

GEOPOLITICAL SCENARIOS, FROM THE MARE LIBERUM TO THE MARE CLAUSUM: THE HIGH SEA AND THE CASE OF THE MEDITERRANEAN BASIN

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The usual rules of maritime and oceanic spaces were stated during the course of years in order to lead to two practices: open waters (Mare Liberum) and closed waters (Mare Clausum). From 1945 to 1982, the political geography of the sea founded expression in a general movement of rush on the high sea. Born of Montego Bay Convention, the new Law of the Sea implemented the principle of 200 mile zone. The enforcement of this principle within the Mediterranean Basin would transform it into a maritime space without high sea. At present, the Mediterranean deals with an increasing militarization. May Mare Nostrum become a Mare Clausum?

Key words: Law of the Sea, Exclusive Economic Zone (EEZ), 200 mile zone, high sea, maritime boundaries, political geography of the sea, Mediterranean Basin.

Uobičajena pravila na morskim i oceanskim prostorima ustanovljena su u prošlosti u namjeri provedbe dvaju načela: otvorenosti mora (Mare Liberum, slobodno more), i unutarnje pripadnosti voda (Mare Clausum, zatvoreno more). Od 1945. do 1982., politička geografija mora, počela se baviti sve češćom pojavom zauzimanja otvorenog mora. Kao proizvod konvencije iz Montego Bay-a, u novo Pomorsko pravo ugrađeno je načelo zone od 200 milja. Forsiranjem ovog načela unutar Sredozemlja, njegov morski prostor bi se pretvorio u zonu bez otvorenih (slobodnih) voda. Danas se Sredozemlje suočava s narastajućom militarizacijom. Smije li Mare Nostrum postati Mare Clausum?

Ključne riječi: pomorsko pravo, ekskluzivna ekonomska zona (EEZ), zona 200 milja, otvoreno more, morske granice, politička geografija mora, Sredozemni bazen

*Those who go down to the sea in ships,
Who do business in great waters;
They see the works of Yahveh
And his wonders in the high sea.
Psalm 107, verses 23-24*

So wrote the psalmist over 2500 ago, when navigation was already a well-established activity; for instance, King Solomon himself had a merchant fleet. Ancient Greeks saw the sea not only as an integrating factor of their homeland; they concentrated their activity on the sea to such an extent they became vulnerable to land attacks. Rome was more successful in combining naval power with an efficient terrestrial organization. The Mediterranean became the Greeks had never been able to make it, an inland sea, a Roman lake, a *Mare Nostrum*. Obviously, the issue of the guarantee of international maritime relations did not arise as long as this inland sea was ruled by Rome, but did later with the disappearance of the Roman Empire.

Sometime around the seventh century, former rules about sea use were compiled, translated and spread through Europe under the name of *Lex Rhodia*. In the following centuries, other compilations appeared in France, in England, in Scandinavia and in the Netherlands. The best known and most influential of these early versions of the Law of the Sea was the *Consolato del Mare*, written in Catalan in Barcelona towards the end of the thirteenth century or at the beginning of the fourteenth. The process was dramatically accelerated by the Europeans' jump beyond their usual shores, for purposes of exploration, conquest, annexation and colonization.

I - Towards Mare Clausum and Mare Liberum

Who had rights on the open sea, who could trade there? Such questions could be answered only by one superior to all monarchs of the Christian world. Pope Alexander III did so in 1169 for the Consul of Genoa: *freedom is to reign on seas*. In the second half of the fifteenth century, the great discoveries of Spaniards and Portuguese fired up a new competition for sea control. Having called for the sharing of seas in 1493, Pope Alexander VI had to arbitrate the Treaty of Tordesillas between the Portuguese and Spaniards in 1494: a line was drawn from the North Pole to the Cape Verde granting Spain all lands 370 leagues west of Cape Verde Islands. This treaty was the first attempt to define a geometrical boundary, known as the "Pope's Line"; it divided unknown lands into a Spanish domain and a Portuguese domain. Hence the Portuguese settled in Brazil and Western Africa, whilst Spaniards colonized the rest of South America, the Philippines and many islands in the Pacific.

