

Mare Clausum et Mare Liberum

BO JOHNSON THEUTENBERG*

INTRODUCTION

The needs of even ancient societies are reflected in a normative system, both internally and in their relations with other entities: tribes, societies, or states. The norms of our society of states have, since time immemorial, stemmed from its political, economic, and cultural needs. The norms have been laid down in laws and regulations, handed down by word of mouth from person to person and later codified in law. The Teutonic-Nordic areas of the world show an evolution of laws and norms which is quite different from that in regions whose legal traditions are rooted in Roman law. Roman law is considered to be the main basis for the whole European legal system, be it internal or external law. If a researcher is digging into the history of a certain rule, he will most surely end up in the ancient Roman school of laws, the oldest dating back to approximately 415 B.C.: the famous Laws of the Twelve Tables.

Roman law also played an important role in the evolution of the international normative system, i.e. the rules governing the behaviour of ancient princes and states. We find in the law of the sea that the basic concepts of Roman law are the very foundation of modern concepts and trends, as well. Concepts such as *mare liberum* — the high seas, open to all nations — and *mare clausum* — the closed sea, under the sovereignty of a power and restricted in terms of use by other states — reflect Roman legal philosophy.

One may ask in what way these concepts reflect the philosophy of Roman law, or whether they might be inventions of later times. It is important to interpret these terms in the right way. These fundamental concepts play an important role in our deliberations on the formation of new normative rules for the present-day law of the sea. Historic roots are always present and important, and society can never eradicate the influence of the past, particularly in the legal field.

Before turning to Roman law, it is worth pointing out that at the dawn of our history the Teutonic-Nordic area was out of reach of Rome and its sophisticated system of laws. There are traces of Roman law in Great Britain, the Gallic countries, and the southern parts of the Germanic region, but north of the Rhine oral tribal rules prevailed. The purpose of these laws was to settle contemporary problems, and certain rules of law can be traced back to the ancient codification of Nordic law.

LAWS REGULATING POLAR WATERS

The ancient Norwegian province law, the *Gulathingslov* (article 111), implied royal sovereignty over the waters adjacent

to the coast of Norway. Though this specific rule does not contain an explicit statement to that effect, the implicit meaning is quite clear: “*su er hin nitianda (erfð) er skiperfð heiter. ef maðr andasc a kaupskipi. firi heðan mitt haf hvernveg er hann stemnir or Norege. þa konongr fe hans halft ...*”. The expression “*mitt haf*” refers to what is now called the median line, midway between two coasts. The older *Frostathingslov* (IX,6) referred to a man who died at sea “*vestan mitthaf eða Islande ut*”, which means to the west of the median line in the sea, and of a man who died “*austan mitthaf deyr*”, east of the median line. These provisions are comparable to the rules of the latter periods of the Icelandic Free State (before A.D. 1262-1264) contained in the Icelandic *Grágás* (*Konungsbok*). The Norwegian laws stated that the King of Norway shared in a dead man's heritage if he died on the Norwegian side of the median line. The Icelandic *Grágás* complemented these Norwegian rules by prohibiting Icelandic laws from regulating incidents occurring in a foreign country or “*firir austan mitt haf*”, i.e. east of the median line or in the Norwegian part of the sea.

The median-line principle, or it also could be the famous *thalweg* principle, is discernible not only in the ancient Norwegian-Icelandic laws, but also in provisions laid down in 1023 by the English king Canute, regulating the rights of the monks to salvage wreckage found “on the English side” of the median line in the English Channel: “*...ex hac parte medietatis maris...*”. The English legal handbook *Le Mirroir des Justices*, dating from the end of the thirteenth century, says: “*la souveraine seigneurie de tote le terre jeques el miluieu fil de la meer environ la terre.*”

It is interesting to note that the ancient independent Nordic laws contained the median-line principle, which gave the kings of Norway broad powers of jurisdiction and protection over vast areas of the northern sea (*Nordanhavet*).

The fact that the principle of *protectio* over the sea already existed in the thirteenth century can be proved by ancient documents. During the winter of 1247-1248 the Norwegian king Haakon Haakonsson wrote to the Council of the Hanseatic city of Lübeck, complaining: “*Et tamen mercatores nostros ad vos bona sua differentes quasi in portibus vestris vos illius brevis maris habentes custodiam a vestris hominibus et vestris guerrariis conductis sustenetis spolari.*” He maintained that, although Lübeck had such a small portion of the sea to supervise and protect, Norwegian merchants had been looted very near the harbours. In other words, it was the duty of Lübeck to furnish *protectio* to their portion of the sea.

*Ambassador and the Legal Adviser of the Ministry for Foreign Affairs of Sweden. Professor of international law at Stockholm University, P.O. Box 16121, S-103 23 Stockholm, Sweden

Obviously, in this period of Nordic history a “national sea”, protected and in some way administered by the littoral state, was an accepted concept. But the concept of the “high sea” or the “open sea” seems also to have existed. The Council of Lübeck responded to the Norwegian king 40 years later, maintaining that the merchant ships of Lübeck had been robbed in an area that they called the high sea, or “*in libero mari*”, which was outside the “national sea” or the “national waters”. In a letter to the English king Edward I dated 27 January 1304, complaints were brought forward regarding an act of piracy that took place “*super mare de praecepto regis Norwegiae*”, i.e. in the sea under the sovereignty of the Norwegian king. The same notion appears in a treaty between Norway and Russia, dated 3 June 1326, in which it is stated that “*Ubi regis Norwegiae terra et aqua sua extendent se, ibi debent Norici pertransire, inhabitare et agnoscere terram suam et aquam*”. The term “*aqua sua*” — his waters — was obviously used to denote “sea territory”.

With the accession to the Norwegian throne of King Magnus Lagabóter (the Law Improver) in 1238, changes occurred to the states of the *Mare Septentrionalis* or the Northern Sea. These changes were brought about because of political, legal, and economic factors. Greenland (*Terra Viridis*), like Iceland, had become incorporated into the Kingdom of Norway as “tax-lands” or “Crown lands”. The Norwegian *jurisdictio* and *protectio* was extended to land areas beyond the seas. The geographic concept of the law was expanded and, as a logical consequence, the sea between the different land areas (Fig. 1) became something like “*mare nostrum*” (our sea). It is a short step from this notion of *mare nostrum* to the concept of *mare clausum*, our sea under our exclusive sovereignty. Parallels are evident to the Roman Empire, in which the Mediterranean Sea was the Roman *mare nostrum*, where Roman laws governed all conditions.

From the middle of the thirteenth century, the Northern Sea gradually came under sovereignty of the Norwegian kings. It was in the interests of Norwegian commerce to forbid foreign merchants and vessels to carry on trade in Norwegian ports, as

well as trade with Greenland and Iceland. When the port of Bergen, on the Norwegian coast, became established as the main international port of Norway, there were formal prohibitions issued that prevented foreigners from carrying on trade in the area north of Bergen, i.e. Haalogaland and Finnmark. Great difficulties arose in upholding these prohibitions, however, since other powers also became interested in utilizing the North.

