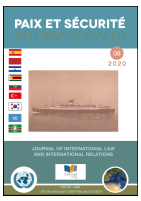
Estudios

Between Grotius and the pro communitate Principle: The Limits to the Principle of Freedom of the Seas in the Age of Marine Global Commons



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Abstract: .

Keywords: General interests of the international community, Mare publicum, Marine global commons, Principle of freedom of the seas, Principle of territorial jurisdiction, Principle *pro communitate*.

Resumen: Este trabajo tiene por objeto defender y argumentar la necesidad de incrementar los límites al principio de libertad de los mares, que había propuesto Hugo Grocio en los inicios del siglo XVII, con la finalidad de ayudar a una mejor protección de los intereses generales de la comunidad internacional. Los espacios y recursos marinos que se encuentran más allá de la jurisdicción nacional pueden ser considerados ahora como recursos marinos globales (*marine global commons*). La protección y administración de estos recursos comunes globales aconseja y aun exige el incremento de los límites a las libertades tradicionales de los mares. La respuesta no está ni en el viento de tierra que es portador de soberanía ni en el viento de alta mar que está cargado de libertad. La opción es establecer límites a las reglas tradicionales pero no en nombre de la soberanía sino del interés general de la comunidad internacional.
Las ideas fundamentales que se exponen y analizan son, en primer lugar, que la libertad de los mares junto con el principio de jurisdicción territorial son principios constitutivos del sistema internacional de Estados que se crea a partir de la Paz de Westfalia de 1648. En segundo lugar, se defiende que el incremento de usos, usuarios, relaciones y prácticas en la alta mar y en los recursos naturales que en ella se encuentran permite considerar tales espacios y recursos como *marine global commons*. En tercer lugar, se constata que las reglas tradiciones derivadas de las libertades de los mares plantean en la actualidad serios problemas en los espacios y recursos comunes globales marinos. Y, por último, se propone que es necesario un Derecho del mar con una mayor y mejor caja de herramientas jurídicas que permita compatibilizar las actividades y los intereses de los Estados, sean ribereños, de puerto o de pabellón, y de los actores no estatales con la protección de los intereses generales de la comunidad internacional.

Palabras clave: Intereses generales de la Comunidad internacional, *Mare publicum*, Principio de libertad de los mares, Principio de jurisdicción territorial, Principio *pro comunitate*, Recursos comunes marinos globales.

Résumé: : Cet article vise à défendre et à argumenter la nécessité de repousser les limites du principe de liberté des mers, proposé par Hugo Grotius au début du XVIIe siècle, afin de contribuer à mieux protéger les intérêts généraux de la communauté international. Les espaces marins et les ressources qui ne relèvent pas de la juridiction nationale peuvent désormais être considérés comme des ressources marines mondiales (*marine global commons*). La protection et l'administration de ces ressources communes mondiales conseillent et exigent même l'augmentation des limites des libertés traditionnelles des mers. La réponse n'est ni dans le vent de terre qui est porteur de souveraineté ni dans le vent de haute mer chargé de liberté. L'option est de fixer des limites aux règles traditionnelles mais pas au nom de la souveraineté mais de l'intérêt général de la communauté internationale.
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Les idées fondamentales qui sont exposées et analysées sont, d'une part, que la liberté des mers ainsi que le principe de la juridiction territoriale sont des principes constitutifs du système international d'États qui a été créé à partir de la Paix de Westphalie de 1648. Deuxièmement, on fait valoir que l'augmentation des utilisations, des utilisateurs, des relations et des pratiques en haute mer et dans les ressources naturelles qui s'y trouvent permet à ces espaces et ressources d'être considérés comme des biens communs marins mondiaux. Troisièmement, il est à noter que les règles traditionnelles dérivées des libertés de la mer posent actuellement de graves problèmes dans les espaces et ressources marins communs mondiaux. Et, enfin, il est proposé qu'un droit de la mer soit nécessaire avec plus et mielleux d'outils juridiques permettant de concilier les activités et les intérêts des États, qu'ils soient côtiers, portuaires ou battant pavillon, et des acteurs non étatiques avec la protection des intérêts généraux de la communauté internationale.

Mots clés: Intérêts généraux de la communauté internationale, *Mare publicum*, Principe de liberté des mers, Principe de juridiction territoriale, Principe *pro comunitate*, Ressources marines communes mondiales.