During the thirteenth and fourteenth centuries, Norwegians, Danes, English and Dutch controlled various parts of the North Sea and North Atlantic. Sporadic frictions occurred between them in search of the best shoals. In the 1590s, the Danes gave up practice of "closed sea" they had inherited from the Norwegians. They established an 8 mile strip around the shores of Iceland and declared it to be Danish waters. Similar strips were rapidly defined around all the possessions of the Danish Crown (Norway, Faroe Islands.....). In the mid-seventeenth century Denmark extended the boundary to 24 miles. Meanwhile, the British were drawing straight baselines between promontories, some of which reached a width of 50 miles.

This was the beginning of the big legal and geographical debate from which most of the principles of the current Law of the Sea arose. The Dutch, a seafaring nation whose country had neither a long coastline nor any bays, were in favour of open seas. In 1630, the Dutch jurist Hugo Grotius published the well-known treatise *Mare Liberum*, which put forward the idea that all flags ought to be allowed in any state's territorial waters for purposes of trade and transportation. The British expert John Selden replied in 1635 with his treatise *Mare Clausum*, according to which only ships flying the flag of the adjoining state could sail its territorial waters. Where Grotius postulated the theory of open waters, Selden argued the theory of closed waters: two schools of thought were in opposition. In *De Dominio Maris Dissertatio*, published in 1702 and revised in 1744, the Dutch jurist Cornelius Van Bynkershoek instrumentalized both theories and established a terminology still in use nowadays. Towards 1750, the Italian diplomat Fernando Galiani proposed to generalize the 3 mile limit as standard width of territorial waters and this principle, codified by the Conference of The Hague in 1930, lasted until the end of the Second World War.

However, in the late eighteenth century, the British backed out the theory of *Mare Clausum* which did not suit their colonial expansionism and was detrimental to their merchant fleet. Until 1774, the Ottoman Empire applied the principle of *Mare Clausum* by refusing foreign ships access to the Black Sea. To this day, according to the Montreux Convention (1936), Turkey is entitled to control the passage of ships through the Dardanelles and the Bosphorus in times of war. The British hold on the Suez Canal in 1930 had to do with the doctrine of *Mare Clausum*.

II - The Rush on the High Sea: From the Truman Declaration (1945) to Montego Bay (1982)

The Conference initiated by the League of Nations in 1930 was a turning point in the history of the Law of the Sea, in that it introduced the novel concept of the sea as "common heritage of the mankind" and shifted the Law of the Sea from the domains of trade and security to that of resources. Between the two World Wars, a few states staked high claims of maritime jurisdiction (12 miles of territorial waters by the USSR in 1927). A major step was taken on September 20th, 1945 when President Harry Truman stated that henceforth, the United States had full jurisdiction over the resources of the continental shelf and its subsoil to isobath 200 meters. Shortly afterwards, the United States started the offshore exploitation of oil off Texas and Louisiana. This fired up the rush on the high sea, as the United States suddenly gained exclusive rights on 2,4 millions km². All South-American states unilaterally decreed the principle of 200 miles of territorial waters in the Santiago Declaration of 1952. This move was intended as a retaliation to the Truman Declaration of 1945 and it was imitated by some African and Asian countries in the ensuing years: Pandora's box had been opened up by the Truman Declaration. Decolonization and the exacerbated nationalism of these new states accounted for this unreasonable run to widen territorial waters.

As a consequence, the UN initiated large conferences in order to redefine the Law of the Sea and adapt to the new geopolitical situation. The first of these conferences, held in Geneva in 1958, defined the continental shelf as the epicontinental sea, the depth of which is less than 200 meters. The Second Conference on the Law of the Sea (Geneva, 1960) accepted the universal principle of 12 miles as the limit of exclusive territorial waters.