It is important to stress that the notion of *mare clausum* or *mare nostrum* was not only a legal concept, but very much a geographical one (Fig. 2). The medieval princes were probably aware of the fact that they could not extend their claims to sovereignty *in absurdum*. Not even the Romans could; beyond their own jurisdiction in the Mediterranean and beyond the Pillars of Hercules, flanking the entrance to the Strait of Gibraltar, they recognized the fact that the wide oceans would be possessed by other princes and peoples. Their geographical concepts included the *mare vastum* or the *mare altum*, which meant the distant rim of the *Okeanos* surrounding the *orbis terrarum*, the circular earth plate. But this *mare vastum*, the Roman legal concept, was in no way known as *mare liberum*, the high or open sea. As we will see later, Roman law did not recognize this notion because of the fact that the only concept it knew was the vast Roman exclusive jurisdiction all the way up to *mare vastum*.

The geographical concepts of ancient times greatly influenced the formation of legal concepts. It was possible to talk about “our sea” or *mare nostrum*, because in the minds of the people, the sea did not extend forever. Knowing that it was limited by other land areas, people perceived that a sea was limited on all sides by land. This was true for the Mediterranean as well as for the *Mare Septentrionalis*, the Northern Sea. In the minds of the ancient Nordic people, the Northern Sea was only an internal sea enclosed on all sides by land (Fig. 3). It is difficult to explain exactly how contemporary people perceived their geography, but obviously the newly discovered land called Greenland was thought to be somehow connected with the then-known land areas to the east, i.e. Novaya Zemlya and Russia or Bjarmaland.

In the west, the Northern Sea was limited by Greenland. Ancient people thought that the land area continued into the American areas of Markland and Vinland and other areas described in the sagas. Greenland also limited the sea to the north. The land discovered in the north in 1194 was assumed to be an eastward continuation of Greenland. For a long period, the island of Spitsbergen was called Greenland, or the wilderness of Greenland (in contrast to the inhabited *Terra Viridis*, the real Greenland to the west). From Spitsbergen, or the Greenland wilderness, the land area continued to Bjarmaland or Russia, and connected with the Norwegian regions of Finnmark and Haalogaland. Given this concept, it is no wonder that the kings of this period claimed sovereignty over areas which they saw as a continuation of the already-known land masses. If the king had sovereignty over the lands enclosing the sea areas, why shouldn't he also claim the sea between? This geographic concept prevailed well into the fifteenth century and even influenced the sixteenth century. When the

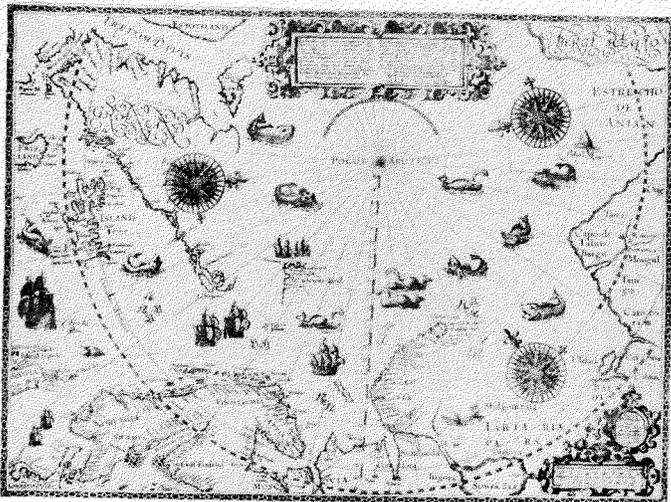


FIG. 1. Barents map, published by Cornelis Claesz (Amsterdam, 1598).

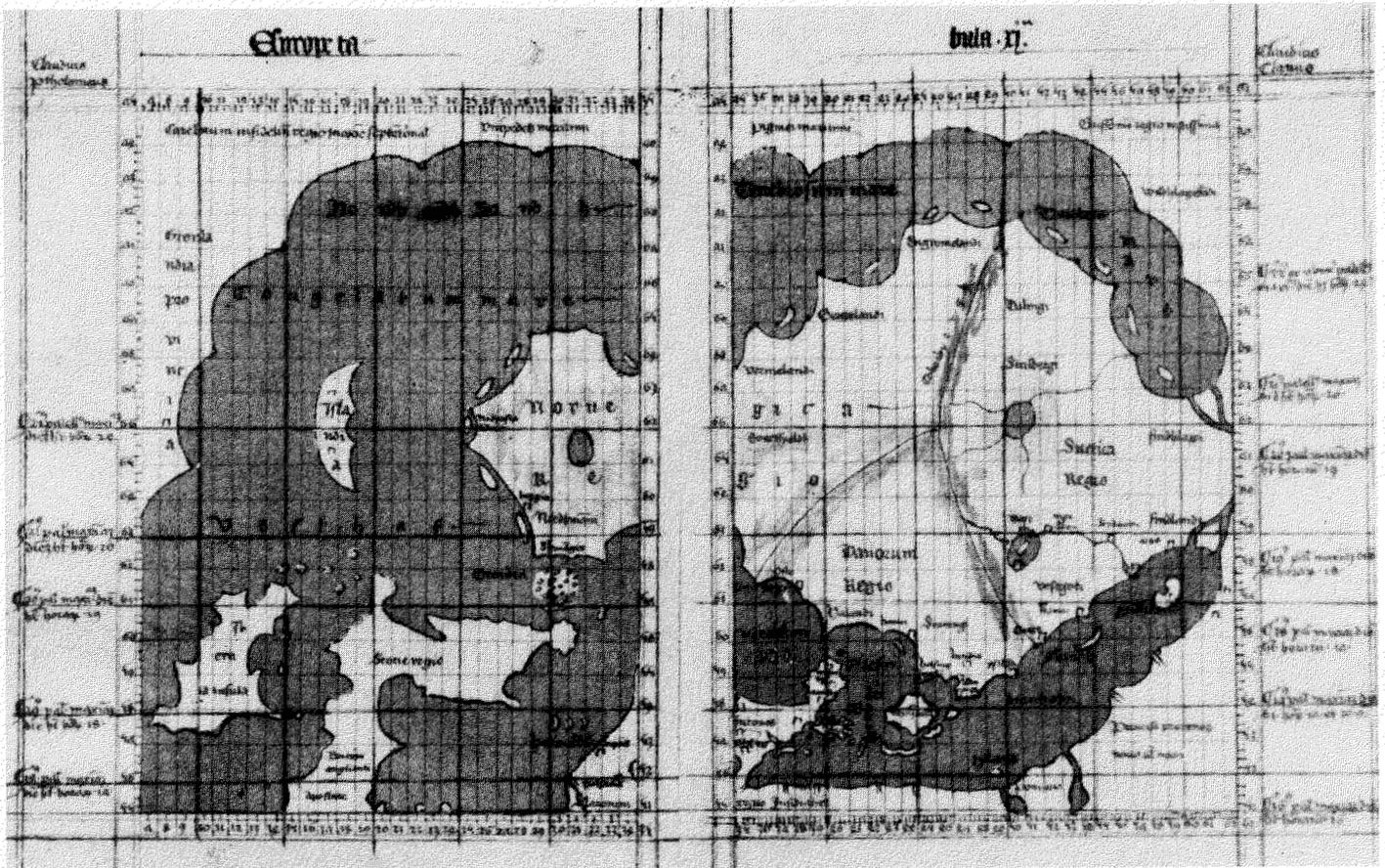


FIG. 2. Claudius Clavius was charged with the making of this map in 1477, to be included in a Ptolemy volume in Lyon. Norvegia and Suecia are mentioned, and the whole area is surrounded by land.

