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Is Article IV of the Antarctic Treaty Still Suitable for the Governance of the Antarctic Seas?

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Abstract

The Antarctic Treaty (AT) establishes several general principles which abandon the traditional rules of international law relating to the exercise of jurisdiction over the maritime areas that are included in the geographic scope of the Treaty. In fact, although art. VI of the AT safeguards States' rights in the high seas, as recognized by international law, the "bifocal approach", adopted by art. IV of the AT, freezes the prerogatives of Claimant States without denying their rights to claim. For example, although almost all Claimant States have declared maritime zones adjacent to their claimed Antarctic territories by adopting specific national legislation, according to the "bifocal approach", these States have so far abstained from enforcing sovereign powers in the claimed maritime areas in compliance with art. IV of the AT.

By the way, enforcing powers are necessary to make effective the substantive obligations and goals that have been established by the instruments belonging to the AT system (ATS). Several provisions of this system, in particular of the Madrid Protocol, adopt the criterion of nationality rather than the principle of territorial sovereignty in order to establish some forms of control over the Antarctic activities of individuals that are nationals both of Claimant and non-Claimant States.

Nevertheless, the issue concerning sovereignty claims has remained a dormant internal threat to the ATS resilience as the proclamation of some new maritime areas, such as the exclusive economic zone (EEZ) and the presential sea and the attempt of extending the continental shelf beyond 200 nautical miles have demonstrated. (ATS Resilience Sect. 3)

In addition, the increasing global economic crisis has provoked the proliferation of commercial activities affecting the Antarctic seas, such as tourism and fishing. These activities are not only promoted by private operators for lucrative purposes, but, sometimes, they are also encouraged by some States that are more concerned about the economic growth of their countries than the conservation of the particularly fragile Antarctic ecosystem. In this regard, a distinction must be drawn between the legal and political consequences arising from private and State activities that are in breach of ATS substantive obligations. While private unlawful activities may be prevented and punished at the domestic level of AT Parties, the unlawful conduct of a State party to the AT, such as, for example, the conduct of a Claimant State encouraging commercial activities in the maritime areas over which it claims sovereign or exclusive rights, must be considered as a threat to the legitimacy and effectiveness of the regime established by Article IV of the AT (ATS Resilience Sect. 6).

Moreover, the governance of Antarctic maritime zones is not only an interest of AT Parties. Both the conservation and exploitation of Antarctic marine resources affect the interest of the entire international community, as is demonstrated by the manifestation of the determination of some third States (with respect to the ATS) of carrying out substantial research activities in Antarctica. Nevertheless, the existence of sovereignty claims over Antarctic territories has precluded the possibility of establishing an international regime disregarding State sovereignty, such as the regime of the UNCLOS that recognises the deep seabed as a part of the "common heritage of humankind". One cannot exclude that the increasing presence of new influential actors within the international community may resuscitate these frictions putting in doubt the legitimacy of the regime established by Article IV. (ATS Resilience Sect. 7)

This presentation is therefore aimed at ascertaining whether the solutions proposed by the ATS are still workable in a world where competing interests of States increase. In the light of this aim, it is necessary to speculate whether the similarities between the ATS norms and other treaty regimes, such as, in particular, the UNCLOS, may guarantee an effective management of the Antarctic waters and seabed.

Other principles of general international law may be beneficial to promote the governance of Antarctica in the interest of the international community. A legal criterion, which appears to be more suitable for the peculiar legal status of Antarctica, is the concept of the "common concern of humankind", according to which the goods falling in the interest of the entire

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international community, such as Antarctica, must be preserved in the interest of humankind, even if they are subject to State sovereignty.

Recently, the so-called responsibility to protect (R2P) doctrine has been formulated in international law to ensure the compliance with obligations of common interest. According to this doctrine a State is not only accountable towards other States, but also vis-à-vis its population and the international community when fundamental interests are at issue. So far, the R2P principle has been instrumental to justify humanitarian interventions in third countries. Although the R2P doctrine applies in case of atrocities, an analogous approach might be beneficial to compel States to intervene if the conservation of Antarctic seas is at risk.

In order to make these principles effective within the AT regime, an evolutionary interpretation of the ATS norms is required in light of the transformation of general international law.

New principles of international law, together with ATS norms, may increase the effective enforcement of the norms regulating the protection of the Antarctic seas as maritime areas of special character. (ATS Resilience Sects 3 and 7)

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