I. INTRODUCTION

This work aims to defend and argue the need to increase the limits to the principle of freedom of the seas, which Hugo Grotius had proposed in the early seventeenth century, in order to help better protect the general interests of the international community.

The fundamental ideas that are exposed and analyzed are, firstly, that the freedom of the seas together with the principle of territorial jurisdiction are constitutive principles of the international system of States that was created from the Peace of Westphalia of 1648. Secondly, it is argued that the increase in uses, users, relationships and practices in the high seas and in the natural resources found in it allows such spaces and resources to be considered marine global commons. Thirdly, it is found that the traditional rules derived from the freedoms of the seas currently pose serious problems for global marine common spaces and resources. And, finally, it is proposed that a Law of the Sea is necessary with a greater and better legal toolbox making

it possible to reconcile the activities and interests of States, be they coastal, port or flag, and non-State actors with the protection of the general interests of the international community.

The work is structured in three parts. In the first part, the principle of freedom of the seas and the principle of territorial jurisdiction are analyzed as constitutive principles of the international system and the consequences that they have had until the 20th century. In the second part, the classification of marine spaces and resources beyond national jurisdiction as marine global

commons and the demand for a new type of global governance are argued. And, in the third part, some of the existing norms, institutions, procedures and techniques in the Law of the Sea which can contribute to improve the administration of the high seas and its global common resources and to the protection of the global public interest are exposed.

II. THE FREEDOM OF THE SEAS AND THE PRINCIPLE OF TERRITORIAL JURISDICTION AS CONSTITUTIVE PRINCIPLES OF THE INTERNATIONAL SYSTEM

In the first half of the 17th century, two of the constitutive principles of the international system related to the seas and oceans and to the territory appeared: the principle of freedom of the seas and the principle of territorial jurisdiction. Both principles became basic legal norms due to their systemic importance, they not only regulated international relations at sea the first and on the land surface the second, but also they helped to maintain order in modernity until the twentieth century and helped Europe conquer the entire world.

1. The territory and the principle of territorial jurisdiction

The territory can be considered as a political technology that spatially delimits sovereignty and that, with the help of the science of cartography, has been used by modern rulers to create, in Weberian terms, an administrative and rational state that exercises monopoly of coercion and force in a given area.2 The territory would be a means used by the modern State to exercise its regulatory, executive and judicial power (jurisdiction) over the people who are in it and, at the same time, is the first object of said power.3

From the Peace of Westphalia in 1649, territorial differentiation, defined, fixed and mutually exclusive, was the fundamental characteristic of the form of government of the new system of States. In this context, the territory acquired a central role in international law, in which the principle of territorial jurisdiction became an essential principle of the new system of States. This principle has a constitutive function in the operation of the international system: on the one hand, it guaranteed each State the exclusivity of the

exercise of its powers in a given territory in matters that it considered internal over which it exercised exclusive jurisdiction (jurisdiction); and, on the other hand, foreign affairs that went beyond territorial borders derived from its relations with other States were regulated by international law and in which, only exceptionally, it could exercise some powers by virtue of the principle of extraterritoriality.

2. Hugo Grotius and the freedom of the seas

In response to the Portuguese claims for exclusive access to ports and trade with the East Indies, on February 25, 1603, the Dutch admiral Jacob van Heemskerk at the service of the Dutch East India Company, seized the Portuguese ship Santa Caterina. In order to legitimize such arrest before the Dutch Court and to convince the Mennonist shareholders of said company, Hugo Grotius wrote between 1604 and 1605 an extensive argumentative work, De iure praedeae. Some changes in the relations between the Netherlands and the Hispanic monarchy (of which Portugal was a part at that time) discouraged the publication of this work. However, in 1609 he published, first anonymously and later with his name, the main chapter of it with

the title of Mare Liberum,4 which became a work of capital importance for international law. In it, he defended the freedom of the seas for all States and free and shared access among all nations in all seas. The legal arguments put forward by Grotius were, in synthesis, that the Eastern Islands were accessible to all the States because the Portuguese did not have dominion (sovereignty) by discovery or by pontifical donation or by title of war. Consequently, he concluded that the Portuguese did not have the exclusive right of navigation and trade with the East Indies by occupation, by pontifical donation or by prescription or custom. These ideas were not new since, in essence, some authors of the Spanish School of International Law of the 16th century had previously defended them. Specifically, Francisco de Vitoria had defended the freedom of trade (ius communicationis)5 in 1532 and Fernando Vázquez de Menchaca in 1564 the freedom of the seas. This defense of the freedoms of the seas served Grotius, on the one hand, to claim the freedom of access and trade of the Dutch East

