

Kobe PCRC Special Session – Antarctic Treaty System Resilience 12th Polar Law Symposium in Hobart, Tasmania (December 2-4, 2019)

Reported by Jason Thompson¹ and Osamu Inagaki²

On December 3, 2019, many polar academics and participants of this year's Polar Law Symposium held at the Institute for Marine and Antarctic Studies (University of Tasmania) in Hobart attended the special session on The Resilience of the Antarctic Treaty System to Future Challenges. This special session was organized by Kobe University's Polar Cooperation Research Centre (PCRC) with the financial support from JSPS KAKEN-HI and Kobe University Center for Social Systems Innovation (KUSSI). Prof. Akiho Shibata, Director of PCRC, chaired this special session and explained that the final goal of this resilience study is to produce a book. The presentations in this session examined different themes that will be featured in this research project.



Dr. Patrizia Vigni, a senior lecturer of international law at the University of Siena in Italy, presented first during the session and asked if Article IV of the Antarctic Treaty is still suitable for the governance of the Antarctic seas? She discussed the bifocal approach of the Antarctic Treaty regarding claims. Article IV states that there should be no further claims in Antarctica, no enlargement of existing claims, and no prejudice to recognition or non-recognition. In addition, Article VI states nothing in the treaty shall prejudice rights in the Antarctic high seas. She recognized a number of threats to Article IV including the declarations of EEZs, submitting extensions of the continental shelf, and exercising jurisdiction in state maritime

zones. Furthermore, several external threats also exist like new international actors coming to Antarctica and the enforcement of other treaty regimes. Regardless of these threats, Article IV has been a successful regime for the sixty years of the Antarctic Treaty. But with recent regimes like the SDGs and the rights of nature, states will need to view Antarctica in a different way to ensure that their responsibilities in the region are met. There is unlikely a better alternative to Article IV according to Dr. Vigni.

Ms. Jill Barrett, a visiting Reader in Law at Queen Mary University of London, discussed the importance of effective compliance and enforcement for the long-term resilience of the ATS. Ms. Barrett's main argument was that effective compliance is vital to the credibility of the ATS. There are existing provisions to jurisdiction in Antarctica including the prior notification requirement, flagships, and recognizing nationality on expeditions. There is some variation of jurisdiction practices in national laws which allows some gaps and overlaps in implementation. The inadequate means of enforcement of violations of these gaps is one major issue that



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should be examined. There has been discussions of solutions, but not all parties are interested in pursuing this issue. It is an unsatisfactory situation, and it shows that there is a lack of transparency to the public regarding jurisdictional issues. One possible solution is the mutual cooperation of law enforcement to ensure that issues are dealt with and respect Article IV. A shared framework for making jurisdictional requests would also benefit the states as well as the tourism industry. She concluded her argument by stating that the inspection regime proves that parties can cooperate so this cooperation could be extended to new areas.

Dr. Kees Bastmeijer, a Professor in nature conservation and water law at Tilburg University in The Netherlands and visiting scholar at the University of Tasmania (November - December 2019), presented next and addressed the topic of Antarctic tourism in the context of the ATS. He noted that it is important to be positive about the system but also be critical. Key aspects of the system should be safeguarded like ensuring peace. He shared a number of challenges to the ATS that could affect the system including activities by outside states, conflicts over large projects, commercial use that conflicts with science, increase of tourism, increase of infrastructure, among others. Looking at tourism specifically, there has been a large increase in passengers landing on the continent and ships being built over the past decade. In addition, the length of the tourism season has increased as well as the number of tourism sites. The impacts of these increases included a noted lack of monitoring, the introduction of non-native species to the continent, increased emissions, disturbance of wildlife, and increased numbers of accidents. To look at finding solutions, we must look at decision making within the ATS and the use of consensus within the system. There is often no consensus which leads to gridlock or 'non decision-making'. He concluded by listing some possible explanations for the issues identified including lack of knowledge, no sense of urgency, or a tendency to focus on science-based decision making.



