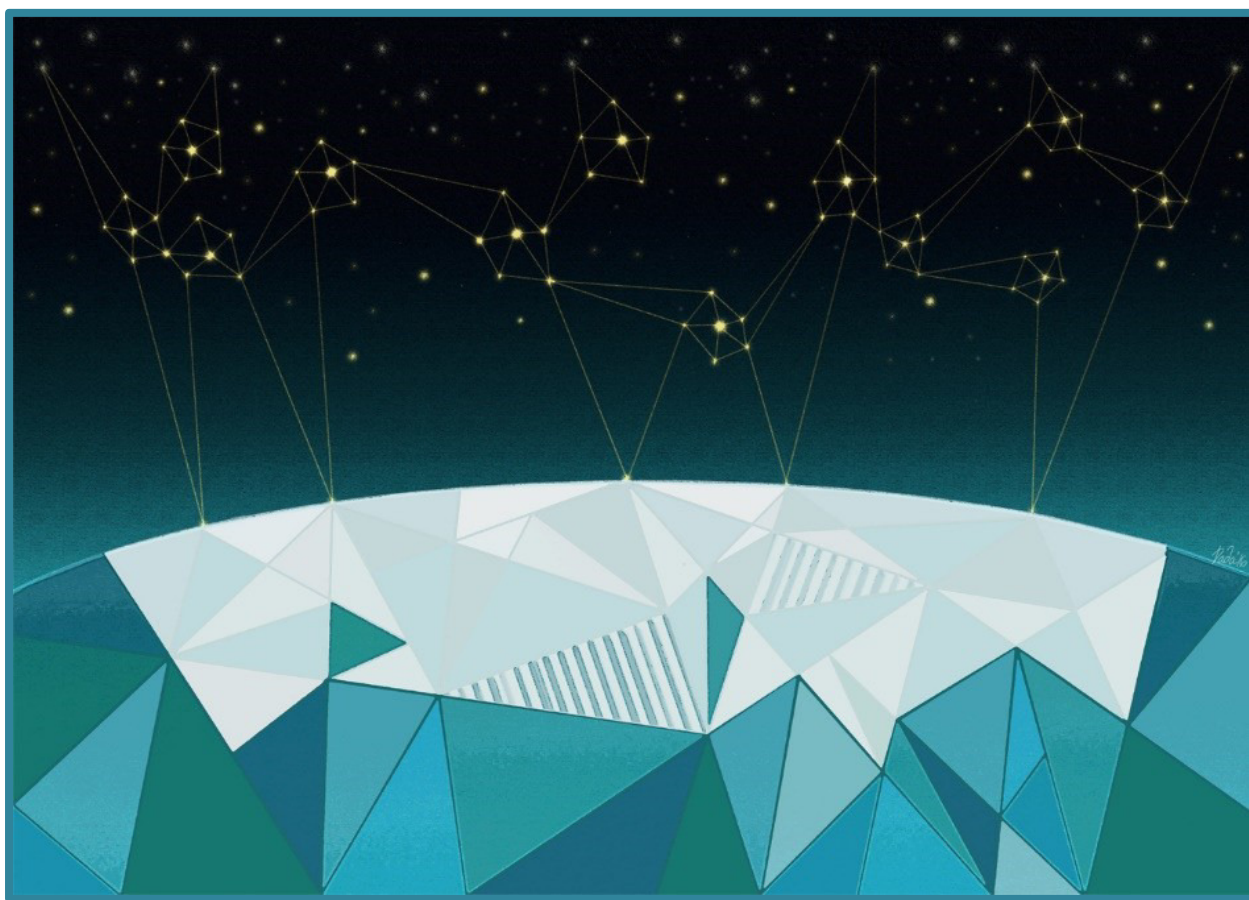


Proyecto Jean Monnet

La Unión Europea y la seguridad: defensa de los espacios e intereses comunes



Numero de proyecto: 565277-EPP-1-2015-1-ES-EPPJMO-PROJECT

Duración: 01/09/2015 – 31/08/2017

Universidad Complutense de Madrid

Cofinanciado por el Programa Erasmus +
de la Unión Europea



Resúmenes

Taller 1 “La utilización de los *global commons* y la seguridad de la UE”

PARTE 1:

Los clásicos *Global Commons*: océanos, ZIFMO, Ártico, Antártida, espacio ultraterrestre.

