea that would come to have great importance later on.[4]

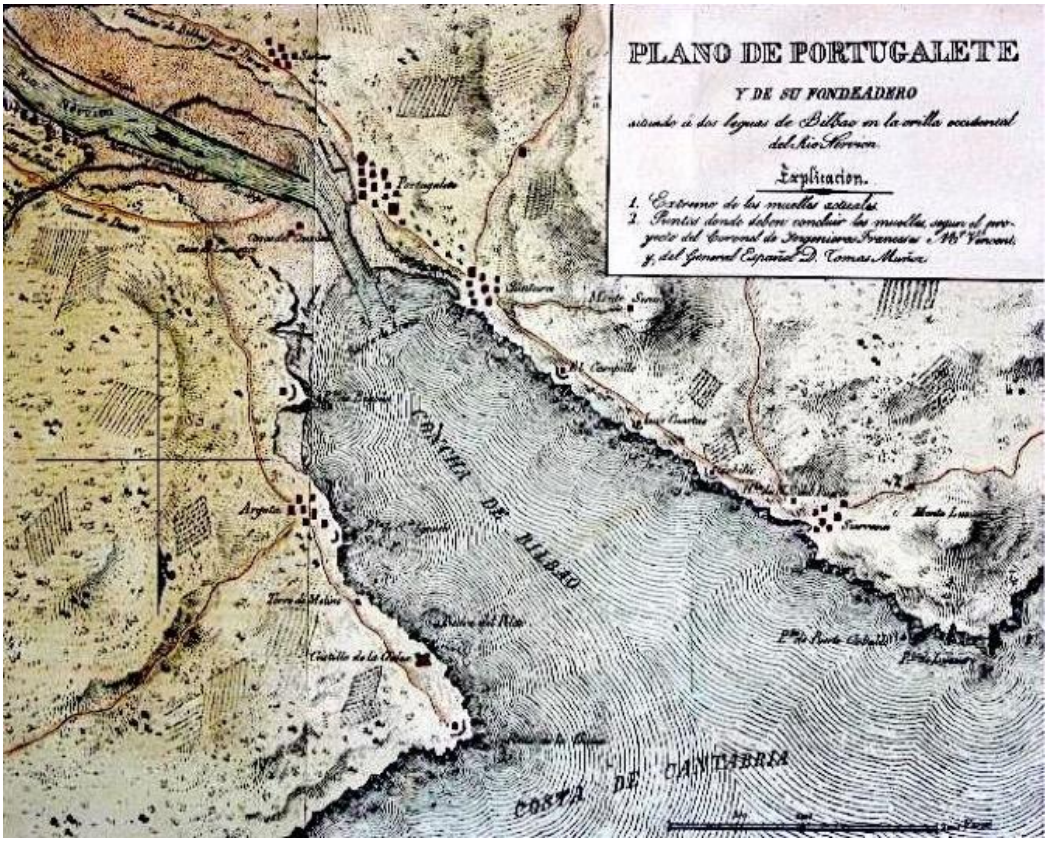

Figure 4. Plano de Portugalete y de su fondeadero situado a dos leguas de Bilbao en la orilla occidental del Río Nervión (Plan of Portugalete and its anchorage located two leagues from Bilbao on the western bank of the Nervión River). Euskal Museoa Bilbao Museo Vasco. https://apps.euskadi.eus/emsime/catalogo/autoria-asensio-pascual-real-establecimiento-litografico-de-madrid-minano-sebastian-/titulo-plano-de-portugalete-y-de-su-fondeadero-situado-a-dos-leguas-de-bilbao-en-la-orilla-occidental-del-rio-nervion-/objeto-plano/ciuVerFicha/museo-57/ninv-AAAA/4099.