The rush on the high sea virtually ratified by those two conferences deserves further explanation. The political map of the world had changed dramatically between the interwar period and the 1950s and 60s. The evolution of international maritime law was linked to that of transportation techniques and maritime movement. Third World countries, including those without access to the sea, do not want to be left out the establishment of laws. Having neither a past nor a present in relation to the sea, they aspire to a future and have a numerical advantage. They also see rules as a check on big nations' greed and a guarantee for weaker states. Ever since the Second Conference held in Geneva in 1960, several Third World countries had been extending their jurisdictions on the high sea, which constituted a favourable context for a Third Conference as all their divergent and contradictory interests were to be conciled. Third World countries were opposed to the *Mare Liberum*, which, according to them, favoured powerful maritime nations. They supported *Mare Clausum* and put forward the "12 + 188" idea (12 miles of territorial waters followed by 188 miles of economic patrimonial sea). On December 17th, 1970, Resolution 2749 of the General Assembly of the United Nations decreed that the seabed as well as the subsoil beyond national jurisdiction belonged to the common heritage of the mankind.

The Third Conference of the United Nations on the Law of the Sea (New York, December 1973 - Montego Bay, December 1982) was the longest, largest, most complex and, arguably, the most important diplomatic conference in history. After 11 sessions spread over 200 weeks, 150 States adopted the United Nations' Convention on the Law of the Sea at Montego Bay (Jamaica) on December 10th, 1982. This was a major event in international affairs, since this Third Conference produced the first constitution drawn up for the sea, the sixth continent covering three quarters of the planet. This *special constitution* came into force only on November 16th, 1994, after it had been signed by 155 states and one year after the sixtieth ratification. The novelty of the Montego Bay Convention is that it newly delimits maritime spaces and gives adjoining states a territorial extension and decreasing rights in direction of the high sea.

On the basis of a straight baseline, each coastal state is granted a territorial sea 12 miles wide, with respect to all points of that straight baseline. Specific rules apply to the 116 international straits where the extension of territorial waters to 12 miles suppresses all free waters (Gibraltar, Messina...). Turkish straits retain the status defined by the Montreux Convention (1936), and the Suez Canal guarantees freedom of inoffensive passage. Beyond territorial waters, a new zone up to 200 miles, known as the Exclusive Economic Zone (EEZ) is instituted which may be seen as a major conquest of the next Law of the Sea. It can be interpreted as a compromise between *Mare Liberum* and *Mare*

Clausum, between territorialization and freedom at high sea. Within EEZ the coastal state has exclusive competence with respect to the environment.

III - The Squaring of the Circle or the Impossible 200 Mile Zone in the Mediterranean

The creation of the 200-mile zone resulted in an immediate and considerable reduction of the surface of high sea within maritime and oceanic spaces. When two states face each other at a distance of more than 400 miles, there is high sea; under 400 miles, the principle of the median line applies to the maritime boundary between two countries. The situation in the Mediterranean is inextricable because every single country is faced by other at less than 400 miles. The delimitation of the EEZ in this context is a real headache for, if the principle of median line were applied, high sea would disappear altogether and not a single square kilometer of *Mare Nostrum* could claim to belong to that category (Fig. 1 and 2). Moreover, the Mediterranean is one of the few seas, worldwide, where not a single state dared proclaim its own EEZ. The discovery and possible exploitation of submarine resources means the situation is fraught with danger. Therefore, only territorial waters limited to 12 miles from the shorelines apply in the Mediterranean. The rest is high sea, which means that Japanese, Korean and other boats take advantage of the situation to fish without control. Another illustration of the consequences comes from the *Orion*, a Russian oil tanker chartered by a British company, which is anchored all summer off Antibes at the limit of French territorial waters, and sells duty-free cigarettes, alcohol and fuel.