Alexander PROELSS: “The origins of the common heritage principle and its relationship to other concepts such as common concern”

Fernando GARCÉS DE LOS FAYOS: “The case for a full-fledged EU Arctic strategy”

(All opinions expressed by the speaker belong solely to him and do not necessarily represent the position of the European Parliament)

The EU may have a relatively small territory above the Arctic Circle but it has always been an important and engaged Arctic actor. The EU, along with the EU Member States, is a world leader in Arctic research and, more importantly, it works hard to encourage international research collaboration. Furthermore, many of its various sector policies, as well as its cross-border actions, have a significant positive impact on the Arctic region. So far, there have been three EU Arctic communications, in 2008, 2012 and 2016. The European Parliament passed resolutions concerning the Arctic in 2008, 2011 and 2014. A new resolution is in the making. The three priorities of the EU Arctic policy have always been maintained: a) Climate Change and Safeguarding the Arctic

Environment; b) Sustainable Development in and around the Arctic; and c) International Cooperation on Arctic Issues. In 2014, the EP asked for an EU Arctic strategy and the Council asked for proposals for the further development of an integrated and coherent Arctic Policy. The 2016 COM/EEAS communication is a response to the Council's request but not to the Parliament's. The EU should think in 'circumpolar' terms as well as in European terms when defining its Arctic policy. We should aim for an EU Arctic strategy, consistent with the EU Member States' Arctic strategies, in which coherence and coordination (and not hierarchy) should be applied. This would be the way for the EU to take the place on the international stage that it deserves as an Arctic player. In other words, the EU should be neither 'assertive' nor 'submissive' in its interaction with the other big Arctic players of the world.

Ignacio José GARCÍA SÁNCHEZ: “The Arctic. Old or new geopolitics? A European vision”

Juan Manuel DE FARAMIÑÁN: “New trends of Outer Space Law in the framework of Global Commons”

Law treaties in medieval England defined the figure of the Global commons as those lands belonging to the community or the municipality that are exploited for the common benefit without belonging to no one in particular. It is from this medieval legal standard as the concept is extrapolated and, at present, is used to define those areas subject to the interest of the international community.

Undoubtedly outer space is a major challenge for humanity and as such we pose a dilemma both philosophical and scientific: human beings seek to conquer space and take profit out of this. However, it is very important to establish a dialogue between the scientific world and public opinion, as we understand that the presence of human beings in outer space and its exploration must be analyzed not only from a scientific and economic point of view but also it should be supported in ethical reflection and values at an international level, to the extent that outer space should be considered as Common Heritage of Humanity.

The Lisbon Treaty has clearly defined the space interests and any Member state of the European Union should withdraw from this task. Indeed, under the Title XIX of the Treaty on the Functioning of the European Union (TFEU), dealing with the Research and Technology and Space Development and in particular Article 189 provides that, in order to promote scientific and technical progress, industrial competitiveness and the implementation of its policies, the Union shall draw up a European Space Policy.

Marco PEDRAZZI: “The EU space security policy”

Security (including safety) is a central concept in relation to outer space activities.

The role of the EU in space, aside that of its member States, private entities and the European Space Agency (ESA), is more and more relevant. Today, after the Lisbon Treaty, the spread into space of EU interests finds its legal basis in the TFEU (Arts. 4.3 and 189): the EU and member States enjoy parallel competences regarding outer space activities. The TEU rules on external action, and specifically on CFSP and on CSDP, are equally relevant.

The relationship between ESA and the EU is based on a cooperation framework. The EU is realizing, thanks to ESA, some major space programmes, such as Galileo and Copernicus, of particular interest for reaching important policy objectives.

At the same time, in 2008, the EU Council decided to propose to the international community a draft Code of Conduct for Space Activities, lately revised in 2014, consisting of a set of non-binding measures, complementary to the existing international legal framework governing space activities. The Code should function as a TCBM, able to enhance the safety, security and sustainability of outer space activities. It has been proposed to nearly 100 States and many, including the US, have expressed their interest or support. However, States such as China and Russia, pursuing their own international space security political agenda, are opposed.