In the medieval and early modern period, many European port cities asserted control over stretches of water adjacent to their territories through various ceremonies and what we might call legal fictions. A ritual that typified such an approach was the consul of Bilbao's annual procession downriver in the consular barge to throw a ceremonial buoy or tile into the estuary at Portugalete to establish the consulate's jurisdiction over the approaches to the port.[5]

Many maritime people attempted to assert control over various stretches of water for the purposes of defense or taxation, but in the fifteenth century, Europeans began to develop a legal novelty: the idea that political control and legal jurisdiction could be exercised not only over lands across the ocean but over the oceans themselves.

No one had ever presumed to treat the sea as a political space analogous to territory on land until the era of the Portuguese and Spanish discoveries. In 1455, Pope Nicholas V declared that Portugal's king Afonso V had "acquired and possessed . . . these islands, lands, harbors, and seas" in West Africa. This assertion of dominion not only overseas but over the seas themselves applied "to all those provinces, islands, harbors, and seas whatsoever, which hereafter . . . can be acquired from the hands of infidels or pagans."[6]

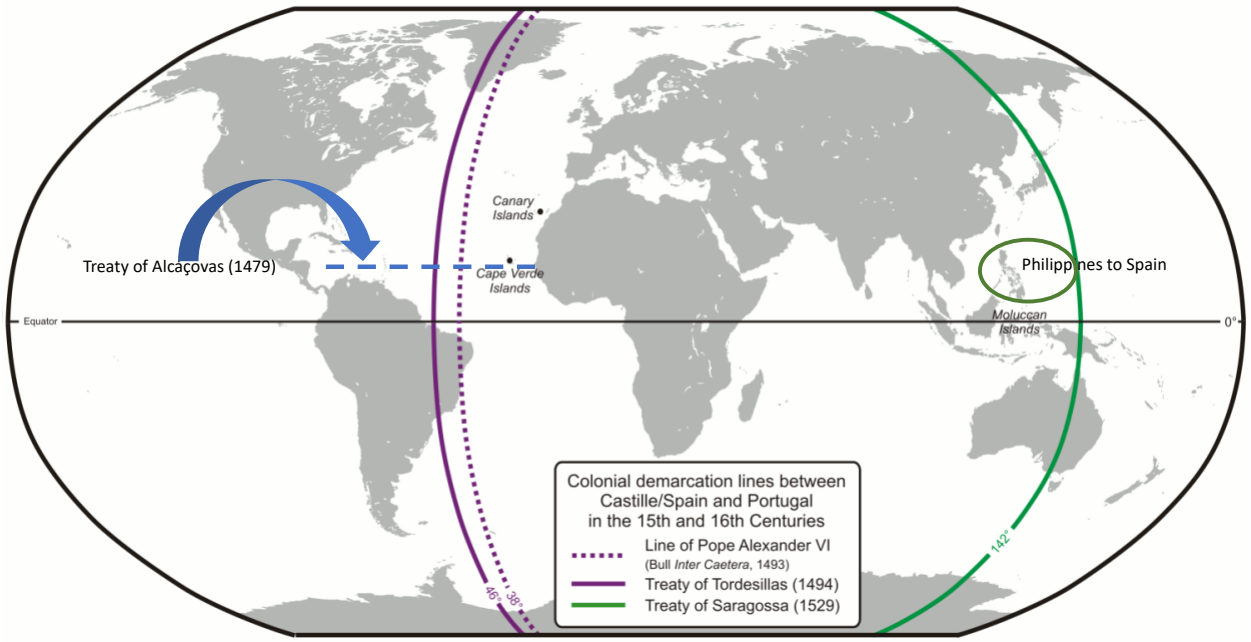

Figure 5. Lines showing the divisions of the non-Christian world between Castile and Portugal according to the Treaties of Alcáçovas (1479), Tordesillas meridian (1494), and Zaragoza (1529). Base map by Lencer, https://commons.wikimedia.org/wiki/File:Spain_and_Portugal.png.

In 1479, the Treaty of Alcáçovas confirmed Portugal's right to "whatever has been found or shall be found, acquired by conquest, or discovered" in exploring the Atlantic, with the exception of the Canary Islands, which went to Isabella of Castile.