Danish-Norwegian king Christian IV wrote to the King of England, James I, on 10 January 1618, he maintained that the whole of the northern lands, except those under Russia, were called Greenland: “*totius Septentrionalis ambitus partes, exceptis quae Moscoviae imperio subjacent, hac denominatione comprehensas.*” Thus, it was totally in accordance with the prevailing views that Willem Barents thought that the land he rediscovered in 1594 and called Spitsbergen was part of Greenland. The same view was held even during the seventeenth century, and some doubts were still discernible during the eighteenth century regarding whether Spitsbergen was a group of islands or part of Greenland. With the voyage of Giles in 1707 this problem was solved, but it is important to point out that it was not until 1863 that ships sailed around the Svalbard islands.

The Northern Sea, claimed by the Norwegian kings as a *mare clausum*, was called either the Greenland sea, the Icelandic sea, or the “*Dumbshav*” (Fig. 4). No common name is to be found from ancient times. “*Gandvik*” means the White Sea; and reference was made to *Havsbotn* or *Trollebotn*, meaning, in general, where the Bjarmamen and the *careli infideles*, the Karelians, lived — the northern and eastern part of the arctic sea. This area was always beyond the control of the Norwegian kings, and later came under the sovereignty of Novgorod. Norway’s claims to the *Mare Septentrionalis* and to forbid foreigners to sail in those waters were so well known

that even on Italian maps from the late fifteenth century the legend appears: “*Ultimus limes cruce Christi signatus. Non licet ultra ire.*” (The outermost limits of the cross of Christ. Forbidden to go further.) An example is Nikolaus Germanus’s copy (1467) of the Nordic maps of Claudius Clavius the younger. As the Russians increased their colonization along the coasts of the arctic sea, cartography became more accurate. The Olaus Magnus map, the *Carta Marina* of 1539 (Fig. 5), shows a strait between Russia and Greenland. But the old concepts of a land connection between these areas died hard among the cartographers of Europe, and thus supported the legal claims to the Northern Sea embraced by these lands. Contemporary documents called this sea *mare nostrum*, *salum nostrum*, and *fretum nostrum Norvagicum* — our Norwegian sea.

As other maritime powers became increasingly interested in these areas; the Norwegian monarchy found it more and more difficult to maintain its claims, particularly against Great Britain and The Netherlands, which had long been interested in fishing, whaling, and trade in this area. Great Britain claimed rights over Spitsbergen because the Englishman Willoughby had discovered the island in 1553, and because Great Britain had been the first nation to start whaling. The Netherlands also claimed specific rights because of Barents’s discovery in 1596. Several fifteenth-century treaties between Norway and Great Britain prove that the Norwegian claims with regard to the

principle of *mare clausum* around their own coasts, but the sovereigns of England were also the ones who became the champions of the principle of *mare liberum*: They even invoked the Law of Nations to support their views, though the changes in direction in the Law of Nations and in the law of the sea were motivated by economic and political factors.

Queen Elizabeth I fought the kings of Denmark-Norway because of their efforts to uphold the principle of *mare clausum* in their area of the arctic sea. These policies were in conflict with the ambitions of England, then emerging as one of the great sea powers of the world. Queen Elizabeth's predecessors had long claimed the title of "Lords of the Seas". This tradition dated back to the Anglo-Saxon king Edgar, "the sovereign Lord of all Albion", who in 964 laid claim to the ocean around Britain. According to Fulton (1911), Queen Elizabeth was charged with inconsistency in her maritime policy on the grounds that while she was asserting the freedom of the seas in the face of the claims of Spain, Portugal, and Denmark-Norway, she was energetically claiming for herself similar dominion over the British seas. However justified this charge of inconsistency may be, it is fair to say that long before the time of Hugo Grotius, the champion of the

principle of *mare liberum*, the English queen had put forward the same ideas with regard to the freedom of the high seas. "The freedom of the seas" means that the high seas, or the open seas, may be used by all nations for different purposes, such as trade, shipping, and fishing. This was not at all usual in those times. Even innocent passage through the sea area of another power could lead to war, and serious controversies arose because some sovereigns demanded to be saluted by ships of other nations even on the high seas, as a token of their sovereignty over the sea. As a symbol and acknowledgement of this absolute dominion, foreign vessels were to pay homage on meeting the ships of the sovereign by striking their flag and lowering their topsails. If they refused to do so, they were attacked, captured, or sunk. The vessels were liable to forfeiture as "good prize", and the offenders were taken into port to be tried for high contempt. This is a good description of the rights entailed in the concept *mare clausum*. The masters of the internal seas — the Arctic waters, the Baltic Sea, the Mediterranean, the English waters, or the "King's Chambers" as it was called — all had exclusive rights and those rights were rigidly enforced. The Danish-Norwegian kings not only claimed the arctic waters as a *mare clausum*. The Sound and the Belts were