Were the principle of median line to be applied to establish EEZs in the Mediterranean, there would be losers and winners in the sharing of maritime space, in relation with the shape of the littoral of adjoining states, for the following reasons:

- 1/ Because of the angle of terrestrial boundary of a state when it arrives at the littoral, a concave coastline would grant but a small maritime space to the concerned state (Morocco, Israel).
- 2/ Conversely, a convex coastline bestows a large maritime space on the state (Egypt, Libya, Spain, Cyprus).
- 3/ The position of insular outposts by continental states would confer large maritime extents to them (Spain with Balearic and Chafarinas Islands; Italy with Sardinia, Sicily, Pantelleria and Lampedusa; Greece with the islands of Aegean Sea, Crete and Rhodes; France with Corsica). It is not unimportant that in this respect European coasts are much more better endowed than African coasts of the Mediterranean, with the exception of the Kerkenna Islands belonging to Tunisia.
- 4/ The existence of insular states (Malta, Cyprus) would automatically reduce the zone granted to neighboring states.

The Mediterranean being a gaming table surrendered by 22 players (states or territorial entities, of which Gibraltar, Monaco, Malta and the British Sovereign Bases on Cyprus), the establishment of EEZ is likely to produce at least four types of tensions:

1/ tensions resulting from differences of interpretation about straight baselines by concerned states, the more likely because each state defined its baselines at different times;

2/ tensions about territorial claims (Spain with Gibraltar, Morocco with Ceuta, Melilla and the Chafarinas Islands...);

3/ tensions over the maritime boundary between Greece and Turkey in the Aegean Sea, and the extreme case of the Greek islands of Megisti-Kastellorizon (10 km²), located less than 2 kilometers from the Turkish coast, which extend Greek maritime surface by 13.500 km² (Fig. 2);

4/ tensions over Cyprus since a Cypriot EEZ further reduce Turkey's opening on the *Mare Nostrum*. The two British Sovereign Bases on Cyprus (Akrotiri and Dhekelia) and their own territorial waters also add to the confusion of the Cypriot maritime domain (Fig. 2).

At present, no more than six maritime boundaries have been confirmed in the Mediterranean Basin. Four of these concern Italy with Spain (1978), Tunisia (1978), Greece (1980) and former Yugoslavia (1970); the fifth is between Tunisia and Libya (1982) and the last deals with British bases and Cyprus (1960). To the exception of the one between Great Britain and Cyprus, the others were drawn according to the principle of the median line.

If the principle of the 200 miles were applied in the Mediterranean, it would immediately result in a regionalization and nationalization of *Mare Nostrum*. It would probably be the part of the world, on a par with the Caribbean, most affected by the closing down of international space. Therefore, the obvious conflictual potential of the concept of EEZ in the Mediterranean makes the *statu quo* the best of solutions for the moment. We shall now address the issues raised by this very *statu quo*.

IV - Towards a "Liquid Far West" in the Mediterranean?

Two hundred millions inhabitants dwell along the 46.000 km of coasts of the Mediterranean, where few more than 130 millions were to be found a decade ago. Within thirty years, 45% of the population of the southern shore of *Mare Nostrum* will belong to the younger section (against 25% on the northern shore). Towards 2025, over three quarters of the coastal population of the Mediterranean, approximately 160 million people, will live in cities: problems are not lacking in these coastal regions. They receive 40 to 50 million tourists annually, a figure that could double within 10 years, and one third of the area is occupied by urban, industrial, touristic or port installations.

