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THE EXERCISE OF JURISDICTION IN ANTARCTICA: A COMPARATIVE ANALYSIS FROM THE PERSPECTIVE OF BELGIUM, FRANCE AND THE UNITED KINGDOM

BY

Alexia DE VAUCLEROY*

Abstract

This Article seeks to identify the relevant rules which govern the exercise of jurisdiction in Antarctica in the context of the implementation of the 1991 Madrid Protocol on Environmental Protection to the Antarctic Treaty (the Protocol) and its Annexes, regarding tourist activities. In particular, it will determine whether the way the Protocol was implemented ensures a "comprehensive protection" of the Antarctic as provided for by Article 2 of the Protocol. In this perspective, after an introduction (Part I), it will examine issues relating to the implementation of the Protocol and the exercise of jurisdiction in Antarctica (Part II). Then, it will examine how Belgium, the United Kingdom and France have implemented the provisions of the Protocol (Part III).

Résumé

La présente contribution a pour objectif d'identifier les règles qui s'appliquent à l'exercice de la juridiction en Antarctique dans le cadre de la mise en œuvre du Protocole de Madrid de 1991 relatif à la protection de l'environnement et de ses annexes, à l'égard des activités touristiques. En particulier, il vérifie si la manière dont le Protocole a été mis en œuvre assure la « protection globale » de l'environnement en Antarctique, tel que le requiert son article 2. À cet effet, après une introduction (I), l'article examine les questions liées à l'application du Protocole et à l'exercice de la juridiction en Antarctique (II). Ensuite, il rend compte de la façon dont les dispositions du Protocole ont été mises en œuvre en Belgique, au Royaume-Uni et en France (III).

* F.R.S.-FNRS Research Fellow in Public International Law at the *Université catholique de Louvain*, under the supervision of Professor Pierre d'Argent. Her doctoral thesis concerns temporal and spatial inter-state differentiation of obligations of conduct. She also gives tutorials in Public International Law and has worked as a member of the course team of Professor Pierre d'Argent for the MOOC, "International Law", on Edx. She graduated from the *Université Catholique de Louvain* and holds an LL.M. from the London School of Economics. Her Master theses concerned respectively the obligation to negotiate in good faith in international law and the notion of humanity in the international law discourse.

I. — Introduction

Since the late 1980's, tourism has steadily increased in Antarctica. During the last austral summer only, 44,000 tourists visited Antarctica; five times as many as twenty years ago. (1) Activities offered by commercial companies have also greatly diversified and include camping, climbing, skiing, overflying, scuba diving, and running a marathon. (2) As several States emphasized during the Antarctic Treaty (3) Consultative Meeting (ATCM) (4) held in Buenos Aires in May 2018, these changes also involve substantial threats to the environment and increasing risks of accidents and, therefore, the need for regulation.

In 1991, several States Parties to the Antarctic Treaty adopted a Protocol aimed at comprehensively protecting the Antarctic environment and its dependent and associated ecosystems. (5) Although it does not address specifically tourist activities, it sets a framework which ensures that all activities in Antarctica are conducted so as to limit adverse environmental impacts. Among others, it prohibits activities relating to mineral resources (6) and requires that all activities in Antarctica be preceded by an assessment of their environmental impacts. (7) This regime has been described as "one of the most stringent environmental instruments in international law to date". (8) Yet, its implementation remains highly problematic due to the specificities of Antarctica.

(1) X, La régulation du tourisme, une urgence dans l'Antarctique, *Le Soir*, 16 May 2018, as available at http://www.francesoir.fr/actualites-monde/la-regulation-du-tourisme-une-urgence-dans-lantarctiquehttp://www.francesoir.fr/actualites-monde/la-regulation-du-tourisme-une-urgence-dans-lantarctique (consulted on 1 September 2018).