Thirteen years later, Columbus crossed the Atlantic from the Canary Islands, whereupon the Spanish Pope Alexander VI granted to Spain all lands "discovered and to be discovered" beyond a north-south line drawn one hundred leagues from the Azores and Cape Verde.

Fearful of losing out to Spain in the race for the Orient, Portugal's King João decided to sidestep the pope and negotiate the Treaty of Tordesillas in 1494, which moved the line of demarcation between Portuguese and Spanish claims 370 leagues—1,100 nautical miles—west of the Cape Verde Islands. This covered only the western hemisphere, and after a Spanish ship completed the first circumnavigation of the globe in 1522, the parties negotiated the Treaty of Zaragossa.

Continuing the line of demarcation from the Atlantic over the poles and into the Pacific brings you through the remote western Pacific. But Portugal allowed Spain to occupy the Philippines, in large part because there were no spices to be had there.

Of course, these grants took no account of the rights, or even existence, of people who might live in these lands "discovered and to be discovered." In India, the Portuguese infamously implemented the *cartaz* system, which obliged all non-Portuguese ships to carry passes to ensure their protection, the greatest threat being from the Portuguese themselves.[7]

Figure 6. The Doctrine of Discovery. Theodore de Bry, Christopher Columbus arrives in America*, 1594, engraving, 18.6 x 19.6 cm, from Collectiones peregrinationum in Indiam occidentalem* (Collected travels in the east Indies and west Indies)*, vol. 4, Girolamo Benzoni, Americae pars quarta.* Sive, Insignis & admiranda historia de primera occidentali India à Christophoro Columbo *(Frankfurt am Main: T. de Bry, 1594)—colorized version.*

Three hundred years later the United States Supreme Court relied on these papal bulls and treaties to assert the “doctrine of discovery,” that is, a complex justification for seizing and colonizing land not inhabited by Christians. According to the court, “all existing titles depend on the fundamental title of the crown by discovery. The title of the crown…passed to the colonists by charters, which were absolute grants of the soil.”[8] Although the Treaty of Tordesillas was undone by the Treaty of Madrid in 1750, indigenous people worldwide have called repeatedly for the papal bulls that undergird the doctrine of discovery, though so far without success.[9]

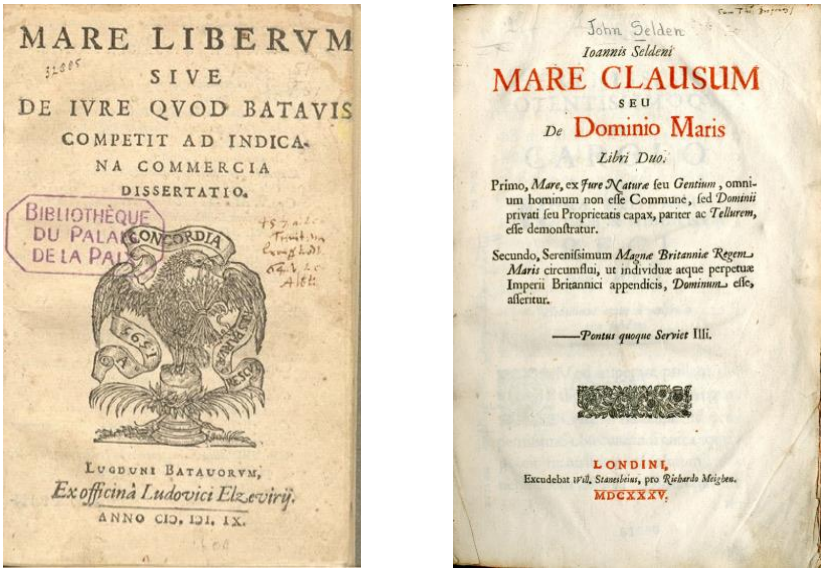

Figure 7. The Battle of the Books: Hugo Grotius, Mare Liberum *(1609) and John Selden,* Mare Clausum *(1619; published 1635).*