India Company, which, like all companies of this type, had a mixed public and private nature at the same time, since, as stated by Max Huber in the matter of the Island of Palmas, "companies formed by individuals and dedicated to economic purposes (Companies created by Charter) were granted, by those States on which they depended, powers of a public nature for the acquisition and administration of colonies".6 And, on the other hand, these freedoms were also the legal argument for the Netherlands' claim for access to English ports and North Sea fisheries resources. In short, "the Mare Liberum was written against Portugal, published against Spain and used against Great Britain by the Dutch. And in the same way, written to defend the freedom of the seas for navigation and commerce through all the Oceans, it was printed to try to obtain the freedom of fishing in the nearby seas".7

The answer to H. Grotius' theses came through the publication of two works. The first, by Serafín de Freitas in 1625 and, later, by John Selden in 1635, which started the so-called "great book battle".8 Serafín Freitas, in his work De iusti imperio lusitanorum asiático, refuted each of Grotius's arguments by resorting to all kinds of sources, especially those of canon law, and claimed ownership of the seas of the eastern islands for the King Felipe IV of Spain (and III of Portugal). According to this author, Portugal would have acquired them by prescription or custom that began at the time of the papal concession of Martin V in 1417 and that would have been reinforced by the occupation of said route by the Portuguese sailors.9 The battle was continued by John Selden, who in 1635 published the work Mare clausum in which he defended the exclusive rights of the coastal States over their neighboring seas.10

Paradoxically, a few decades later, the English hegemony in the seas ended up imposing the proposal of H. Grotius of freedom of the seas. In fact, as early as 1703, C. van Bynkershoek emphasized that the consideration that the high seas was not under the sovereignty of any State was already a dominant idea.11 This basic idea became part of the content of classical international law. In this sense, L. Oppenheim affirmed that "the sea is open by nature, that it cannot be the object of possession through occupation and that it can never be under the sovereignty of any State".12 However, Grotius had a spatial conception of the seas. The seas were a means to facilitate communication between different parts of the globe and an instrument to promote freedom of trade.

3. Consequences for the State system up to the 20th century

Both the principle of territorial jurisdiction and the principle of freedom of the seas are constitutive principles of the Westphalian State system that articulated the international order in modernity until the beginning of the 20th century. Both principles helped Europe to conquer, in one way or another, the entire globe. Thus, at the beginning of the 20th century, the era of great discoveries had already come to an end and pointed to two fundamental consequences: the strategic effects on the essential unity of the world's oceans and the temporal and spatial implosion of the globe.13 The first consequence was derived, on the one hand, from the unity of the seas, from what J.H. Parry considered as "the great discovery was the unity of the sea,

that all seas are one"14 And, on the other hand, it was derived from the English naval supremacy that gave it the dominion of the seas and the responsibility to guarantee the freedom of trade. The second consequence, which was more ignored by the commentators of the time, today we know that it had enormous impact, was the integration of different modernities, of different separate and coexisting world systems that enjoyed a relative autonomous social existence and that

had their own laws of historicity, in a single post-modern world system already different from that of the 'Columbian' era of the great discoveries.15

In this Westphalian State system, international law relating to the seas and oceans regulated a minimum legal order to guarantee the exercise of the freedoms of the seas, conceived as a means of navigation and commerce. In this context, freedom of navigation appeared and became international customary norms, which was articulated around the legal link of the flag and the principle of exclusive jurisdiction of the flag state (with very few exceptions), and freedom to fish almost without restrictions.

Now, in relation to the seas and oceans, the principle of territorial jurisdiction and the principle of freedom of the seas have always been carriers of winds of different nature. R-J. Dupuy explained it very graphically with an elegant metaphor: "the sea has always been whipped by two winds of opposite sign: the wind that blows from the high seas towards land is a wind of freedom; and the wind that blows from land to the high seas is the bearer of sovereignty. The law of the sea has always been in the midst of these conflicting forces".

