YEARBOOK
2010
ANNUAIRE

THE LEGAL REGIME OF ANTARCTICA

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The legal regime of the Artic has been eruditely explained by Mr. Nigel Frawley. I have been asked to give now a short account of the regime established by the Antarctic Treaty, including the rules applicable to ships that navigate in Antarctica.

It may be worth starting by reminding that the activities that take place in Antarctica are governed by the Antarctic Treaty signed in Washington DC in 1959. The Treaty is, so to speak, the cornerstone of a system composed of a series of more specific conventions and other rules adopted in order to deal with different aspects of cooperation in Antarctica and the protection of the environment including its natural resources. Those rules are basically:

– The measures, decisions and resolutions adopted at the Antarctic Treaty Consultative Meeting by consensus;
– The Convention for the Conservation of Antarctic Seals, which was signed in London in 1972 and entered into force in 1978;
– The Convention on the Conservation of Antarctic Marine Living Resources, which was signed in Canberra in 1980 and entered into force in 1982; and
– The Protocol on Environmental Protection to the Antarctic Treaty, which was signed in Madrid in 1991 and entered into force in 1998.

Also in 1988, a Convention on the Regulation of Antarctic Mineral Resources, was adopted in Wellington, New Zealand. However, this Convention is not expected to enter into force as it was superseded by the Environmental Protocol.

The Treaty's 'object and purpose' is to ensure that Antarctica is used only for peaceful purposes, and that free access to scientific research, and cooperation towards that end, as postulated in the International Geophysical

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Year (1957-1958), continues; even though military personnel and equipment may be used in pursuing peaceful purposes. The Treaty is open for accession to virtually any State, in addition to the 12 nations active in the IGY which are the original Parties.

According to Article VI, the Treaty applies to the area of 60° South Latitude, including all ice shelves, but without prejudicing the rights of States (and not only those of contracting Parties) with regard to the high seas within that area. That is to say that the regime of the high seas applies in the area in conformity with international law, including the principle of the freedom of high seas and its exceptions, the maintenance of order on the high seas such as the rules of customary law on piracy and other illegal acts, jurisdiction over ships, oil pollution casualties, etc. Such regime is no other than the one that stems from the United Nations Convention of the Law of the Sea (UNCLOS), 1982, and related instruments.

Article VI is, thus, a fundamental provision. As we all know, the Antarctic Treaty's key provision lays on Article IV which reserves the rights and claims of contracting Parties to territorial sovereignty, and denies the creation of new claims or enlargement of existing claims, in the area. There are seven claimant States: Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom, whose claims are based on a number of titles including occupation, discovery, rights to succession, geographical proximity, geological affinity, the exercise of jurisdictional acts, and a combination of them. Some claims overlap partially or totally. For example, the sector claimed by Argentina overlaps in its entirety with the sector claimed by the United Kingdom and partially with the sector claimed by Chile. On the other hand, there are parts of Antarctica which are unclaimed.

Article VII, in turn, creates a mechanism for observation and inspection, according to which, each Party may appoint national – no international – observers, with a right of access to any parts of Antarctica, including any facilities, equipments, ships, aircrafts, and places of embarkment or disembarkment in Antarctica.

Article VI is to be read together with Articles IV and VII insofar, for the claimant States, Article VI has a different scope of application than for States that do not recognize claims to territorial sovereignty in Antarctica and that therefore object to the rights and jurisdiction over sea adjacent to their coastlines.

Given that most transportation, including 95% of tourism in Antarctica, is by sea, and what has just been said about the status of the waters in the area, it may be worth reviewing briefly the rules developed by competent international organizations, notably by the International Maritime Organization (IMO), purported to promote safety for ships and for navigation, which may apply in Antarctica. For those who are interested in deepening their knowledge on the impact of the continuing increase of

tourism in Antarctica and the impact caused to the legal regime, there exists an outstanding paper written by my colleague Fausto López Crozet from which my presentation borrows a great deal.

The International Convention for the Safety of Life at Sea (SOLAS), 1974, provides for internationally accepted standards in relation to the design, construction, equipment and operation of ships, as well as measures to prevent accidents. The International Convention on Maritime Search and Rescue Convention (SAR), 1979, establishes a basic international framework for cases of emergency. The Standards of Training, Certification and Watchkeeping (STCW) Convention, 1978, is aimed at securing that ships have a competent, trained, certified crew. Last, the International Convention for the Prevention of Pollution from Ships (MARPOL), 1973, with its Protocols, seeks to minimize pollution attributable to shipping both due to operational reasons and to accidents.

Most Consultative Parties to the Antarctic Treaty (28 countries in total, including the original 12 and other States that have become Consultative Parties by acceding to the Treaty and demonstrating their interest in Antarctica by carrying out substantial scientific activity there) are State members of IMO (which is formed of 167 State members) and have ratified many of IMO Conventions. Indeed, the relation between IMO and the Antarctic Treaty is not new.

The Antarctic Parties adopted, in 2005, Decision 8 recognizing that IMO is the competent organization to deal with navigation related rules. The previous year, in 2004, the Antarctic Treaty Consultative Parties had taken the decision to send the 'guidelines for ships that navigate in Arctic and Antarctic iced-covered waters' requesting IMO to examine them as a matter of priority. It may be worth mentioning that though, IMO is currently developing a set of binding rules, at least some of them will be, for ships that navigate in Polar waters. The so-called Polar Code is yet at a very early stage and may take several years to complete. Once adopted, the Code should provide for a set of rules and recommendations which are specific and adequate for polar navigation in terms of training, ship equipment and design and, as proposed by some, risk criteria that take into due account environmental impact. The Code may also take into consideration differences that may be relevant in navigating Arctic vis-à-vis Antarctic waters.