The Iberian delineation of oceanic space remained more or less intact until the 1590s, when English and Dutch merchants began sailing for Southeast Asia and the Americas in violation of Portuguese and Spanish claims, respectively. From a legal standpoint, the greatest disruption came from Hugo Grotius, who in *Mare Liberum*—the Free Sea—of 1609 argued that the Dutch East India Company was justified in capturing the Portuguese ship Santa Catarina off what is now Singapore. "It is lawful for any nation to go to any other and to trade with it."[10]

Although he was not the first to consider the issue, the comprehensive nature of argument, and his rooting it in natural law makes Mare Liberum a cornerstone of modern international law.

Yet the law is arguable and changeable, even by the lawyers who come up with novel legal doctrines, and Mare Liberum was the opening salvo of what became known as the battle of the books. The best-known counterblast to Grotius was John Selden's Mare clausum, the closed sea. However, when it suited him or the people he worked for, Grotius was not above arguing in favor of closing the sea.

The most obvious place to start closing the sea is at home, and the Dutch established a clear means of identifying their sovereign waters, or territorial sea—the cannon-shot rule: "By the law of nations," the Dutch argued in 1610, "no prince can challenge further into the sea than he can command with a cannon except gulfs within their land from one point to another."[11]

In so saying, they paradoxically upheld Grotius's doctrine of the free sea even as they left open possibility that they could close it, because at the time, the farthest a cannon could shoot was about three miles, and the "cannon-shot rule" is the best-known of the ingredients of what became the three-mile limit of territorial seas.[12]

The United States was the first country to enshrine the three-mile limit in domestic law, in 1794. Some countries called for more extensive buffer zones, especially to protect domestic fisheries from outsiders or to control smuggling.

In the twentieth century, it became apparent that while the three-mile limit made sense for some purposes, defense was no longer one of them. By the 1940s, shore-based guns could fire well over twenty miles, but aircraft could "challenge" hundreds of miles into the sea. Other technological developments also meant a three-mile exclusion zone was not useful for all purposes.

In 1945, immediately after World War II, the United States unilaterally claimed jurisdiction over "the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States," and simultaneously declared the creation of conservation zones for fisheries.[13] This opened the door for other countries to assert their own claims, and the once more or less free sea seemed destined to close.

But did it? And is the open sea/closed sea binary really the best way to think about the legal regimes that govern uses, and non-uses, of the sea?

As it turns out, in the industrial age, applying the Roman legal concept of *res communis*—common to all humankind—doesn't make much sense for a variety of reasons. In *Mare Liberum* Grotius combined this general idea with a belief that the fisheries were inexhaustible, which people have long known to be untrue. Limitations on fisheries began to be widespread in the late nineteenth century, but for many the focus tended to be on domestic fisheries.

