

Protecting the Antarctic Environment: Will a Protocol be enough?

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1. Introduction

The Antarctica as a single continent, with no indigenous or permanent human inhabitants, and no commercial or industrial activities, is more easily governed by a single comprehensive environmental treaty regime known as the Antarctic Treaty System (ATS). These include the Antarctic, the Agreed Measures for the Conservation of Antarctic Fauna and Flora, the Convention for the Conservation of Antarctic Seals, the Convention for the Conservation of Antarctic Marine Living Resources, the Convention on the Regulation of Antarctic Mineral Resource Activities, and the Protocol on Environmental Protection to the Antarctic Treaty (The Madrid Protocol). The Madrid Protocol was designed to protect and preserve the Antarctic environment. This paper assesses the Madrid Protocol.

The Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol)

In 1989, Australia proposed that the Antarctic Treaty countries should negotiate a comprehensive environmental protection regime for the Antarctica. This led to the signing of the Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol). The Madrid Protocol was signed by the Antarctic Treaty members in 1991 and entered into force in 1998. The Madrid Protocol reaffirms the status of Antarctica as an area reserved exclusively for peaceful Purposes, including in particular scientific research, and sets forth a

comprehensive legally binding system of environmental protection applicable to all human activities. The Madrid Protocol prohibits all activities in Antarctica except for scientific research. The Madrid Protocol also commits parties to environmental impact assessment procedures for proposed activities, both governmental and private.

The Madrid Protocol was adopted to supplement the Antarctic Treaty and to minimize the environmental impact of human activities in the Antarctic. The Madrid Protocol has been greatly instrumental in strengthening international cooperation with the Antarctic Treaty System as well as in changing the broader international community's perception about the Antarctic Treaty System.

The Madrid Protocol may be seen as containing two main Units. The first unit is that it prohibits mineral activities, except for scientific research. The second unit is that it regulates human activities.

The second unit creates an environmental protection regime for the Antarctic. For instance Article 3 (1) states that:

The protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica including its wilderness and aesthetic values and its value as an area for the conduct of scientific research, in particular research essential to understanding the global environment, shall be fundamental

considerations in the planning and conduct of all activities in the Antarctic Treaty area.

For the activities not prohibited in the Antarctica, the Madrid Protocol requires an environmental impact assessment (EIA) at the planning stage. An EIA is required if the activity is determined to have at least a minor or transitory impact on the Antarctic environment or on dependent and associated ecosystems.

The Madrid Protocol has five annexes: on Environmental Impact assessment (Annex I), Conservation of Antarctic Fauna and Flora (Annex II), Waste Disposal and Waste Management (Annex III), Prevention of Marine Pollution (Annex IV), and Area Protection and Management (Annex V).

The Madrid Protocol builds the Antarctic Treaty and Recommendations adopted by Antarctic Treaty Consultative Meetings to extend and improve the Treaty's effectiveness as a mechanism for ensuring the protection of the Antarctic environment. It designates Antarctica as a natural reserve, devoted to peace and science, and sets forth basic principles and detailed, mandatory rules applicable to human activities in Antarctica, including obligations to accord priority to scientific research. The Protocol prohibits all activities relating to Antarctic mineral resources, except for scientific research, and provides that this prohibition cannot be amended by less than unanimous agreement for at least fifty years following entry into force of the Protocol.

The Madrid Protocol establishes a Committee for Environmental Protection as an expert advisory body to provide advice and formulate recommendations to the consultative Meetings in Connection with the implementation of the Protocol. Dispute settlement procedures are included in the Protocol. These include compulsory and binding procedures for disputes over the interpretation or application of, and compliance with, the provisions of the Protocol relating to mineral resource activities, environmental impact assessment and response action.

2. The Contributions of the Madrid Protocol to the Antarctic Environment

The Madrid Protocol has significantly contributed in strengthening international co-operation within the Antarctic Treaty System. It has also changed the perception about the Antarctic Treaty System in the broader international community.

The Madrid Protocol has significant legal effects: by introducing a comprehensive instead of an issue specific approach in Antarctic environmental protection; by doing this in a legally binding instrument; and by establishing a new institution, the Committee for Environmental Protection (CEP), with an advisory role in the implementation of the Protocol.