Aside from the Code, Europe should concentrate on developing a coherent and comprehensive intra-European space security policy.

Philip DE MAN: “Space policy in support of EU defense capabilities”

José JUSTE RUIZ: “The seabed Area uncertain status as a common heritage of mankind”

THE AREA’S DEFINITION AND LEGAL STATUS UNDER UNCLOS

For the purposes of the Convention, the Area comprises the seabed, ocean floor and subsoil thereof, beyond the limits of national jurisdiction, including (all) its resources (Article 1, 1 (1), (2) (3)). The Area’s legal status is different from that of the superjacent waters and air space (Art. 135).

Part XI of UNCLOS declares the Area and its resources as a common heritage of mankind (Art. 136) which is excluded from sovereignty or appropriation (Art. 137). There shall be no amendments to the basic principle relating to the common heritage of mankind (Art. 311, 6).

Part XI of UNCLOS sets up a specific regime for the exploration and exploitation of mineral resources of the Area (mining activities). However, various articles of this part apply to the Area at large such as those referring to “general conduct of States” (Art. 138), the “use of the Area exclusively for peaceful purposes” (art. 141), scientific research in the Area (Art. 143 and 256) and preservation and disposal of archeological and historical objects (Art. 149). The powers and functions of the Authority, although specially focused at organizing and controlling activities concerning mineral resources of the Area may also extend to other activities expressly conferred upon under the Convention (Art. 157, 2).

REGIME OF THE ACTIVITIES IN THE AREA UNDER UNCLOS

Under the provisions of UNCLOS some activities affecting the Area are permitted to all States, namely: the laying of submarine cables and pipelines (Art. 89 (c) and 112), internationally regulated dumping (Art. 210), construction of artificial islands and other installations (Art. 87 (d) and 147), and marine scientific research (256).

Part XI and Annexes III and IV of UNCLOS establish a specific and detailed regime for the exploitation of all solid, liquid and gaseous mineral resources *in situ*, including polymetallic nodules (Art. 133) and (most likely) hydrocarbons. However, Part XI does not have specific provisions relating to the exploitation of other resources of the Area such as biological and genetic resources of the sea-bed and geo-morphological resources of the sub-seabed. In my opinion, this does not mean that activities addressed to the exploitation of biological and geological resources of the Area necessarily fell under the freedom of access rule applying in the high seas. It rather mean that specific regimes, giving effect to the “common heritage of mankind” principle, shall be set up.

ENVIRONMENTAL PROTECTION AND PRESERVATION OF THE AREA

The general provisions of Part XII of UNCLOS concerning the protection and preservation of the “marine environment” apply to all parts of the sea and, consequently cover also all activities in the Area. In addition, Part XI of UNCLOS includes specific provisions relating to the protection of the marine environment with respect to mining activities in the Area (Art. 145 and 139). In my opinion, similar provisions should be adopted in order to ensure that activities addressed to biological or geological resources of the Area respect the general obligations of States to protect the marine environment.

The International Court of Justice, in its 1966 advisory opinion on the legality of the threat or use nuclear weapons, declared “the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment” (Legality of nuclear weapons, Advisory opinion, 1966). Moreover, the International Law Institute (IDI), in its 2005 Cracovia Resolution on “Obligations and rights *erga omnes* in International Law” affirmed that “obligations relating to the environment of common spaces” are examples of such *erga omnes* obligations binding all subjects of international law.

FADING AWAY OF THE AREA AS A COMMON HERITAGE OF MANKIND?