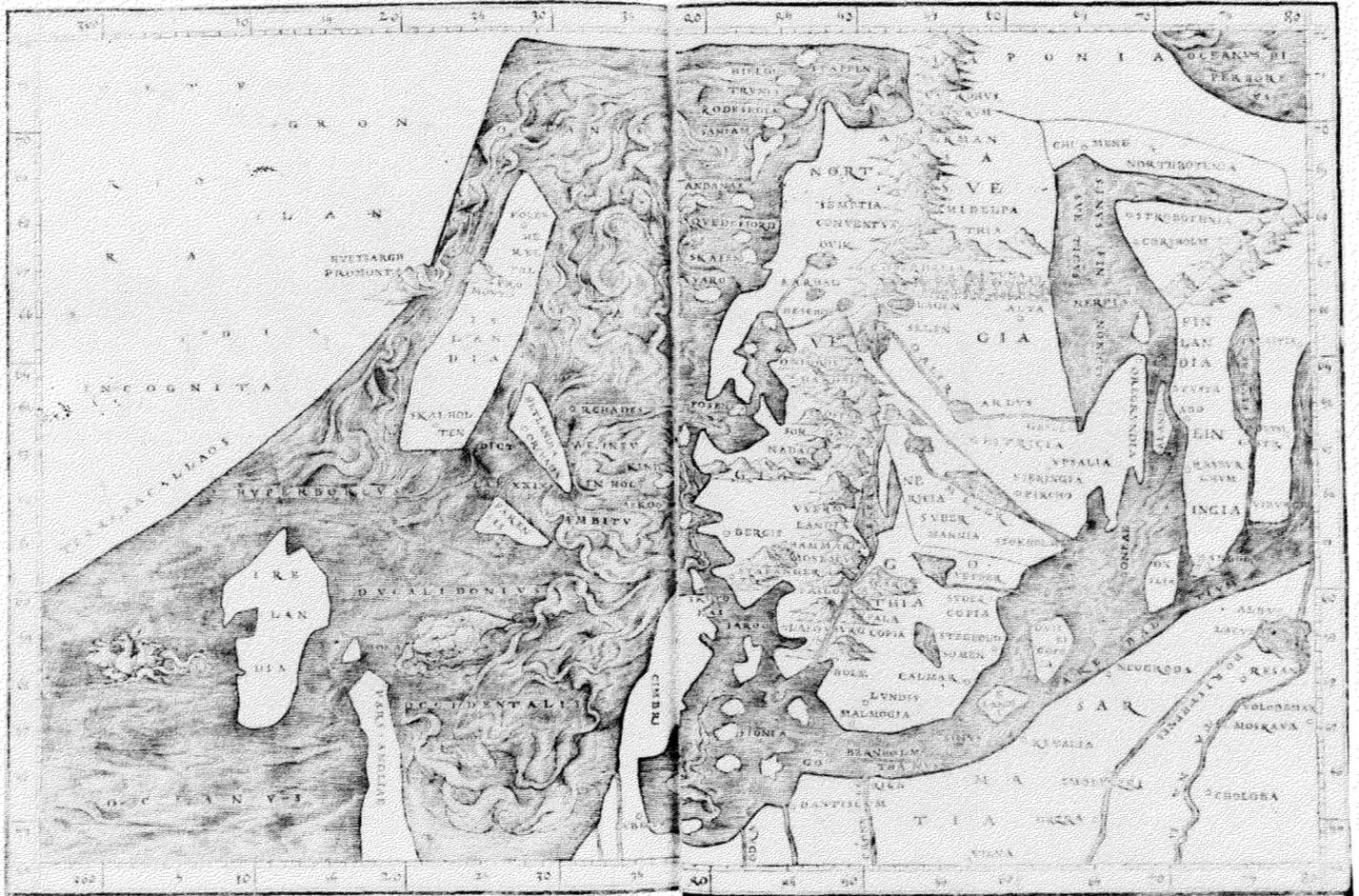


FIG. 4. A map by Jacob Ziegler, geography professor in Uppsala, Sweden, printed in Frankfurt in 1532. His map of the Nordic region still shows medieval features similar to those on Claudius Clavus's maps. A good picture of *mare clausum* is shown, with land connections between Greenland, Scandinavia, and Russia.

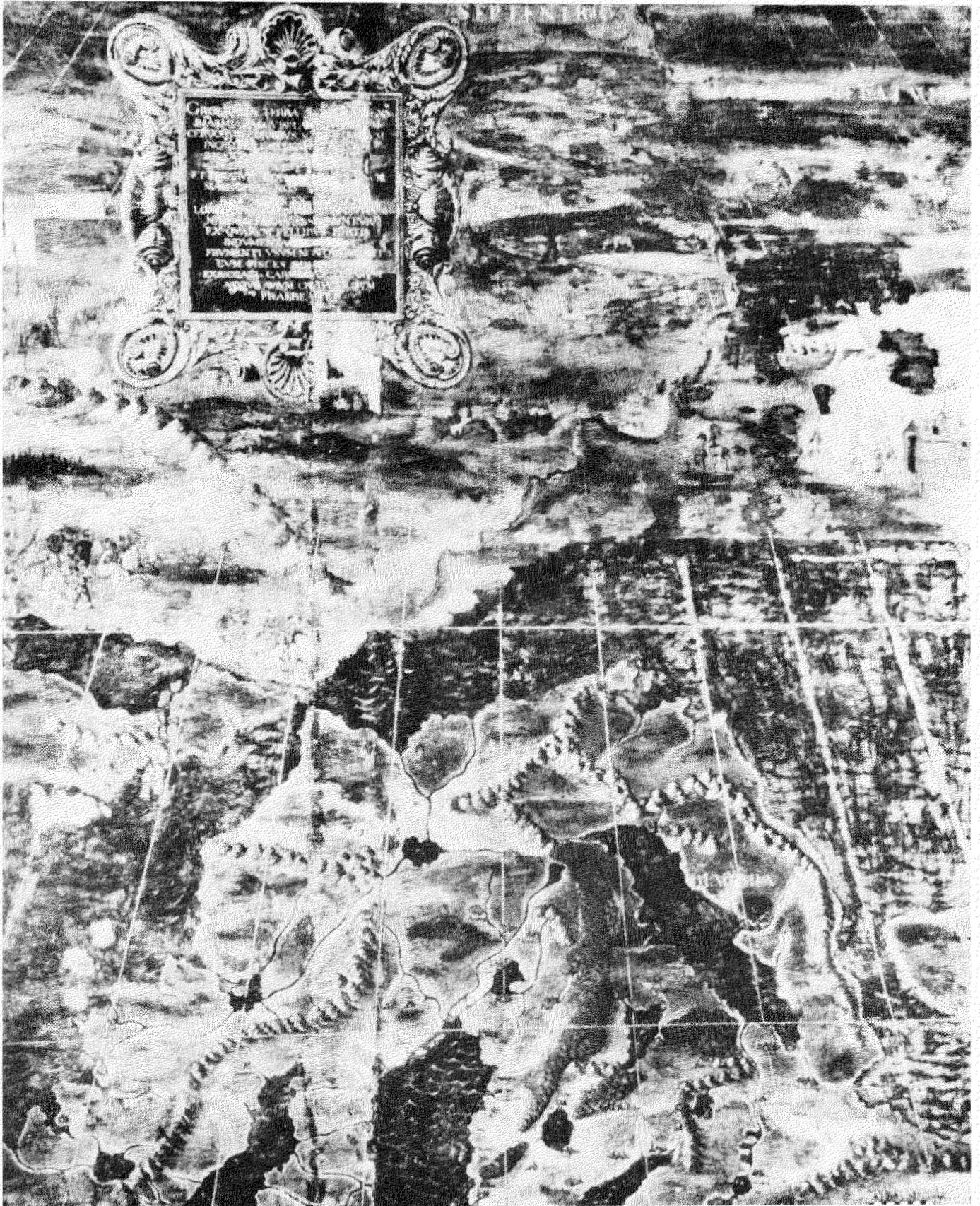


FIG. 5. An Olaf Magnus map from 1539 (Monumenta Cartographica Vaticana, 1955). After a wall painting in the Vatican. A land area to the north has been added, so the *mare clausum* still appears.

