Chapter 13

The Exercise of Jurisdiction over Activities in Antarctica: A New Challenge for the Antarctic System

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Introduction

Hugo Caminos not only shares with Hugo Grotius the same first name; he also possesses an encyclopedic knowledge of law of the sea. His long and rich experience in international law, however, is not limited to a specific branch of law. This explains that the present contribution will not address a topic related to the law of the sea but instead will examine a question relating to Antarctica, an area which presents a particular interest for Judge Caminos as well as Argentina. More precisely, this paper will examine legal issues regarding the exercise of jurisdiction in Antarctica. This topic has recently attracted a greater interest in legal writings and this reflects the expansion of human activities in the area located south of 60 degree South Latitude, i.e. the territorial scope of the 1959 Antarctic Treaty.

The Exercise of Jurisdiction in the Antarctic System

Sovereignty over a territory traditionally represents one of the two main sources of State jurisdiction, the other being the nationality. In the case of Antarctica, the exercise of territorial jurisdiction is complicated by the existence of territorial disputes between some of the seven States claiming sovereignty over parts of Antarctica, the non-recognition of sovereignty claims by other States parties and, last but not least, the fact that the USA and the Russian

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Federation have reserved their right to raise sovereignty claims. In this context, Article IV² of the Antarctic Treaty constitutes the pillar sustaining the whole system. It freezes the disputes over sovereignty issues by stating that the provisions of the treaty cannot be interpreted as prejudicing the position of any party to it as regards claims of territorial sovereignty, and by declaring that any act taking place during the entry into force of the treaty has no effect on the sovereignty claims. On the basis of this understanding, the Antarctic Treaty could then build a system of governance requiring the active participation of the States parties to it.

Since 1959, the system has developed through the conclusion of additional and separate conventions dealing with specific activities (convention on the conservation of Antarctic seals in 1972 and the convention on the conservation of Antarctic marine living resources in 1980), the signature in 1991 of the Madrid Protocol on environmental protection to the Antarctic Treaty, and the adoption in 1995 of a decision (Decision 1 (1995)³) which clarifies the different legal tools available to the States Parties acting collectively during their annual meetings.⁴ Due to the increase in the number of tasks to be discharged by the States parties to the 1959 Antarctic Treaty and its 1991

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² Article IV

1. Nothing contained in the present Treaty shall be interpreted as:
   a. a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
   b. a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
   c. prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State’s right of or claim or basis of claim to territorial sovereignty in Antarctica.

2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

³ The decision was adopted on the basis of a working Paper (XIX ATCM/WP 1) submitted by Belgium, Chile, France, Germany and the United Kingdom.

⁴ According to Decision 1 (1995): “measures” refer to a “text which contains provisions intended to be legally binding once it has been approved by all the Antarctic Treaty Consultative Parties . . . in accordance with paragraph 4 of Article IX of the Antarctic Treaty”; “Decisions” refer to a “decision taken at an Antarctic Consultative Meeting on an internal organizational matter”; “Resolutions” refer to a “hortatory text adopted at an Antarctic Consultative Meeting".