The legal status of the Area as a common heritage of mankind is nowadays affected by a regressive trend with several manifestations:

- The original legal regime of the Area was amended through GA Resolution 48/263 adopting the Agreement relating to the implementation of Part XI of UNCLOS (1994).
- The Area's geographical extension is being substantially reduced as a consequence of the proliferation of national claims for extended Continental Shelves.
- The regulations adopted by the Authority are limited so far to only three mineral resources, namely: polymetallic nodules, polymetallic sulfides and ferromanganese crusts.
- Some scholars sustain a doctrinal restrictive interpretation which challenges the legal autonomy of the Area under UNCLOS. According to such interpretation, the Area shall be considered as a part of the high seas except for activities directed to mineral resources which are covered by the specific provisions of Part XI of UNCLOS (Oude Elferink).
- Institutional obliviousness: the 1996 London Protocol discussions on the amendments allowing carbon capture and storage in sub-seabed geological formations (2006) and transboundary export of CO₂ fluxes (2009) describe injection in the sub-soil of the Area as "transfer to the high seas". Several recent documents of UN Agencies do not cite the Area among the global commons identified in International Law (UN System Task Team on the Post-2015 UN Development Agenda, January 2013).

PARTE 2: Los nuevos *Global Commons*:

Clima, medio ambiente, recursos genéticos, ciberespacio, propiedad intelectual

Lara LÁZARO TOUZA: “Europe and climate change governance after the Paris Agreement”

The European Union (EU) has sought to lead by example in the climate change arena since the late 80's, despite an asymmetric demand for climate action across Member States, diminishing economic clout and its decreasing contribution to global emissions. The reasons for this leadership include a demand for action by Europe's citizens that are increasingly worried about the consequences of climate change, energy security concerns as EU's access to fossil fuels is limited and the desire to engage in an economic model that is more sustainable and can deliver growth and jobs.

As regards EU's climate pledges, it is recognized that they represent a 'medium' effort towards limiting temperature increases to 2°C compared to pre-industrial levels. More needs to be done by Europe (and others) to ensure we avoid a dangerous anthropogenic interference with the climate system.

Europe has however managed to decouple its economic growth from its GHG emissions and it has enacted relevant legislation to honor its pledges. Among the most representative: the 2020 climate and energy package, the low-carbon economy roadmap to 2050, the 2050 Energy roadmap, the 2030 climate and energy framework (40% reduction in GHG emissions, 27% renewables, 27% energy savings, ETS reform, diversification of supply, interconnections, policy coherence and coordination, investor certainty), and the Energy Union that seeks to provide a secure, sustainable, and affordable energy and whose dimensions include: energy security, internal energy market, energy efficiency, decarbonization, research, innovation and competitiveness.

The challenges ahead in the post Paris Agreement world include implementation of pledges and ratcheting up climate ambition. Europe's reference scenario (REF2016) shows insufficient progress towards meeting 2030 and 2050 goals. Further challenges include overcoming path dependencies in the fossil fuel

industry and its power to lobby governments, among other.

Rosa GILES CARNERO: “Integrating climate change action into EU security police”

El cambio climático se introduce en la Política de seguridad de la UE y se configura como una amenaza que, aunque se admite que puede afectar a las personas y el territorio europeo, conlleva sobre todo un efecto potenciador en situaciones de riesgo. El cambio climático aparece desde esta perspectiva como un elemento que puede incrementar posibles conflictos, de forma que su incidencia en fenómenos como la desertificación, la degradación del suelo, o la escasez de agua o comida puede incrementar la vulnerabilidad de determinadas zonas y situaciones de riesgo en materia de seguridad.

En el documento “*Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union’s Foreign and Security Policy*”, se ha resumido la respuesta que la UE prevé ante la amenaza que supone el cambio climático. En este documento se señala la necesidad de que la UE desarrolle una intensa cooperación con diferentes socios en diferentes Áreas, y que además colabore en el desarrollo de la gobernanza de los “global commons”. La alianza con los Estados más relevantes en la acción climática internacional, como son Estados Unidos y China, resulta crucial para avanzar en el diseño de estrategias con las que abordar esta amenaza. Pero además, la UE debería en este ámbito mantener una presencia destacada en el régimen internacional desarrollado para la gestión del cambio climático.