It is, therefore, submitted that a close complementation between IMO and the Parties to the Antarctic Treaty has proven useful in the past and should be further developed particularly if the Parties to the Antarctic Treaty want to prevent and punish Treaty violations by ships from non-State Parties. Although these ships are not bound by the rules of the Antarctic Treaty System, most ships have a flag of States that are a Party to IMO and that have adopted some IMO rules.

In sum, and like in the Arctic, navigation in Antarctica is characterized

by a series of factors: extreme weather conditions; variable conditions of ice; lack of sufficient knowledge of the submarine topography which, in turn, results in inadequate navigation charts; crew that lacks the experience and ships that are unprepared to navigate through ice; and rescue systems that are likewise inadequate for the Antarctic weather. Many of these matters are dealt with at IMO level and require an appropriate relationship between IMO and the Consultative Parties to the Antarctic Treaty.

When I was invited to speak at the Colloquium, I was asked not to focus only on transportation and navigation in Antarctica, but to give a more comprehensive view on the Antarctic regime. I have already spoken, yet briefly, on territorial sovereignty in Antarctica and the situation created by overlapping claims. I have also spoken a little bit more in detail on navigation and more generally the regime of the Antarctic waters. I will, therefore, give now a very short account on some environmental issues in Antarctica focusing on the protection on marine living resources and the prohibition of activities related to mineral resources.

As I already mentioned, in the late 1970s and early 1980s, two conventions were adopted to protect the Antarctic marine living resources: the 1978 Convention for the Conservation of Antarctic Seals; and the 1980 Convention on the Conservation of Antarctic Marine Living Resources. These conventions were adopted after a number of scientific studies were released, accounting that overexploitation caused by uncontrolled fishing of Antarctic species, especially krill, could lead to irreversible damage to the populations of other species of the Antarctic marine ecosystem, including whales. The Convention on the Conservation of Antarctic Marine Living Resources provides for a delicate balance of interests aimed at preserving legally based positions, economic interest and the responsibilities imposed by a particularly vulnerable ecosystem; in other words, the interests of the fishing countries, of countries which do not carry out commercial fishing and are concerned with the conservation of species, and of countries which claim sovereignty or jurisdiction in the area of application. According to the Convention, its objective is the conservation of the Antarctic marine living resources, the term 'conservation' including 'rational utilization'. The Convention creates an institutional underpinning directed to achieve the Convention's ends. The organs include the Commission for the Conservation of Antarctic Marine Resources, the Scientific Committee and the Secretariat. The power to enact conservation measures lies on the Commission. The Convention also provides for a dispute resolution system enabling the parties to submit their differences to the International Court of Justice or an arbitral tribunal whose decision is deemed definitive and binding.

In 1989, at the Consultative Meeting in Paris, an agreement was reached to negotiate a regime aimed at the comprehensive protection of the Antarctic environment and dependent and associated ecosystems, including provisions

related to mining activities. Only two years later and after only four rounds of negotiations, the Protocol on Environmental Protection to the Antarctic Treaty was adopted in 1991. The Environmental Protocol complements and does not modify the Antarctic Treaty nor other Conventions in place within the Antarctic Treaty System. The Parties to the Protocol designate Antarctica as a 'natural reserve devoted to peace and science'. A number of 'environmental principles' are enacted, which all activities permitted in Antarctica must comply with. Emphasis is placed on the need to plan and conduct activities on the basis of prior assessments in order to minimize their possible impacts on the environment. A Committee for Environmental Protection is created, whose functions are to formulate recommendations to the Parties in connection to the implementation of the Protocol. Last but certainly least, the Protocol prohibits 'any activity relating to mineral to resources, other than scientific research'.

Now, to wrap up my presentation, I would like to mention that there are currently two positions regarding Antarctica. Some countries and authors consider the Antarctic Treaty System as illegitimate because it is formed by a limited, though qualified, group of countries, and would like to keep Antarctica beyond any national jurisdiction, declaring it the 'common heritage of Mankind'. Conversely, other countries and authors, including obviously the claimant States, seek to strengthen the Antarctic Treaty System. In general, most texts adopted at the United Nations only state the need that the United Nations are informed about the 'Antarctic matter' and that any exploitation of mineral resources in Antarctica should benefit all Mankind. When the Antarctic Treaty was signed in 1959, Antarctica was a territory of many potential conflicts, in view of the overlapping sovereignty claims and the possibility that the Cold War extended there. 50 years later, the Antarctic Treaty and other related instruments show that this initial situation was successfully overcome. This may be due, partly, to the Antarctic Treaty, a treaty of only 14 articles yet flexible enough to face the new circumstances unforeseen at the time of its celebration.

The demilitarization and denuclearization of Antarctica, together with a system of inspections that allows countries to confirm at any given moment that other countries comply with the Treaty provisions, have proven crucial for strengthening cooperation and mutual confidence among the Parties.

The key achievement of the Antarctic Treaty was to freeze or leave aside highly conflictive matters virtually impossible to resolve.

The adoption of the Environmental Protocol, in turn, has neutralized in great deal the arguments of countries which sought the complete internationalization of Antarctica for ecological reasons; and has kept afar certain countries interested in a hypothetical exploitation of minerals that may exist in the area.

In sum, we can see today the existence of an Antarctic System that has

proven to be open to virtually all States and other organizations, and which is dynamic and flexible. These elements point out to a system suitable to accomplish the basic objectives established in the 1959 Antarctic Treaty, and helps to explain the absence of initiatives to amend the Treaty as well as the increasing number of Parties to the Treaty and its related instruments.