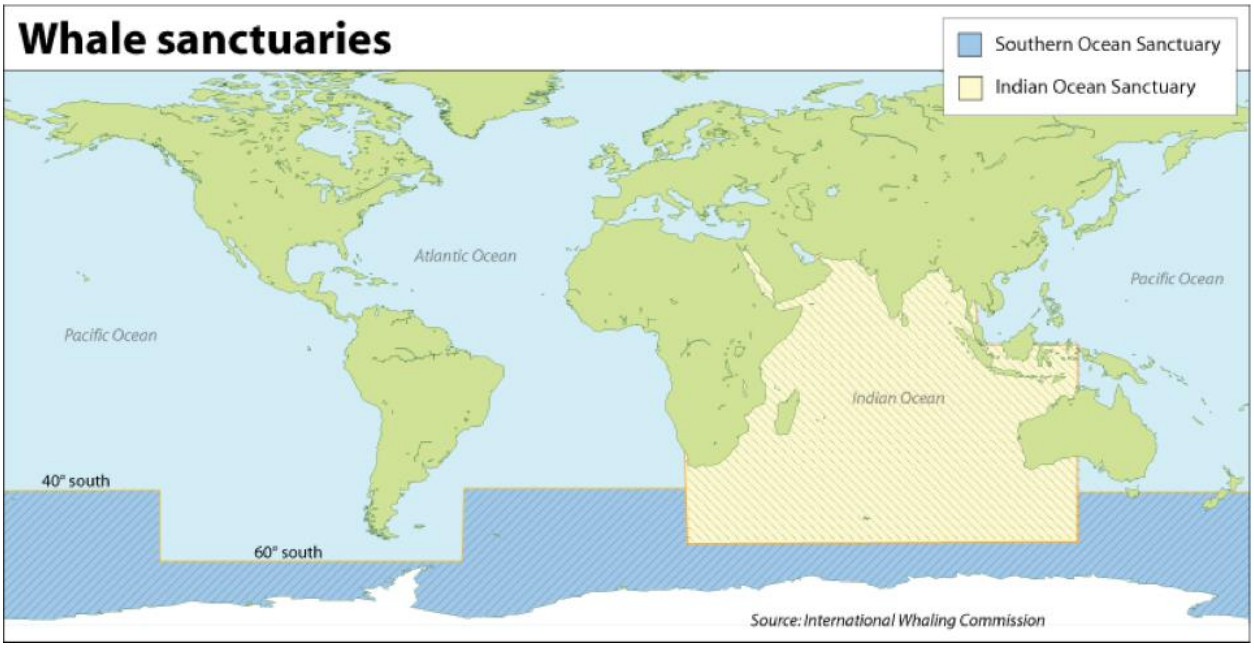

Figure 8. Whale Sanctuaries in the Southern Ocean and Indian Ocean. *https://wwf.panda.org/wwf_news/?193865/Antarctic-whaling-ban-crucial-for-Southern-Hemisphere-whales.*

An exception was the whale fishery, the overfishing of which had been recognized in the mid-1850s. Half-hearted efforts to limit whaling in the 1930s had proven ineffective, but in 1946, fifteen countries signed the International Convention on

Whaling to regulate the whale fisheries. This established massive whale sanctuaries in the Indian and Southern Oceans and recognized the rights of aboriginal people to hunt whales within certain limits.