On the Antarctic environmental management, the Madrid Protocol has enabled a change in behavior relating to minimizing environmental impact of activities in the Antarctic in three major ways: by increasing awareness of domestic agencies, by increasing the transparency of domestic implementation, and by increasing mutual control of environmental practices in the Antarctic.

3. The Challenges of the Madrid Protocol

The context of the Madrid Protocol's provisions, by and large, did not result from new writing. To a great extent, the Madrid Protocol and its annexes evolved from a cut and paste operation. Many provisions in the Annexes were extrapolated from earlier recommendation, and legal instruments such as the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA).

Secondly, an unambiguous determination of the area of application of the Protocol as an environmental protection instrument is hampered by the fact that the Madrid Protocol lacks any specific provision as to its territorial scope. This omission is due to the fact that the Madrid Protocol is meant to be a supplement to the Antarctic Treaty.

Depending on the legal system of each country that are party to the Protocol, some countries needed to pass national implementing legislation to complete the process of ratification of the protocol, while others did not need to go through this procedure. As many provisions of the Protocol are not entirely self-executing, they need to be implemented by more detailed domestic instruments. Most Antarctic Treaty Parties have adopted some form of legislation or regulations to implement the Protocol. In some instances this process took well over a decade since the Protocol was signed.

Chronic and substandard implementation of the Protocol is another major problem. The significant gap that developed between the countries implementing many of the Protocol obligations and that lagging significantly behind, is one of the more disappointing developments since the Protocol was signed.

Despite the Protocol's commitment to ensure protection for dependent and associated ecosystems there is limited evidence of this innovative and environmentally same concept in the practical operation of the Protocol.

On the exchange of information, Article 17 of the Protocol requires Parties to report annually on the steps taken to implement the Protocol. This requirement is a proxy indicator of implementation standards. Information exchange should show not only what Parties are doing to implement the Protocol, but also what they are not doing. Only a few Parties have reported consistently since the Protocol was signed.

The Protocol requires each Party to take appropriate measures to comply with the Protocol and to exert appropriate efforts to influence other nations to comply. No definition is provided for the term "appropriate measures" or "appropriate efforts". Each Party is required to notify the other Parties of activities affecting the implementation of the Protocol. It establishes a committee on environmental protection to assist the Parties in enforcement but it is advisory only and has no independent powers of enforcement, or inspection, leaving enforcement to the individual Parties. Enforcement of the Protocol is subject to binding arbitration or

compulsory International Court of Justice (ICJ) jurisdiction. However, this provision of the Protocol does not apply to disputes involving the parts of the Protocol that relates to environmental impact statements or the disclosure of environmental information. Disputes concerning these matters are subject only to an obligation to resolve disputes by peaceful means. The information gathering and disclosure of the Protocol are its most important parts. Omitting these parts from the compulsory dispute resolution requires renders them meaningless.

Regarding damages, the Protocol requires the Parties to undertake elaborate fines and procedures relating to liability for damages resulting from activities within the Treaty area. Unfortunately, no further guidance is given.

4. Conclusion

The Madrid Protocol has been a significant step forward for the protection of the Antarctic environment. Nearly 27 years after its signature, the Madrid Protocol is not consistently applied and some of its more innovative and progressive aspects of environmental management are constantly under pressure. A better and more consistent implementation of the Protocol's letter and intent is required. This includes greater transparency in national implementation and a greater commitment to international management of the Antarctic region.

Despite the Madrid Protocol having been negotiated in haste and with an imminent political agenda and thus being hampered by some important contradictions, several aspects of the Madrid Protocol, and the political will of the Parties to implement them, are directly responsible for the practical impact on improved environmental management in the Antarctic.

The Madrid Protocol does not realistically provide comprehensive effective protection for the Antarctic environment. Like many other international conservation agreement, the Protocol is crippled by its deference to national sovereignty and its need for national consensus for enforcement. Unfortunately for the protection of the Antarctic resources, the

Protocol is part of the evolution of international environment law and shares the weakness of most treaties: general standards, weak institutional structure, and dependence on sovereign States for enforcement.

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