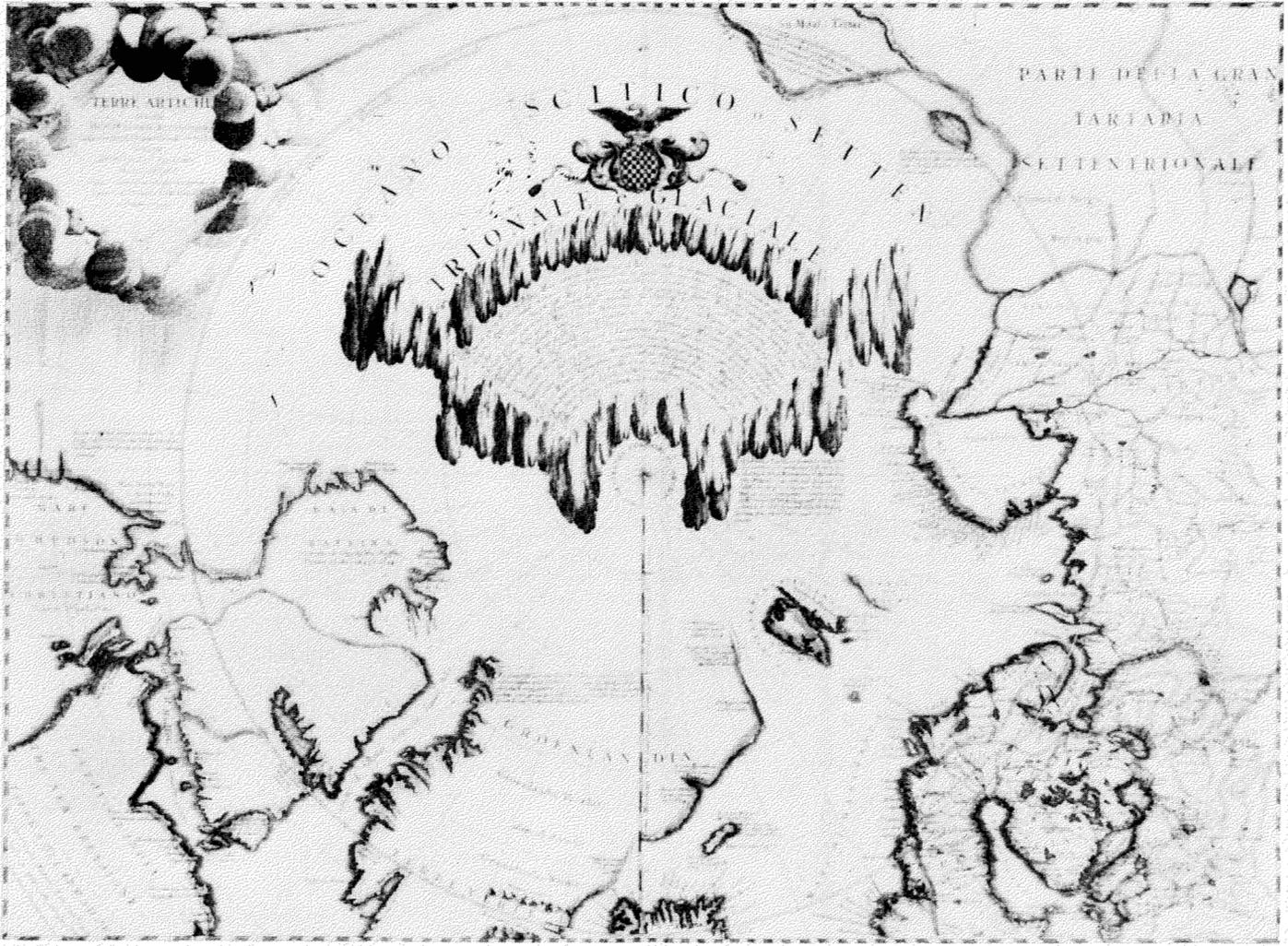


FIG. 6. Map of the Arctic by Vincent Coronelli, a Venetian priest, from approximately 1690. This map still shows the uncertainty about a northern land area, disguised in the form of a corona borealis.

also prohibited waters and thus served as a key to the Baltic, which at that time was under the *Dominium maris Baltici* of the Danish king (later, the Swedish king).

During the reign of Queen Elizabeth I, England launched the long struggle for commercial and maritime supremacy, with the aim of enhancing its power against all rivals. The rivals were mainly found among the medieval great sea powers: Spain, Portugal, and the Nordic countries. These countries defended their positions as masters of the sea on grounds of long and continuous possession of the seas, and they were supported by several papal bulls giving the sovereigns of the respective countries the right to these areas. Again, the doctrine of *mare clausum* was predominant. Another challenger to England's ambitions was the Dutch Republic, which was rapidly rising to the position of the leading trading state in Europe and aspiring to embrace the whole world in its efforts to promote trade and commerce. This aim is attested to by the discovery of Spitsbergen by Willem Barents in 1596, and the Dutch activities in the northern seas. The Dutch also expanded trade toward India, thus combatting Portugal's claims to a *mare clausum* and to the exclusive rights to carry on trade with

India. In the time of Queen Elizabeth I, England and Holland were both interested in opposing Spain's claim to exclusive sovereignty over a vast part of the Atlantic Ocean in accordance with the doctrine of *mare clausum*. This common interest made it impossible for England to curb the growing power of the Dutch. On the contrary, England advanced the same arguments supporting the right to sail freely on the high seas. The arguments were then directed against Spain, Portugal, and Denmark-Norway. Queen Elizabeth invoked the Law of Nations in support of the principle of *mare liberum*, as did the Dutch author Petrus Bertius in his book of geography published in Amsterdam in 1616. He described the arguments used by the nations involved in the controversies about the whaling around Spitsbergen. In 1615, apparently, France, Spain, Flanders, and Holland referred to the Law of Nations as supporting their claims to carry on whaling in this area, whereas Denmark and England claimed possession of the area. ("Gallis, Hispanis, Cantabris, Flandris, Batavis aliisque ius gentium odendentibus, Anglis & Danis proprietatem vindicantibus.")

A change had taken place in England's maritime policy by



FIG. 7. Hugo Grotius's *Mare liberum*, frontispiece, shown in a 1633 print.

1635, as is evident from the publication, in that year, of Selden's *Mare clausum*. The dispute between Queen Elizabeth and the King of Denmark over fishing rights in the North Atlantic bears a strong resemblance to that between Holland and James I of England, which began a few years later — but by then the positions were reversed. James insisted on exclusive fishing rights along the British coasts, while the Dutch used the arguments Elizabeth had used in support of the complete freedom of the seas.

I have put great emphasis on the notion of *Mare clausum* in the arctic regions, and have given emphasis of claims made by

the Norwegian (later the Danish-Norwegian) Crown to these areas. The controversies between the kings of Denmark-Norway and the English sovereigns have also been described. It is true that the battles, both literal and figurative, between the two nations were important for the futures of both countries. It is difficult, however, to explain how conflicts between two nations, regarding a remote and deserted area far from either country, could bring about fundamental changes in the Law of Nations. Therefore, in the cause of accuracy, we must broaden the scope somewhat.

The policy of Spain and Portugal, claiming exclusive sovereignty over large areas of the Atlantic, explains why the juridical controversy between two legal notions — *mare liberum* and *mare clausum* — reached such dimensions and influenced the future of international law. A few more examples on the doctrine of *mare clausum* will prove that this doctrine was well founded in historic traditions, not just in the northern areas of the world.

Roman law taught that the sea could not be possessed by anyone; that the sea was common and free for the use (*usus*) of man. *Protectio* and *jurisdictio* were assigned to the master of the sea, i.e., the head of state possessing the nearest land area. The famous medieval Italian lawyer Baldus stated: "*maris... est commune quod usum, sed proprietas est nullius... jurisdictio est Caesaris, & sic ista tria sunt diversa: proprietas, usus, jurisdictio & protectio*". Although according to Roman law and its later Italian interpretation the sea was common and free to all, in the Middle Ages many seas had been more or less effectively appropriated. Writers began to assign to maritime states, as a principle of law, a certain jurisdiction in the waters adjacent to their coasts. The distance from the coast to which the writers allowed such jurisdiction to extend varied, sometimes extending to 60 or 100 miles from land. Italian writers on law thus established in their doctrines the notion of specific sea territory connected with the land area, over which the littoral state could exercise exclusive jurisdiction. The question then arose of whether a state could exercise jurisdiction in a still wider area. The Nordic countries, as has been shown, applied their own doctrines in this respect; in addition, the medieval Italian republics practiced the same doctrines.

Long before the thirteenth century, Venice had assumed sovereignty over the whole Adriatic Sea, though she was not in possession of both shores. Venice enforced its jurisdiction by force, and could prohibit all passage through the Adriatic. The rights of Venice were later recognized by the other European powers and by the Pope himself, the latter being extremely important at this time, since the Pope as *vicarius Jesu Christi* also held power in worldly matters.