III. SEAS AND OCEANS AS GLOBAL COMMON SPACES AND RESOURCES

This traditional conception of modernity that conceived of the seas and oceans, especially the high seas, solely as a means of communication has been modified and completed in practice. The high seas is now a new form of spatiality in which new types of international relations, uses and practices are developed. And this new form of spatiality demands a new type of governance different from the traditional one that was based on the freedoms of the seas. This traditional conception of the seas and oceans was challenged by at least three factors. The first was the extension of the competences of the coastal States, which is explained by means of different legal arguments: the sovereignty of the coastal State, the exercise of functional competences,

the recognition of jurisdictional rights, the adjacency principle, the notion of continental platform extension or the claim of special interests and the possibility of exercising the so-called progressive or rampant jurisdiction (creeping jurisdiction) beyond its Exclusive Economic Zone. The second challenge came from the development of technology that allows possibilities for the exploration and exploitation of marine spaces and resources that had not been possible at all. And the third factor has been the increase in uses and legal relations on the spaces, resources and goods that the seas and oceans can provide. The preamble of the 1982 United Nations Convention on the Law of the Sea recognizes the convenience of establishing a legal order for the seas and oceans that, with due respect for the sovereignty of all States, "facilitates international communication and promote the peaceful uses of the seas and oceans, the equitable and efficient use of their resources, the study, protection and preservation of the marine environment and the conservation of its living resources" (para. 4).

In particular, in the case of the high seas, the basic rules applicable to fishery resources (freedom of access for all and rivalry in the use and enjoyment of such resources) are those that characterize the so-called global commons and spaces. For this reason, the evolution and intensification of the activities of the different types of actors in the high seas allow us to maintain that said marine space provides global common resources, such as fisheries resources, and also global public goods, such as freedom of air and maritime navigation. Furthermore, the intensification of uses in the high seas, their consideration as global commons and the legal regime applicable to space and resources has generated the already known problem in common spaces and resources of another nature with the expressions of 'the tragedy of the commons'17 or 'plunder of the commons'.

Addressing these types of problems requires new forms of governance and the modification of the current legal regime. The proposals made can be synthetically systematized into two options: on the one hand, the appropriation and division of all marine spaces; and, on the other hand, the global governance of global common spaces and resources and global public goods.

1. The division and appropriation of the seas and oceans

G. Hardin explained the 'tragedy of the commons' from a communal pasture plot where, for generations, the inhabitants of a community had fed their livestock. But at a certain point, each of the shepherds, as rational beings, sought to maximize their profit by increasing the number of heads they brought to the communal meadow. The result of individual rationality led to the tragedy of common resources: "Ruin is the destiny towards which all men go who seek to maximize their benefit in a society that believes in the freedom of common resources. The freedom of common resources leads to ruin for all".20 More specifically, regarding the oceans, he stated that "they will continue to suffer from the survival of the philosophy of common resources. The coastal states still automatically respond to the axiom of "the freedom of the seas." By professing the belief in 'the inexhaustible resources of the oceans', they are leading the various species of fisheries resources and whales closer to extinction".21 His proposal to deal with this problem was to adopt coercive social systems, including creating a coercive system of privatization and division of common resources and the attribution of property rights. However, at the end of his life he recognized that perhaps he should have titled his famous article 'the tragedy of unmanaged commons' because in such situations we encounter the real problems.

At the international level, there is also the temptation to close the global commons, to appropriate them, divide them and place them under the sovereignty of the States. In the case of seas and oceans, the division of spaces has been proposed as an alternative to the limitations and problems of the current statu quo. G. Hafner has suggested that maritime territorial differentiation would allow beneficiary States to better protect common spaces because or they would do it in their own interest.23

However, although international law in its origins contributed to this process of commodification of natural resources, today there are examples and authors that show that it is possible to protect and manage global common resources in another way, in a more sustainable way and that serve the general interests of the international community.

2. Global governance of global marine common spaces and resources

The starting point for this proposal for global governance of global marine common spaces and resources is the rule-based theory of collective action developed by the Economics Nobel Prize winner E. Ostrom to address the challenges posed by collective action regarding to common resources.25 However, its application in the international sphere requires adapting and qualifying the conceptual and institutional loan given that the social system in which they operate is different.