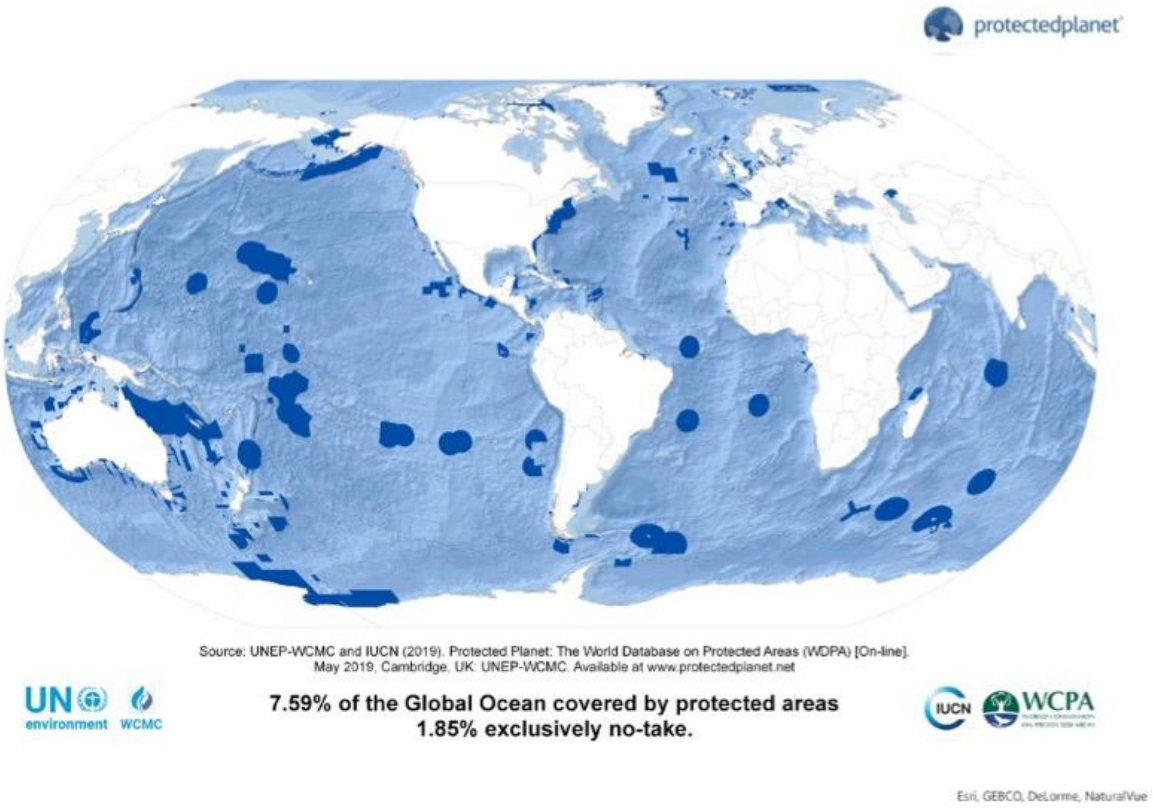

Figure 9. Official Marine Protected Areas map. https://oceanconference.un.org/OceanAction.

As concerns about overfishing and other environmental issues have grown, national, state, and tribal governments have established more than 5,000 marine protected areas worldwide, nearly forty of which are characterized as very large marine protected areas with a variety of protections. Most of these focus on protecting fisheries or the environment more generally, and according to the International Union for Conservation of Nature (IUCN), these collectively cover nearly 8 percent of the world ocean—though less than 2 percent are areas where fishing is prohibited.