Finally, **Dr. Zia Madani** from the Iranian National Institute for Oceanography And Atmospheric Science in Tehran, presented on third states' presence on the 7th continent. He noted several issues that will be caused due to the presence of third states on the continent that are related to international legitimacy, universal values, decision making, and accession procedures. He went on to detail Article XIII of the ATS which deals with the designated depositary of the ATS, which should act impartially. He asked what if the depositary was the Secretary-General of the United Nations and what would the advantages & implications be? Some advantages could include a possible increase in participating states in the ATS, moving the regime out of 'isolation', and accommodating the UN within the existing ATS legal regime. Also, new players could be introduced into the system like NGOs and non-state actors which would lead to new practices within the regime as well as new interpretations of norms & terms. Finally, he posited that new political groupings could form as new actors join the regime.



In the following panel discussion, Mr. Andrew Serdy of Southampton University brought up Australia's 1994

continental shelf extension claim with respect to making a claim versus an existing entitlement. Dr. Vigni responded by noting that a claimant state requesting an continental shelf extension may be within their rights but their behavior should have good faith within the ATS. Following a comment by Dr. Alan Hemmings of the University of Canterbury, Dr. Barrett commented on a 1992 case between Russia and Uruguay where jurisdiction was not properly defined after a Russian was murdered. Another question was posed that asked how can third parties be regulated in Antarctica? Dr. Bastmeijer responded that there should be a new attitude in domestic law and states should establish a stronger net of jurisdiction that tightens the gaps and overlaps in the current system. Finally, Dr. Tony Press (UTAS) asked for further clarification on the role of the depositary in the ATS and why Dr. Mandani thought it should be transferred to the UN. He responded by saying that according to Article 76 of the Vienna Convention on the Law of Treaties (1969) no conflicts outside of the treaty should be reflected by the depositary. All conflicts and differences should be put aside and with current relations between the US and Iran could put this neutrality in jeopardy. He asked for further discussion on the topic. Finally, Dr. Vigni was asked to clarify the 'responsibility to protect'. She responded by saying that the key is 'responsibility' because many states do not exercise jurisdiction even though they should.



Policy–Law–Science Nexus in Antarctica

In the final session of the day, **Dr. Luis Valentín Ferrada** of the University of Chile chaired a group of presentations that are a part of the PoLSciNex project from the SCAR Standing Committee on the Humanities and Social Sciences (SC-HASS). The goals of this project are to examine the crossover between law, policy, and science in the context of the Antarctic so that scientific-based decision making is better understood by relevant stakeholders.

Dr. Osamu Inagaki of Kobe University's Polar Cooperation Research Centre (PCRC) and **Prof. Gen Hashida** of the Japanese National Institute of Polar Research began the session by examining the legal complexities of Dronning Maud Land Air Network (DROMLAN) in the context of the Antarctic Treaty System.



DROMLAN is the air network established by 11 national Antarctic programs in 2002 that provides inter-continental flights between Cape Town and Antarctica and intra-continental flights within Antarctica. Dr. Inagaki and Prof. Hashida identified some of the legal issues that DROMLAN brings up, particularly in relation to the obligations of advanced notice under Article 7(5) of the Antarctic Treaty and obligation of EIA under Article 8(3) of the Madrid Protocol. After reviewing the operation of DROMLAN, they examined two specific cases in which the issues concerning DROMLAN were discussed by the parties to the Antarctic Treaty. They also examined the recent practice of advanced notice by relevant parties. As a result of these examinations,

Dr. Inagaki and Prof. Hashida pointed out that states had some difficulties in complying with obligations of advanced notice and EIA regarding DROMLAN operation. Finally, they concluded that the case of DROMLAN suggests the necessity to reconsider how to enhance compliance with these obligations to catch up with modern complex logistical systems.

In the Q & A session, there was a question as to what kind of clarifications Article 7(5) needed. Mr. Inagaki answered that while existing ATCM decisions on Article 7(5) have elaborated what kind of information to be noticed under the Article, it is also necessary to clarify which state parties need to give notice especially in case of the activities involving private companies.