The formation of the Law of Nations, the normative code applying between nations, has been influenced by canon law, and by the Popes in their personal capacities. In 1176 Pope Alexander III gave the golden ring to the Doge of Venice, as a token symbolizing the dominion of Venice over the sea. This became an annual ceremony which characterized the sovereignty of Venice and its unbreakable bonds with the sea. "*Desponsamus te mare, in signum veri perpetuque domini*", the Doge said each year when casting the ring into the sea: he

married the state to the sea. There is no better way of demonstrating the principle of *mare clausum* and exclusive sovereignty. There were political reasons for the ceremonies and the support of the Venetian efforts. The republic on the Adriatic coast formed a useful barrier to further expansion in Europe by the Turks, and served as a scourge to the Saracen pirates.

On the other side of the Italian peninsula, the Republic of Genoa claimed the same rights over the Ligurian Sea. Further examples are legion.

In the Nordic countries, where the doctrine of *mare clausum* had so many political and commercial implications, the expression *Dominium maris Baltici* had great significance. The Danish-Norwegian kings claimed not only great areas of the *Mare Septentrionalis* in the north, but also the entrances to the Baltic and the Baltic itself. Later Sweden shared in this *Dominium*. Since time immemorial the Gulf of Bothnia had been under exclusive Swedish jurisdiction as a *mare clausum* or internal sea, because Finland was part of the Swedish kingdom until 1809. Poland also claimed certain rights over parts of the Baltic.

What, then, are the "basic historic facts" with regard to the Baltic? It is a well-known fact in international law that ancient treaties must be interpreted within the context of the circumstances prevailing at their time of adoption, the "intertemporal interpretation". In accordance with this principle, it is possible to confirm that several treaties dating from the eighteenth century are based upon the assumption that the Baltic was a *mare clausum* — open solely to the warships of the Baltic States. Before commenting upon this subject in more detail, however, it is worth noting that the formula of *mare clausum* was first applied after the conclusion of the Peace Treaty of Nystad in 1721, when Russia acquired new territories along the coast of the Baltic Sea proper and was thereby allowed to participate in the protection of the region against foreign intrusion. Before then, the responsibility of protection had rested with Denmark and Sweden under the previously-mentioned *Dominium maris Baltici*. As early as the beginning of the fourteenth century, apparently, the Danish monarchy took over *Dominium* from the Hanseatic cities, and it rested with the Danish king for centuries to come, though due consideration was generally paid to Swedish interests. As master of the Baltic straits, Denmark was in an excellent position to guard the waters. During the first part of the seventeenth century the power of Denmark was broken by the Emperor of Germany, and *Dominium* over the Baltic passed to Sweden and stayed there until 1721. At that time unilateral domination gave way to a kind of "condominium" between the maritime states — Denmark, Germany, Russia, and Sweden. They acted in concert to protect the Baltic from the intrusion of hostile foreign navies, all in accordance with the formula of *mare clausum*. Treaties from this period mention specifically the Baltic as "une mer fermée". In the Declaration of St. Petersburg of 21 July 1780, the foundation of the so-called armed neutrality of the Baltic states, the following sentence appears:

Comme Sa Majeste...et Sa Majeste...sont toujours égale-

ment intéressées à veiller à la sûreté à la tranquillité de la Mer Baltique...Elles sont mutuellement convenues à soutenir, que c'est une mer fermée...où toutes les nations doivent et peuvent naviguer en paix...et de prendre pour cette effet entre Elles des mesures capables de garantir cette mer et ses côtes de toutes hostilités, pirateries et violences.

Similar wording was used in other treaties from the same period. There is, however, one indispensable factor to keep in mind: all treaties pertaining to the Baltic as a "closed sea" were aimed at protecting the neutrality of the maritime states and consolidating the peace in the Baltic region. The powers acted in common, through their "League of Armed Neutrality", to uphold their own neutral status and that of the sea itself. There are further grounds for believing that other states, if reluctantly, accepted this regime as long as the Baltic states adhered strictly to their declared neutrality. The factor of neutrality was thus a *sine qua non* for the whole construction of *mare clausum*. When the powers along the Baltic coast became actively involved in military entanglements or wars — as was the case from the early 1800s — the concept of *mare clausum* was impossible to maintain. If one of the states was at war with powers outside the region, it seemed in accordance neither with international law nor with national interests for a neutral state to take an active part in the "closing" of the sea concerned, thereby protecting one of the belligerent parties.

The fact is that, as early as 1807, Sweden had obviously come to share this view. In an exchange of notes with Russia, Sweden argued that it was not prepared to participate in measures aimed at the "closing" of the Baltic. A message to the same effect was dispatched to Denmark in 1834. The Belts and the Sound would be free for passage, even to foreign warships. Whole navies were allowed to pass through the straits during the Crimean War (1854-1856). These navies, seeking contact with Russian forces, were not denied passage because Sweden and Denmark had declared themselves neutral. The policy of the "open sea" was established. Ever since, Sweden and Denmark have adhered to this policy and have always tried to implement it in practice. In proclamations of neutrality, and decrees regulating admission to territorial waters and airspace for foreign warships and military aircraft, both Sweden and Denmark have meticulously followed the principle of free passage to and from the Baltic for all kinds of traffic. The Convention of 1857 on the Abolition of Rights over the Sound and the Belts — between Denmark on the one hand, and Sweden-Norway, Austria-Hungary, Belgium, France, The Netherlands, the United Kingdom, the German states, and Russia on the other — contains rules on free passage through the straits with regard to fiscal duties and fees. It is believed that the convention primarily pertained to commercial shipping, but a paragraph of a wider nature could have some general bearing on the question of rights of passage: "Aucun navire quelconque ne pourra désormais, sous quelque prétexte, que ce soit, être assujetti au passage du Sund et des Belts à une détention ou entrave quelconque."

The fact that the "strait-owning" states, Denmark and Sweden, have for a long time applied the principle of free passage through the straits is of the greatest importance to the

whole question of the status of the Baltic Sea. The decrees in force in the respective countries declare explicitly that the Swedish part of the Sound, and the Great Belt, are completely free for passage without any form of "homage" to the states through whose territorial waters the passage is made. Free entrance to the Baltic has been a reality for more than 160 years. The right of passage is based on national legislation and on principles of public international law. Custom has made free entrance through the straits part of a recognized European legal order. The principle of the "open sea", with respect to the Baltic, is also part of the same order. It is obvious that the ancient formula of *mare clausum* only remains as a feature in history books and old documents.

Another example of the doctrine of *mare clausum* is the so-called "papal sea". During the Middle Ages in the Mediterranean, according to *Magnum Bullarium Romanum* (I:507), the papal sea extended from Monte Argentino to Terracina: "*Qui mare nostrum a Monte Argentino usque ad Terracinam discurrere...praesumpserunt*". Fishing in this sea was permitted only for inhabitants of the Church State and those of the city of Rome (*Statuta Urbis*, lib. 3, cap. 72).