A. Common resources as a social system

Common resources "can no longer be abstracted from the social networ- ks that participate in their production and protection: without communities, there are no common resources." S. Cogolati and J. Wouters describe the commons as social systems that are the result of three cumulative elements. The first is the object, that is, the existence of a set of resources that can be of a tangible nature, such as pastures, land, seeds, forests, water resources, or they can have an intangible nature such as traditional Internet knowledge. The second necessary element is the subject, that is, the existence of a community that has exclusive access to the resource in question and that manages it in common. And the third element is the commoning

practice, which consists of the activity of governing the resource in question through collective action and in accordance with the norms and institutions established for it.26

B. The high seas and its resources as marine global commons

The transfer of the notion of common resources to the space of the high seas and its fishing and marine genetic resources poses some difficulties. The marine global commons bring together some of the elements that characterize the aforementioned social system: the principle of freedom of the seas allows free access to ships of all States both to the marine space and to fishing resources and, in addition, there may be rivalry (and, therefore, exclusion) in the use made of common resources by the different actors who have access. However, major problems represent, on the one hand, the absence of institutions for collective action such as regional fishing organizations or other organizations in the case of access to existing marine genetic resources beyond national jurisdiction; and, on the other hand, the deficient functioning for various reasons of the institutions that are already in operation. As recognized by T. De Moor, at present, marine spaces and resources on the high seas are even closer to being considered res communis ommnium than marine global commons.27 In sum, it can be concluded that the greatest difficulties are not in the object (the high seas and

its global common resources) or in the subject (the existence of a community of users, although it has important peculiarities) but in common practices (the commoning). In other words, the challenge is to improve the governance of global common marine spaces and resources through more legitimate and effective norms and institutions for collective action.

IV. A LAW OF THE SEA FOR THE PROTECTION OF THE GENERAL INTERESTS OF THE INTERNATIONAL COMMUNITY IN AREAS BEYOND NATIONAL JURISDICTION

The aim is therefore not only to better manage the high seas and its common resources but also to better manage the global marine common resources located in areas beyond national jurisdiction by harmonizing the particular interests of coastal and flag States with the general interests of the international community. Stewardship of the high seas requires the progressive recognition of legal limitations on access, use, appropriation, conservation, and benefits obtained from global marine common spaces and resources. To this end, the Law of the Sea provides a set of rules, institutions, and different types of legal obligations, procedures and techniques that can help improve the mentioned administration. In any case, beyond the individualized existence of this set of available and easily identifiable legal resources, all activities carried out on the high seas are subject to international law. In other terms, and as it happens with other spaces,28 the high seas is not an "outside the law" space, as the European Court of Human Rights has recognized in several judgments29 and the arbitration case law in the The Artic Sunrise case

The Law of the Sea constitutes a basic tool for creating and regulating the functioning of institutions for collective action that govern the conduct and activities of the community of users of global marine common spaces and resources. International practice on the matter shows the design and operating limitations of these institutions, especially regional and subregional fisheries organizations that have been denounced by the international law doctrine.31

The Law of the Sea also offers a set of principles of a different legal nature, some already incorporated in international law and others are still agreed international standards, which can help the governance of areas beyond national jurisdiction: conditional freedom of the seas; the principle of protection and conservation of the marine environment; the international cooperation principle; the science-based approach to managing the marine environment; the precautionary approach; the ecosystem approach; the principle of sustainable and equitable use; the principle of public availability of information; the principle of decision-making through an open and

transparent process; the principle of responsibility of States as stewards of the global marine environment.32

Third, the Law of the Sea provides rules of public interest such as, among others, rules on the conservation and sustainable use of fishery resources on the high seas.33 They are norms that protect collective or general interests of the international community that create collective obligations either of an interdependent nature or of an integral structure and that have a vocation of universality.34

Fourth, the Law of the Sea also provides procedural obligations to inform, notify, and disseminate information or prior assessment of the environmental impact that contribute to a better administration of the marine global commons.35 Likewise, and fifthly, the Law of the sea has created different mechanisms

for the management of global marine common spaces and resources that are based on the delimitation of geographical areas that have certain characteristics and that are subject to a more demanding or more restrictive legal regime of the freedoms and rights of the intervening actors. Some of these modalities are the Particularly Sensitive Marine Areas (PSSA) created and designated

by IMO,36 the special areas under the MARPOL Convention,37 the areas of special environmental interest that exclude the possibility of carrying out mining exploration and exploitation activities,38 the areas of control of the emissions39 or areas to avoid to prevent marine pollution in the Mediterranean Sea and in the Antarctica.