Ms. Sakiko Hataya and Prof. Akiho Shibata, also from Kobe University's PCRC, presented about possible legal concerns regarding China's Kunlun Station located at Dome A in eastern Antarctica. They examined the legal implications of the proposal made by China in 2013 to establish ASMA around Kunlun Station. The proposal was opposed by some consultative parties arguing that the proposal was premature or was inconsistent with the objectives of ASMA as defined by Annex V of the Madrid Protocol. Given the fact that so far 7 ASMAs have been established without any controversy, the Chinese proposal is a unique case. On the other hand, Ms. Hataya and Professor Shibata identified that the Chinese proposal triggered the discussion on the substantive requirements and designation procedure of AMSA within CEP and ATCM which culminated in the adoption of guidelines for designation of ASMA in 2017. They concluded that the procedural rules for ASMA designation were clarified with the guidelines and the Kunlun ASMA proposal did not satisfy the substantive requirements under Article 4, Annex V of Madrid Protocol.



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In the Q&A session, there was a question as to what criteria under Article 4 of the protocol Kunlun ASMA proposal did not satisfy. Ms. Hataya replied that there are no overlapping research programs in Dome A area in case of Kunlun proposal, unlike existing ASMAs that were intended to avoid conflict of different research programs. Responding to the question of the difference between the Kunlun ASMA proposal and the Amundsen-Scott Station ASMA, she answered that the difference lies in the fact that international scientific programs are proceeding in Amundsen-Scott Station area.

Dr. Arron Honniball from the National University of Singapore continued the session by focusing on the expanding role of nationality jurisdiction in international fisheries regulation. In the presentation, he detailed current array of global instruments and finds that there is no internationally binding treaty that specifically imposes an obligation on the state of nationality to regulate IUU fishing, though the preamble of Port State Measures Agreement (PSMA) recognizes the duty of state's nationality. However, UNCLOS Article 117 allows for broader interpretation that the article obliges not only flag states but also states of nationality to take measures. Article 7 of the Fish Stock Agreement also refers to states of nationality, though some parties attached restrictive interpretive declarations on it. Moving to the examination of international adjudications, Dr. Honniball introduced ITLOS SRCF advisory opinion in 2015 and South China Sea Arbitration in 2017. In the ITLOS advisory opinion, there were numerous statements submitted that support the exercise of state nationality jurisdiction and tribunals found that states should take necessary measures for its nationals. In the South China Sea Arbitration, the award found China's non-compliance of the obligation to regulate its citizens referring to SRCF advisory opinion. Finally, Dr. Honniball touched upon the regional efforts to regulate its nationals including CCAMLR.



In the Q&A session, in response to a question about the relevance of the Judgement of ITLOS Norstar Case, Dr. Honniball answered that the judgement is unfortunate since it does not provide evidence why the principle of exclusive flag state jurisdiction extends to prescriptive jurisdiction.



Mr. Jason Thompson, a recent MSc graduate from KU Leuven in Belgium, finished the session with a presentation about border changes in the Norwegian Antarctic claim of Dronning Maud Land. He showed that the southern border of the claim has shifted over time from the inception of the Antarctic Treaty to the present day using published maps from the Norwegian Polar Institute, a government organization, as well as those used by the national public broadcaster NRK. While, from a legal standpoint, these documents are not admissible as evidence for an enlarged claim, it shows that the spirit of Article IV may have been

violated by the inconsistency of these maps. Mr. Thompson ended by questioning the methods of enforcement should a more legitimate territorial violation occur and asked the audience to consider the question for future discussion.

In the final Q&A session, in reply to the question of whether there are the official documents demonstrating that these maps are indeed Norwegian government policy, Mr. Thompson replied that these maps have a certain amount of legitimacy even though they are 100% Norwegian policy. There was also a suggestion to have a look at Norwegian domestic law since domestic law might have a more concrete definition of Dronning Maud Land.

Conclusion

These two sessions occurred as the Antarctic Treaty System was celebrating sixty years of peace on the seventh continent. The world has significantly changed in these sixty years, and the ATS has evolved along with it. The purpose of these presentations and discussions was to look to the past to see where the ATS has both succeeded and failed in order to better prepare for the future of the regime. A diverse research group has formed in order to prepare a comprehensive look into the continued resilience of the ATS from the perspective of international law and is planning to publish their work in 2021.