As the final example of the doctrine of *mare clausum*, I would like to touch upon the ambitions of Spain and Portugal to claim enormous sea areas for themselves, thereby excluding all other nations. It was the Spanish and Portuguese policy that started the real discussions and controversies about the legal doctrine, in terms of whether the open seas would be free for the use of all nations or closed to common use. As has been shown, Queen Elizabeth of England was the champion of the principle of *mare liberum* several years before the notion became dressed in juridical clothing through the work of Grotius. It must be admitted that the actions of the English queen were no more based on considerations of the general good of mankind than were the efforts of Grotius. Both had in view the interests of their native lands. Elizabeth's motive was to secure for her subjects liberty of trade and fishery, which was threatened by the pretensions of Spain and Portugal. When Portugal, in the latter half of the fifteenth century, had pushed her way down the west coast of Africa and ultimately around the Cape of Good Hope to the East Indies, she obtained from the Pope several bulls securing the country's possessions. The bulls granted sovereign authority to the Crown of Portugal over all the lands it might discover in the Atlantic from Cape Bojador to the Indies.

Immediately after Columbus's return from his first voyage in 1493, the Spanish monarchs also obtained a bull from Pope Alexander VI (Borgia), confirming Spain's jurisdiction over the newly discovered regions; this was the well-known bull *Inter Cetera*. In order to prevent disputes between Spain and Portugal regarding the extent of their respective claims, another bull was issued on 4 May 1493 in which the famous line of demarcation was drawn, dividing the Atlantic Ocean between the two countries. The bull also granted to the respective states the lands that were, or could be, discovered. The Borgia Pope declared in the bull that he had chosen to intervene on his own initiative and by virtue of his power as *vicarius Jesu Christi*. In this, one of the most important docu-

ments of the history of the Law of Nations, the following appears:

...motu proprio, non ad vestram vel alterius pro vobis super hoc nobis oblatae petitionis instantiam, sed de nostra mera liberalitate, et ex certa scientia, ac de Apostolicae potestatis plenitudine, omnes insulas, et terras firmas inventas, et inveniendas, detectas et detegendas...auctoritate omnipotentis Dei nobis in B. Petro concessa, ad vicarius Jesu Christi, qua fungimur in terris,...tenore praesentium donamus, concedimus, assignamus.

The famous line of demarcation was drawn from the North Pole to the South Pole, passing 100 leagues to the west of the Azores and Cape Verde Islands. All islands or lands discovered to the west of this line by the Spaniards, and which had not been in possession of any Christian power before the preceding Christmas, were to belong to the Spanish Crown. All territory discovered to the east of the line was to belong to Portugal. The Pope, moreover, granted a monopoly of commerce within these immense regions to the respective Crowns, so that other nations could not trade without license from the Spanish or Portuguese sovereign. Spaniards were not even allowed to go to the New World to trade or form establishments without royal license and authority. Disputes arose between Spain and Portugal over the equity of the Pope's line of demarcation, and by the Treaty of Tordesillas (7 June 1494), they agreed that the inter-polar line should pass 370 leagues to the west of the Cape Verde Islands, a solution in Portugal's favour. The exclusive rights conferred by the Pope were rigorously enforced by Spain and Portugal. Navigation to their new possessions and the carrying on of any trade or commerce with them without royal license were punishable by death and confiscation of goods.

Early in her reign, Elizabeth had occasion to protest against the claims of Portugal, as she had done with Denmark, and she had a heated dispute with King Sebastian. The later adventures and exploits of Sir Francis Drake on the Spanish seas were a more than flagrant violation of King Philip II's pretension to *mare clausum* in the western Atlantic and Pacific oceans — a claim that Elizabeth refused to recognize. When Mendoza, the Spanish ambassador, complained to her in 1580 of Drake's depredations, and that English ships were presuming to trade in the "Indian" seas, he was told, in effect, that the Spaniards, contrary to the Law of Nations, had prohibited the English from carrying on commerce in those regions and had consequently drawn the mischief on themselves. She was unable to understand, she said, why her subjects and those of other monarchs should be barred from the "Indies". Again she invoked the Law of Nations, alluding to the principle of *mare liberum* as she had done in her controversies with the Danish king.

As has been stated, Elizabeth's successors to the throne of England had other interests to promote. England, developing into one of the great sea powers of the world, became more and more interested in protecting her own *Dominium* over the sea. As time passed, the English kings came forward as protectors of the principle of *mare clausum*. One of the greatest juridical debates in the history of the development of international law was the fight between Grotius and the Englishman

Selden. It reached its greatest pitch during the reign of Charles I, who was one of the last champions of the principle of *mare clausum*.

Hugo Grotius, often called the father of modern international law, was Dutch by birth. He came, however, to serve Sweden, both as a scientist at the University of Uppsala and as ambassador to France. It is noteworthy that the birth of modern international law was associated with juridical controversies concerning the freedom on the sea. It was the appearance of *Mare liberum* in 1609 that heralded the dawn of the new epoch. This little book by the then-very-young Grotius was at once a reasoned appeal for the freedom of the seas in the general interests of mankind, and the source from which the principles of the Law of Nations evolved.

He opened his argument supported by the then-prevailing natural law: "*Propositum est nobis breviter ac dilucide demonstrare ius esse Batavis, hoc est, Ordinum Foederatorum Belgico-Germaniae subditis ad Indos, ita uti navigant navigare, cumque ipsis commercia colere...*" ("My intention is to demonstrate briefly and clearly that the Dutch — that is to say, the subjects of the United Netherlands — have the right to sail to the East Indies, as they are now doing, and to engage in trade with the people there. I shall base my argument on the following most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to every other nation, and to trade with it.")

In developing his theme, Grotius attacked in succession all the arguments put forward by the Portuguese to justify their claim. Their titles — from the prior discovery of the Cape route, under papal bulls, by right of war or conquest, or from occupancy and prescription — were all, he maintained, invalid: by the Law of Nations navigation and commerce were free to all mankind. The attempt by the Portuguese to restrict trade with India provided just cause for war, and the Dutch were resolved to assert their rights by force. But *Mare liberum* was much more than a plea in a particular case. An earnest and powerful appeal was made to the civilized world for complete freedom of the high seas for the innocent use and mutual benefit of all. Grotius spoke in the name of humanity as against the selfish interests of a few; and though he made full use of arguments based on Roman law, natural law, and national law, it was principally the lofty moral ideas which inspired his work that gave it its reputation and charm (Fulton, 1911).

The opinions of the youthful Grotius were repeated more concisely in his great work *The Rights of War and Peace* (*De Juri Belli ac Pacis*, Libri Tres), which appeared in 1625 (Fig. 8) and greatly influenced the development of international law.

But the English sovereigns James I and Charles I defended the principle of *mare clausum*. It was an important element of the policy of Great Britain to strengthen her grip over the waters she claimed. None of the works on the rights of England in the adjoining seas — which had appeared when Charles's new policy began to be fashioned — was sufficiently profound or authoritative to furnish reasonable justification for that policy in the eyes of the world, however. The king, in 1632, desired to demonstrate his rights by means of "some



FIG. 8. Frontispiece from *De Jure Belli ac Pacis* by Grotius. The "beams" of the Law of Nations are directed toward its "father", the author.

public writing" founded upon the historical records of the realm, a demonstration that preceded the revival of the English pretension to the dominion of the seas.

The book *Mare clausum* appeared in 1635. The author, John Selden, wrote that his work had begun long before at the request of King James, and had been lying incomplete and imperfect for fully 16 years. It had been presented to King James in 1618, but several factors had prevented its publication, one of the chief being that the king feared that some passages in it might offend the King of Denmark, from whom he was then endeavouring to borrow money (Fulton, 1911). At Charles's request, Selden recast his treatise, added to it, and completed it. It was dedicated to the king and published by his "express commands" in 1635, as he explained later, "for the manifesting of the right and Dominion of Us and our Royal Progenitors in the seas which encompass these our Realms and Dominions of Great Britain and Ireland."