In addition, a sixth option for the protection of general interests has been the appearance in international law of an increasing set of limitations on the freedoms of the seas and traditional principles of the Law of the Sea, such as, among others, the general obligation of due respect for the rights and interests of other States and a restrictive interpretation of the freedom of navigation and of the principle of exclusive jurisdiction of the flag State. And it is that, as

D. Freestone has rightly recalled, all the freedoms of the seas are "conditional freedoms", which are subject to a number of limitations and the corresponding obligations derived from them.40 The general obligation of due respect (due regard) is recognized in art. 56.2 of the UNCLOS (the coastal State, in its EEZ, "shall take due account of the rights and duties of the other States"), in art.

58.3 (the third States in the EEZ "shall duly take into account the rights and duties of the coastal State and shall comply with the laws and regulations issued by the coastal State") and in art. 87.2 (the freedoms of States on the high seas "shall be exercised by all States with due regard to the interests of other States in the exercise of their freedom of the high seas"). This obligation of due regard or taking due account has been interpreted and applied in some judicial decisions such as the advisory opinion of the International Tribunal for the Law of the Sea on the responsibilities of the flag State in the exclusive economic zone of

other States41 and in various arbitration decisions in which the arbitral tribunals found the violation of said obligation.42 The conclusions that can be obtained, according to J. Gaunce, are the following two: the obligation of due regard implies a relationship between States based on legal equality and a change from the traditional freedoms based on laissez-faire in the seas to an order law under the UNCLOS more normatively dense and more comprehensive of the different interests, rights, obligations and freedoms of all the States that intervene. The practical consequences of the first are that, beyond the territorial sea, no State enjoys priority of use in the seas based on its own interests or on the freedoms of the seas. And the second consequence is that the content of the obligation of due regard supposes a more robust normative standard than its predecessor (reasonable regard) because it allows taking into account obligations that protect the interests of the international community.43 The restrictive interpretation of the freedom of navigation and of the principle of exclusive jurisdiction of the flag State is the result of a process of progressive expansion of the existing exceptions already in the UNCLOS (the right of visit, that of persecution and that of arrest). In some cases, the exceptions are prescribed in other international treaties such as the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which, with prior authorization from the flag State, allows the inspection, boarding and seizure of third party vessels States on the high seas. In other cases, exceptions have been introduced through Security Council resolutions that allow either to inspect, seize or even alienate ships that are

on the high seas off the coast of Libya in order to combat the smuggling of migrants and trafficking of people,44 or they authorize the inspection on the high seas of ships originating from and destined for Libya to contribute to the maintenance of peace in that State.45 Together with these exceptions, the possibility of justifying new exceptions protected by customary international law and the Lotus principle is gaining support. In the first case, despite the extensive interpretation that the majority of the International Tribunal for the Law of the Sea has made of the freedom of navigation in the case M / V 'Norstar' (Panama v. Italy) of April 10, 2019,46 both the dissenting opinion of seven judges47 and the doctrine48 have admitted that customary international law allows a State to exercise its prescriptive criminal jurisdiction with respect to illegal activities that are carried out in whole or in part in its territory. Furthermore, in the second case, the judges who sign the dissenting opinion make an updated interpretation of the Lotus principle which is now used to protect the general interest, would allow States to exercise prescriptive criminal jurisdiction as agents of the international community "with respect to conduct on the high seas when such conduct is part of a crime committed in the

territory of the State not only when it is justified or permitted by international

law, but when it is not prohibited by international law".49

A seventh option allowed by the current Law of the Sea is the possibility for States to act as agents of the international community for the protection of the general interest with respect to spaces and resources located beyond national jurisdiction. For this, one way may be the exercise of legislative and executive powers of the port State to give effect to generally applicable international norms and standards that regulate such global marine common spaces and resources. The legal basis of the jurisdiction of the port State can be, on the one hand, a broad interpretation of the principle of territoriality that would allow the exercise of its executive jurisdiction and, with more limitations, also of the prescriptive jurisdiction; and, on the other hand, although less frequent, it may also be in international treaties that allow the exercise of the jurisdiction of the port State.50 In these cases, the State would assume the role of an organ of the international community for the protection of community interests and its conduct could be considered "as the individual application of the right of dédoublement fonctionnel.