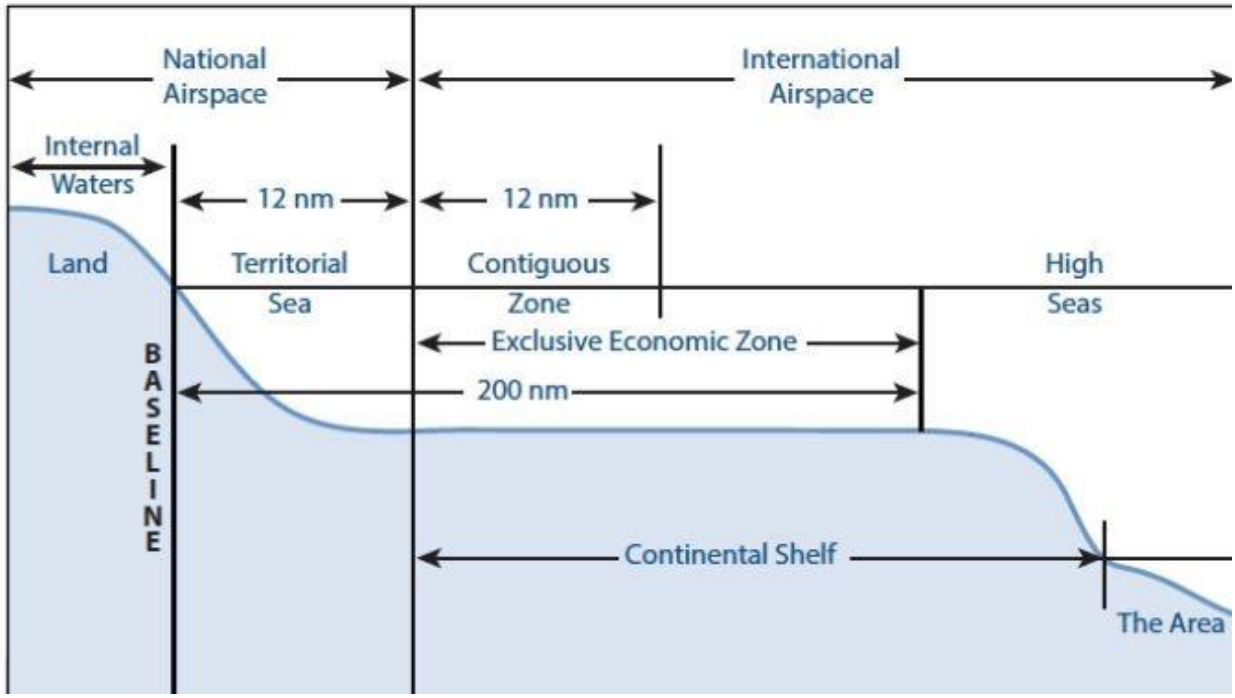

Figure 10. Schematic of maritime zones according to the UN Convention on the Law of the Sea. nm = nautical mile (= 1.825 meters = 1.15 statute miles). https://www.drishtiias.com/images/uploads/1577089572_image2.jpg.

The ultimate expression of the legal regime of the sea is of course the United Nations Convention on the Law of the Sea (UNCLOS), which was the product of the UN Conference on the Law of the Sea that lasted from 1973 to 1982 and came into force in 1994. This gave maritime states jurisdiction over four distinct marine spaces: inland waters; territorial seas out to 12 miles; a contiguous zone out to 24 miles[14]; and an exclusive economic zone (EEZ), in which coastal states have “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living” out to 200 miles.[15] Beyond that lie the high seas.

Territorial Map of the World, inclusive of Exclusive Economic Zones (EEZs)

Figure 11. A map of the world showing contiguity of Exclusive Economic Zones.

The regime of EEZs yields a fundamentally different world map than one determined exclusively by terrestrial borders, and as this is of very recent construction, it remains to be seen how this will play out in the future. One thing that is certain is that it is not the last word on the subject of maritime boundaries.