Until the Second World War, *Mare Nostrum* was a European lake dominated by the old maritime powers of Britain and France. Subsequently, the Mediterranean became an American lake controlled by the Sixth Fleet of the US Navy, constituted by 40 surface ships and some nuclear submarines. After the Suez Crisis (1956) which tolled the knell of Franco-British leadership in the *Mare Nostrum*, the Soviets stepped in with the Fifth Sovmedron, constituted by 40 ships. After the disappearance of the USSR in 1991, the Mediterranean changed

geostrategic profile by becoming a Western lake once again, though remaining as armed and patrolled as in the recent past: in that sense it can still be considered as a *liquid Far West*. It is estimated that at least 2000 warships of all descriptions, of which a hundred submarines, sail there, adding up to 150.000 men and a load of 2 million tons: this military fleet is the world's third most important. There are as many warships as there are merchant ships. The Sixth American Fleet is being reduced and replaced by EUROMARFOR, a joint Italian-French-Spanish emergency force under WEU.

Naval power in the Mediterranean clearly has to do with matters of power projection, maritime control and sea police. It uses up specific spaces along the coasts of *Mare Nostrum* (arsenals, ports, dry docks, refining docks, fuel storage, shipyards, bases for staff and families...). The Mediterranean claims about 80 naval bases, which have a considerable impact on the region, in the form of zones reserved for naval drill, for submarines and for air and sea forces. There are no fewer than 230 of these in the Mediterranean Basin, covering 1/30th of the sea and prohibiting circulation during exercises. This type of military appropriation clearly has to do with the principle of *Mare Clausum*.

The Third Conference of the United Nations on the Law of the Sea omitted several aspects of the political geography of seas and oceans, notably on their military use and the creation of nuclear-free maritime zones. There is no reference to an obligation for the coastal state to preserve the marine environment. Since 1982 and Montego Bay, the major environmental problem in the Mediterranean has been *driftnet fishing*, which has depleted the fish stock most dramatically, some nets drifting long after they have been abandoned by ships, becoming true "ghost nets" for years.

V - May Mare Nostrum become a Mare Clausum ?

Recent geopolitical developments have contributed, in a disorderly yet converging way, to the return in force of the principle of *Mare Clausum*. The first of these is that of *Joint Development Zones*, whereby two maritime states agree to appropriate a maritime space as a condominium, rather than confront each other about the boundary (France and Spain in the Bay of Biscay; Saudi Arabia and Sudan in the Red Sea; Saudi Arabia and Bahrain in the Persian Gulf; Japan and Korea in the China Sea; Norway and Iceland in the North Atlantic...). The second of these developments consists in the proliferation of marine parks and sanctuaries, of which all ships are excluded except for touristic or scientific purposes: these have caused protest by some states that freedom of navigation is unduly restricted. A third development results from the mounting power of the concept of *straddling stocks*. A state like Canada has used the pretext of such fish stocks at the margin of its EEZ to claim unilaterally the competence to enforce stock protection beyond its EEZ and consequently inspects ships at high sea.

Current practices seem to be developing in a way that favours "coastal states" extending their competence beyond the 200-mile limit. The most extravagant case is that of Chile promoting the concept of the "sea of presence" (*el*

mar presencial): in this zone contiguous to Chilean EEZ, the country reserves the right to retaliate against ships acting against Chilean interests. This Chilean "sea of presence" covers no less than 19,9 million km² in the South Pacific!

The matter at hand is to know whether the Law of the Sea resulting from the Montego Bay Convention (1982) is final or is only to constitute a stage or a transition before *Mare Clausum* starts extending over *Mare Liberum* again. There are two points of view on this:

1/ Big industrialized countries traditionally rally around Grotius's *Mare Liberum* principle, which enriches them through international trade, the projection of their strategy, access to resources, the preservation of their zones of influence.

2/ Selden's *Mare Clausum* is the point of view upheld by Third World countries whose economy is very much reliant on the "nourishing sea". Savage competition with other nations and the depletion of littoral resources push them to appropriate ever more distant maritime territories.

This dichotomy between *Mare Liberum* and *Mare Clausum* operates among countries adjoining the Mediterranean Basin and bears on geopolitical choices: rich countries of the northern shores and poor ones of the southern shore divide over *Mare Nostrum*. Unilateral exclusive appropriation of sea areas by pioneering states such as Chile gives new impetus to the march towards the high sea. If the process is to gain pace, countries are heading for common boundaries in the middle of oceans. Is high sea, in the Mediterranean and elsewhere, an element of the world political map threatened with disappearing?