And, finally, the pro communitate principle can contribute to the protection of the general interests of the international community in spaces and resources beyond national jurisdiction. It is an interpretive principle that operates in areas such as these spaces and resources in which rules that protect particular or common interests of some States and collective interests that are found in different international regimes such as the Law of the Sea, the human rights, international humanitarian law or environmental law, among others. In these cases of plurality of interests and applicable norms or, even, possible normative conflicts, the pro communitate principle facilitates, in some cases, the total or partial integration of the content of other existing norms in other regimes that protect general interests by means of the interpretation of the

rules of the Sea Law;52 and, in other cases, it can facilitate the preferential application, without affecting the validity of the default rule, of the public interest norms.

V. CONCLUSIONS

The traditional conception of the seas and oceans as a means of navigation and commerce has been modified and completed by the evolution of practice. The high seas is now a new form of spatiality that demands a new kind of governance. The justification for the new governance models can be of different kinds: demands for intra- and intergenerational distributive justice, economic efficiency, sustainability or even the urgency to face the problems that arise.

Marine spaces and resources that are beyond national jurisdiction can be considered as marine global commons. The protection and administration of these global common resources advises and even demands the increase of the limits to the traditional freedoms of the seas. The answer is neither in the land winds that

is the bearer of sovereignty nor in the high seas winds that is loaded with freedom. The option is to establish limits to the traditional rules but not in the name of sovereignty but of the general interest of the international community. However, the increase in limitations does not imply the abolition of the freedom of the seas, but implicitly or, at times, explicitly its use and enjoyment is subject to greater collective legitimation, to greater and better regulation by means of public interest norms that protect the general interests in such spaces and resources, and the supervision of the application of the norms preferably by international institutions of collective action and, alternatively, by individual States acting as agents of the international community.

Although we do not yet have the appropriate vocabulary to describe and name the changes and evolution that are taking place in spaces and resources located beyond national jurisdiction, we are aware that something new is happening. To do this, between the Mare Liberum by H. Grotius and the Mare Clausum by S. Freitas and J. Selden, other terms have been proposed that seek to verify and designate the need to combine and harmonize the traditional

freedoms of the seas with the need to protect the general interests. Some of the new terms that are struggling to prevail in the market of ideas are Mare Legitimum;53 that of Mare Geneticum to capture the need to regulate the access, use and sharing of benefits derived from the genetic diversity of genetic resources located beyond national jurisdiction;54 and that of Mare Publicum in which it is possible to combine and make compatible the activities and interests of States (riverside, flag and port) and non-state actors with the protection of the global public interest by means of a truly public international law.

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Plunder of the Commons. A Manifesto for Sharing Public Wealth, London, Penguin, 2019.This author defends that common goods have been subjected to a continuous looting that has resulted in the private appropriation of said goods and the deprivation to the community of the benefits derived from public wealth. The author focuses on the case of the commons of England which, since the Forest Charter of 1217, have been disappearing and being privatized. G. Standing shows in his work that there is an inversely proportional relationship between the reduction of the commons in England and the increase of the wealth of the elites.

This is not a new problem. Already in the sixties of the twentieth century, in a context of the creation of new States in the international community, an increase in population and an increase in the needs for access and consumption of natural resources, approaches were of- fered that basically align with the options presented. A good example was the debate around the governance of the seabed and ocean and the use of natural resources found in them to which G. Hardin and A. Pardo offered quite different answers.

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These exceptions were introduced by resolution 2240 (2015), paras. 7, 8, 9 and 10 and have been successively renewed for one year by resolutions 2316 (2016), 2380 (2017) and 2437 (2018).

These exceptions were introduced by resolution 2292 (2016) and have been exceptionally extended for one year for each of resolutions 2357 (2017) and 2420 (2018).

The majority of the Court affirmed as a general rule that "any act that subjects the activities of a foreign vessel on the high seas to the [prescriptive and executive] jurisdiction of States other than the flag State constitutes a violation of the freedom of navigation, except in exceptional cases provided for in the Convention or in other international treaties "(paras. 224-225).

The dissenting opinion of judges Cot, Pawlak, Yanai, Hoffman, Kolodkin and Lijzaad and Judge ad hoc Treves argue that nothing in the Convention, nor in the preparatory work, nor in other international treaties, nor in customary international law "excludes the right of third States to exercise their prescriptive criminal jurisdiction with respect to activities on the high seas"(paras. 19-20).

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