Desde la perspectiva señalada, aparece con claridad la idea de que los elementos de política exterior y de seguridad deben quedar inexorablemente unidos. Abordar el cambio climático desde la perspectiva de la seguridad supone realizar un proceso de securitización en el que se subrayan los efectos transversales que esta amenaza ambiental puede desplegar. Esta visión puede ser un incentivo para desarrollar una mayor acción de diplomacia ambiental en el ámbito del cambio climático, debido a que la principal actuación a llevar a cabo es precisamente tratar de establecer un sistema de gestión global del cambio climático que pueda ser eficaz. Esta aproximación presenta una naturaleza

preventiva, y resulta acorde con la idea de tratar de enfrentar una amenaza de las características del cambio climático.

Como complemento a lo anterior, quedaría por explorar el desarrollo de acciones específicas por parte de la UE en el ámbito de la adaptación al cambio climático. En cualquier tipo de despliegue estratégico u operativo desarrollado por la UE debería tenerse en cuenta una metodología acorde con la evaluación, mitigación y adaptación al cambio climático. El principal obstáculo en este ámbito es la complejidad técnica, pero su desarrollo supone el de una transversalidad que mostraría una verdadera y eficaz integración de la gestión del cambio climático en una política de seguridad.

La acción para la gestión del cambio climático requiere cambios de modelos de vida, y por tanto una compleja actuación que no puede ser emprendida únicamente desde una aproximación basada en la securitización del problema. No obstante, la perspectiva de la seguridad incluye un mayor incentivo para la acción ambiciosa en materia ambiental, y un sistema operativo que puede ponerse al servicio de la acción para la mitigación y la adaptación al cambio climático.

Ángel GÓMEZ DE AGREDA: “Cyberspace: beyond the concept of Global Commons”

Pedro DE MIGUEL ASENSIO: “The so-called intellectual commons and EU law”

This contribution provides a general overview of the main legal issues raised from a European perspective by the development of a concept of “Intellectual Commons”. That concept basically refers to intellectual resources that are openly accessible and not under private control and hence it may conflict with the nature of intellectual property as territorially limited exclusive rights. The scope of copyright protection determines not only the extent of the public domain but also how certain uses may be permitted as a result of limitations or exceptions to the exclusive rights. Particular attention is paid to the challenges posed by

license contracts regarding free and open source software and other alternative license models in the light of the European Union and national legislation in the field as well as the proposals debate on the review of the legal framework of the Union concerning copyright. The main issues addressed are:

- I. Intellectual Commons versus proprietary aspects of intellectual property.
- II. Intellectual Property and Public Domain.
- III. Intellectual Commons beyond Public Domain: Open Access; Free/Open Source Software; Creative Commons (Wikipedia).
- IV. Implications of the expansion of IP Protection: Extension of Rights.
- V. Licenses regarding intellectual commons and EU copyright law.
- VI. Developments concerning the creation of digital libraries.
- VII. Other developments regarding limitations and exceptions to Copyright.

Beatriz BARREIRO CARRIL: “Genetic Resources as a Place of Convergence of Different Global Commons: Challenges for the EU Patent Policy”

The diversity of genetic resources is considered a human legacy. In this sense, it falls into the category of global commons. Moreover, genetic resources are a place of convergence of other specific global commons: cultural diversity and food and health security. In fact, lots of peoples use traditional cultural knowledge linked to genetic resources to satisfy their basic needs of health and food.

States which are part in the Convention on Biological Diversity have the obligation of ensuring that their patent regimes promote the development by traditional famers and indigenous peoples of their cultural traditional knowledge. EU' States which are part in this Convention face some challenges, both at the interior of the EU and at the external level.

At the internal level, the rules on patent protection for biotechnological inventions, which are harmonized in the EU by Directive 98/44/EC on the legal protection of biotechnological inventions need to be improved in order to include an obligation similar to the one contained in the BDC, which asks States to show proof that the biological material has been obtained with the consent of local communities. At the external level the common defense of the introduction of the

disclosure of origin obligation -not only in relation with the State origin but also in relation with the territory/community origin- within the WIPO and TRIPS rules is also a challenge for the EU.

Miguel Enrique ARENAS MEZA: “The comprehensive EU’s approach to fisheries, global commons and security”

Tullio SCOVAZZI: “The Principle of Common Heritage of Mankind as Applicable to Some Marine Resources: the Position of the European Union”

Elena LOPÉZ GUNN: “Think global, act local? Water as part of the global commons”