The political significance of Selden's work was immediately recognized both at home and abroad. It appeared at the time

when Charles's pretensions to the dominion of the sea were astonishing Europe. While the printers were still busy with it, the Earl of Lindsey's fleet was scouring the Channel to force the elusive squadrons of France to strike to the king's flag. The longing to compel homage to the flag burned like fever in the breasts of naval officers (Fulton, 1911).

Selden's book is an elaborate and masterly exposition of the case for the sovereignty of the Crown of England in the British seas, which overshadowed all the other numerous works that were written on that side of the question. It concludes with the following words:

It is certainly true, according to the mass of evidence set forth above, that the very shores or ports of the neighbouring sovereigns on the other side of the sea are bounds of the maritime dominion of Britain, to the southward and eastward; but in the open and vast ocean to the north and west they are to be placed at the farthest extent of the most spacious seas which are possessed by the English, Scots, and Irish.

It was Selden's misfortune that the cause he championed was moribund, opposed to the growing spirit of freedom throughout the world and to the emerging principle of *mare liberum*. At the same time, apart from its extreme doctrines regarding England's sovereignty over the sea, it more correctly represented what are now the accepted principles of appropriation of the adjacent or territorial sea than did most of the works written on the other side, not excepting those of Grotius.

The Law of Nations developed along the lines proposed by Grotius. More and more, the principle was recognized that the high seas should be open and free for the use of all nations. No nation could prevent another from carrying on traditional activities at sea. The exclusive sovereign claims over vast areas of the sea had to be abandoned. On the other hand, there was general recognition by the states that a littoral state had the right to claim sovereignty over the waters near its coast.

In this paper I have attempted to trace the evolution of two important legal concepts — important for international law, but also important for world policy. The rules of international law reflect the political ambitions and needs of states. This was true for the historic periods covered herein, and it is true for today. We have penetrated into the arguments and thoughts surrounding the concepts of *mare clausum* and *mare liberum*. In ancient times the former concept was widely recognized, and the latter broke through during the seventeenth century, reflecting new needs of the existing states.

I should like to conclude with a reference to the future. I am not sure that the principle of *mare liberum* has won the battle between the two concepts. The evolution of international law seems, rather, to be along the lines of the ancient principle of *mare clausum*. But if it happens this way, the world would abandon the old Roman maxim *maris communem usum omnibus hominibus* (the seas are for the use of Man). I hope that the open oceans, in the future, will be an area of *usus publicus* (for the public use of all nations). It is important to uphold the principles of freedom, among them the principle of scientific freedom. One of our tasks, then, is to contribute to this principle with respect to arctic waters.

SELECTED BIBLIOGRAPHY

- BUTLER, W.E. 1969. *The Law of Soviet Territorial Waters*. New York, Washington, London.
- . 1971. *The Soviet Union and the Law of the Sea*. Baltimore and London.
- Danmark-Norges Traktater 1523-1750 med dertil hørende Aktstykker: 1907. Copenhagen: Udgivne af L. Laursen.
- de PAUW, F. 1965. *Grotius and the Law of the Sea*. Brussels.
- Diplomatarium Islandicum. 1857-1911. Islenzkt Fornbréfasafan...Kaupmannahöfn og Reykjavik.
- Diplomatarium Norvegicum. 1847-1910. Kristiania.
- FULTON, T.W. 1911. *The Sovereignty of the Sea*. Edinburgh and London.
- Grágás. *Islandernes Lovbog i Fristatens Tid*. 1852. Copenhagen.
- GROTIUS, H. 1916[1609]. *The Freedom of the Seas, or The Right Which Belongs to the Dutch to Take Part in the East Indian Trade*. Scott, J.B. (ed.). Oxford.
- HJÄRNE, E. 1979. *Land och Ledung*. Rättshistoriskt Bibliotek 31(a). Lund.
- JOHNSON THEUTENBERG, B. 1972. *Suveränitet i havet och luftrummet*. (Souveraineté sur la Mer et dans les Airs: Etude sur les droits de souveraineté en haute mer et les limites de la juridiction nationale sur la mer et dans l'espace aérien). Stockholm.
- . 1973a. *Baltic*. New Directions in the Law of the Sea. Collected Papers Vol. III. London and New York.
- . 1973b. *Kolliderande suveränitet, Översikt över folkrättsliga problem i det nordiska närområdet*. (Colliding Sovereignty, A Survey of Problems of International Law in the Nordic Region). Kungl. Örlogsmannasällskapets Tidskrift i Sjöväsendet (May-June). Karlskrona.
- . 1979. *Ishavet — Folkrättsliga och strategiska problem*. (The Polar Sea — Problems of International Law and Strategy). *Världspolitikens dagsfrågor* 2. Stockholm: Utrikespolitiska institutet.
- LAKTHINE, W. 1930. *Rights over the Arctic*. *American Journal of International Law* 24:703ff.
- Magnum Bullarium Romanum, a beato Leone magno usque ad Benedictum XIII. *Opus absolutissimum Laertii Cherubini etc. 1727-1740*. Edit novissima T I-XIX. Luxembourg.
- MASTERSON, W.E. 1929. *Jurisdiction in Marginal Seas*. New York.
- Mezhdunarodnoye Pravo. (International Law). 1950, 1970. Moscow.
- MOLODSOV, S.V. 1960. *Mezhdunarodno-pravovoj rezhim otkritovo morja i kontinentalnovo shelfa*. (The International Regime of the Open Sea and the Continental Shelf). Moscow.
- NIKOLAJEV, A.N. 1954. *Problema territorialnych vod v mezhdunarodnom prave*. (The Problems of Territorial Waters in International Law). Moscow.
- . 1969. *Territorialnoje more*. Moscow.
- Norges gamle Love indtil 1387 I-V. Christiania 1846-95. 1912. Kristiania.
- OLENICOFF, S.M. 1972. *Territorial Waters in the Arctic: The Soviet Position*. Rand R-907-ARPA (July). Santa Monica, CA.
- PHARAND, D. 1973. *The Law of the Sea of the Arctic*. Ottawa.
- RAESTAD, A. 1912a. *Kongens Strømme*. Historiske og folkeretslige undersøkelser angaaende sjøterritoriet. Kristiania.
- . 1912b. *Norges Høihetsret over Spitsbergen i aeldre tid*. En folkerets-historisk fremstilling. Kristiania.
- SCOTT, J.B. (ed.). *Hugo Grotius: De Juri Belli ac Pacis, Libri Tres*. The Classics of International Law. London.
- SMEDAL, G. 1930. *Erhvervelse av Statshøihet over Polarområder*. Oslo.
- . 1932. *De l'acquisition de souveraineté sur les territoires polaires*. Paris.
- STURLASSON, S. *Heimskringla*. Norges Kongesagaer 1-4. 1979 edition. Oslo: Gyldendal Norsk Forlag.
- TARACOUZIO, T.A. 1935. *Soviet in the Arctic*. New York: The Macmillan Company.
- Völkerrecht. 1961. Hamburg: Akademie der Wissenschaften der UdSSR, Rechtsinstitut.