The Mediterranean lost its role as center of the world centuries ago. However, it never stopped being a point of contact between people, and history weights heavily on all geopolitical and geostrategical scenarios. Nietzsche termed the Mediterranean *the most human of seas*, but would it remain so if were nationalized by adjoining states?

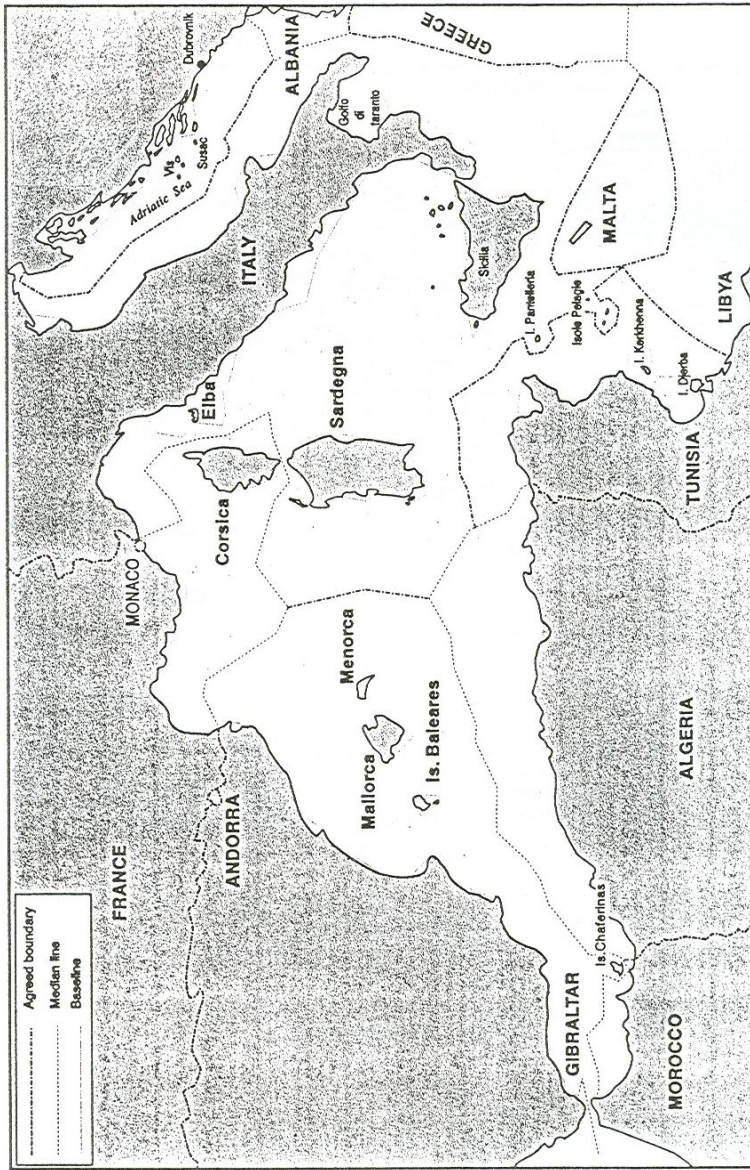


Fig. 1 Agreed and potential boundaries in the Western Mediterranean (after J.R.V. Prescott)
Sl. 1 Dogovorene i potencialne granice na Zapadnom Sredozemlju (prema J.R.V. Prescott)