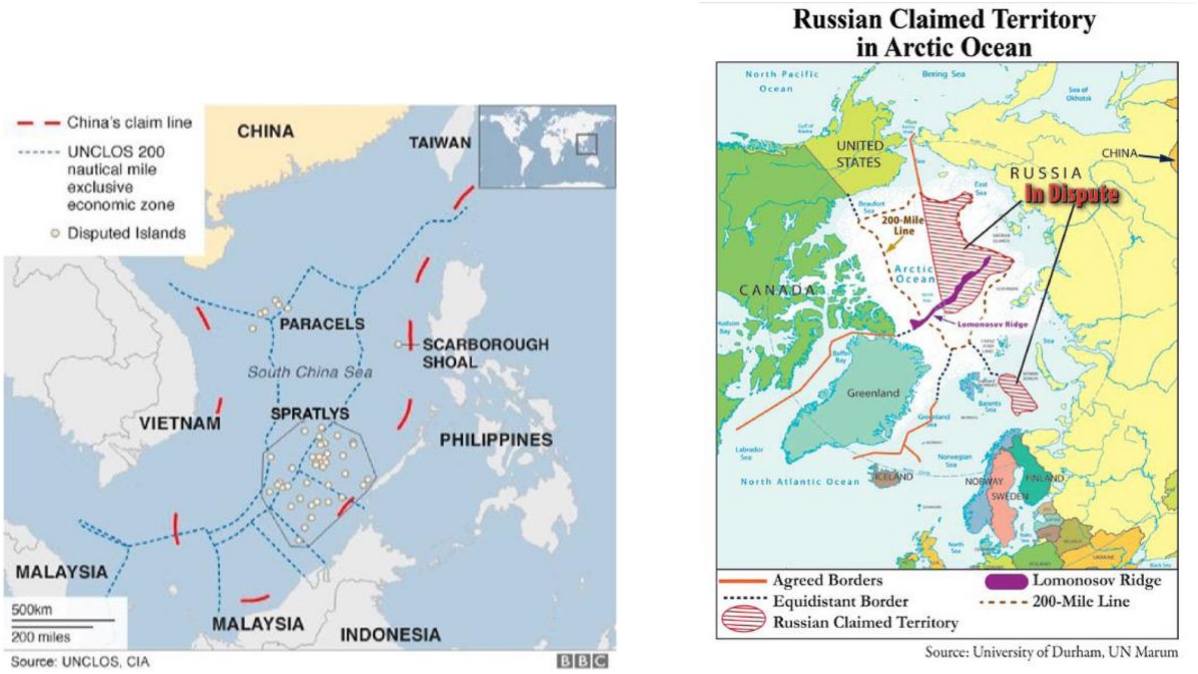

Figure 12. Chinese Bull and Russian Bull: The Nine Dash Line (https://www.bbc.com/news/world-asia-pacific-13748349) and expansive claims in the Arctic (https://www.gifex.com/detail-en/2009-09-18-7453/Russian_claimed_territory_in_Arctic_Ocean.html).

If we think back to the interventions of the papacy in defining the world map in the 1400s, we might see the expansive claims to the South China Sea and the Arctic as nothing more than Chinese bull and Russian bull, respectively.

But that is history in the making, and a subject for another time.

Notes

[1] Itsasmuseum, Bilbao.
[2] Kim Ann Zimmermann, "What Are the Seven Seas?" *LiveScience*, March 5, 2013, https://www.livescience.com/27663-seven-seas.html; Alexandru Micu, "Where did the Seven Seas come from?" *ZME Science*, January 28, 2021; https://www.zmescience.com/science/seven-seas-idiom-82463562/.
[3] "How Many Oceans?" National Ocean Service, NOAA. https://oceanservice.noaa.gov/facts/howmanyoceans.html.
[4] Percy Thomas Fenn, Jr., "Justinian and the Freedom of the Sea," *American Journal of International Law* 19:4 (1925): 716–27; 727.
[5] Itsasmuseum, Bilbao.
[6] Nicholas V, Papal Bull *Romanus Pontifex,* 18 June, 1452, in Frances Gardiner Davenport, ed., *European Treaties Bearing on the History of the United States and Its Dependencies to 1648* (Washington: Carnegie Institution of Washington, 1917), 23.
[7] Ruby Maloni. "Control of the Seas: The Historical Exegesis of the Portuguese '*Cartaz*'." *Proceedings of the Indian History Congress* 72 (2011): 476–84.
[8] 21 U.S. 543. 5 L.Ed. 681. 8 Wheat. 543. *Johnson and Graham's Lessee v. William M'Intosh*. March 10, 1823. Chief Justice John Marshall.
[9] See Vinnie Rotondaro, "Disastrous doctrine had papal roots," *National Catholic Reporter*, Sep 4, 2015.
[10] Hugo Grotius, *The Free Sea*, trans. Richard Hakluyt; ed. by David Armitage (Indianapolis: Liberty Fund, 2004), chap. 1 (p. 10). Grotius refined his argument in *De Jure Belli ac Pacis* (On the law of war and peace, 1625).
[11] "By the law of nations": in Swarztrauber, *The Three-Mile Limit of Territorial Seas*, 25.
[12] The others were the line-of-sight doctrine and the Scandinavian league. See Swarztrauber, *The Three-Mile Limit of Territorial* Seas.
[13] Proclamation 2667—Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, September 28, 1945.
[14] The contiguous zone exists to bolster a state's law enforcement capacity and frustrate criminals seeking to flee the jurisdiction of the territorial sea. Within the contiguous zone, from 12 to 24 miles out from the baseline (determined by the low-water line along a maritime state's coast), a state has the right to both prevent and punish infringement of fiscal, immigration, sanitary, and customs laws within its territory and territorial sea.
[15] UN Convention on the Law of the Sea, Part V, Exclusive Economic Zone, Article 56, 1(a), https://www.un.org/depts/los/convention_agreements/texts/unclos/part5.htm.