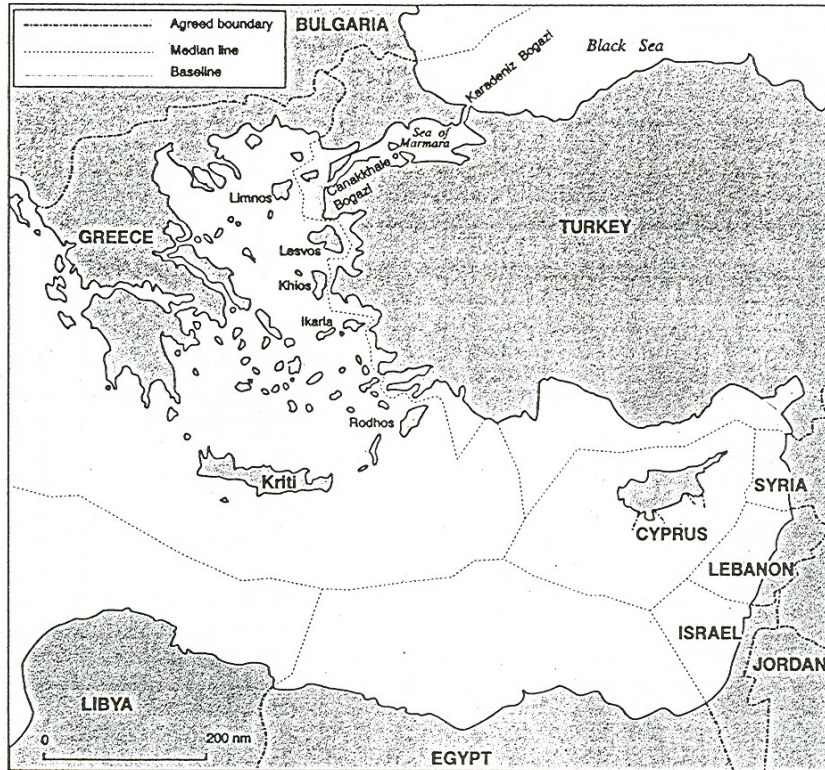


Fig. 2 Agreed and potential boundaries in the Eastern Mediterranean (after J.R.V. Prescott)

Sl. 2 Dogovorene i potencijalne granice na Istočnom Sredozemlju (prema J.R.V. Prescott)

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SAŽETAK

André-Louis Sanguin: Geopolitički scenario Mare Liberum i Mare Clausum: otvoreno more i slučaj sredozemnog bazena

Na morskim i oceanskim prostorima ustanovljena su u prošlosti uobičajene pravne norme u namjeri provedbe dvaju načela: otvorenosti mora (Mare Liberum, otvoreno, slobodno more), i unutarnje pripadnosti voda (Mare Clausum, zatvoreno more, teritorijalno more). Od 1945. do 1982., politička geografija mora, počela se baviti sve češćom pojavom zauzimanja otvorenog mora. Nakon donošenja konvencije u Montego Bay-u, u novo Pomorsko pravo ugrađeno je načelo pripadnosti zone od 200 milja od obale. Primjenom ovog načela unutar Sredozemlja, njegov morski prostor bi se pretvorio u zonu bez otvorenih (slobodnih) voda. Danas se Sredozemlje suočava s narastajućom militarizacijom. Smije li Mare Nostrum postati Mare Clausum?

SOMMAIRE

André-Louis Sanguin: Scénarios géopolitiques du Mare Liberum au Mare Clausum: la haute mer et le cas du bassin méditerranéen

Les règles d'usage des espaces maritimes et océaniques se sont précisées au cours des siècles pour aboutir à deux pratiques: les eaux ouvertes (Mare Liberum) et les eaux fermées (Mare Clausum). De 1945 à 1982, la géographie politique des mers s'est traduite par un mouvement général de ruée vers la haute mer. Le nouveau Droit de la Mer, issu de la Convention de Montego Bay, a mis en place le principe de la zone des 200 milles. L'application de ce principe au bassin méditerranéen en ferait un espace maritime où la haute mer aurait complètement disparu. La Méditerranée est actuellement l'objet d'une militarisation croissante. Le Mare Nostrum peut-il devenir un Mare Clausum?

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