(2) Information concerning activities organized in Antarctica are to be found on the ATS website, as available at https://www.ats.aq/e/ep.htm (consulted on 1 September 2018). See also: R.A. Sànchez, R. Roura, "Supervision of Antarctic Shipborne Tourism: a pending issue", in M. Schillat, M. Jensen, M. Vereda, R.A. Sánchez, R. Roura (eds), *Tourism in Antarctica*, Springer, 2016, p. 41, 43.

(3) Antarctic Treaty. Multilateral convention, 1 December 1959, 402 *United NationsTreaty Series* (*UNTS*), 1962, pp. 71, 72-84. This treaty entered into force on 23 June 1961, as available at https://www.ats.aq/documents/ats/treaty_original.pdf (consulted on 1 September 2018).

(4) The Antarctic Treaty Consultative Meeting is hosted every year by one of the Consultative Party. It is attended by representatives of the Consultative Parties, non-Consultative Parties, observers and invited experts. During these meetings, Consultative Parties may adopt measures, decisions and resolutions that give effect to the Antarctic Treaty (*supra* note 3) and to the Protocol on Environmental Protection to the Antarctic Treaty (*infra* note 5).

(5) Protocol on Environmental Protection to the Antarctic Treaty. Multilateral protocol, 4 October 1991, 2941 *UNTS*, 2019, pp. 3, 9-70, Article 2. This protocol entered into force on 14 January 1998, as available at https://treaties.un.org/doc/Publication/UNTS/Volume%202941/v2941.pdf (consulted on 1 September 2018). Hereinafter 1991 Madrid Protocol.

(6) *Ibid.*, Article 7.

(7) *Ibid.*, Article 8.

(8) N. Vanstappen, "Challenges for the Antarctic Treaty", 1 *Wereldbeeld*, 2014, p. 21, 24. See also: S. Deliancourt, "Les mesures de protection de l'environnement en Antarctique adoptées par la France depuis 2005", 33 *Revue Juridique de l'Environnement*, 2008, p. 25, 27.

As this is well known, the United Kingdom, New Zealand, France, Australia, Norway, Chile and Argentina claim parts of Antarctica.(9) Together, the territories claimed cover 85 per cent of the continent with the Argentinian, Chilean and British claims overlapping in the Palmer Peninsula Region. However, States have generally not recognized these claims.(10) Besides, although the United States and Russia have not staked claims to areas in Antarctica, they have reserved their rights to do so in the future. When the Antarctic Treaty was adopted in 1959, States Parties to that Treaty agreed to freeze their territorial disputes. Article IV of the Antarctic Treaty, which enshrines this compromise, provides that no provisions in the Antarctic Treaty can be interpreted as a renunciation or diminution of their territorial claims. Consequently, under the Antarctic Treaty, there is no sovereign authority entrusted with the power of adopting and implementing laws in Antarctica. In this regard, the question of jurisdiction, *i.e.* who can apply and enforce rules in Antarctica, plays an important role.(11)

This contribution explores the question of jurisdiction vis-à-vis tourist activities in Antarctica in the context of the implementation of the 1991 Madrid Protocol and its Annexes. In particular, it examines whether the implementation of the 1991 Madrid Protocol ensures a "comprehensive protection" of the Antarctic as provided for by Article 2 of the 1991 Madrid Protocol. In this perspective, it will examine issues relating to the implementation of the Protocol and the exercise of jurisdiction in Antarctica (II). Then, it will determine how Belgium, the United Kingdom and France have implemented the 1991 Madrid Protocol (III).

II. — Implementation of the 1991 Madrid Protocol

In the absence of an authority entitled to apply and enforce uniform rules in Antarctica, the protection of the Antarctic environment depends on the collective efforts of State Parties to ensure that activities under their jurisdiction are carried out in accordance with the 1991 Madrid Protocol. According to Article 13 on the implementation of the 1991 Madrid Protocol, "each Party shall take appropriate measures within its competence, including the

(9) P.A. Bernhardt, "*Sovereignty in Antarctica*", 5 *California Western Journal of International Law*, 1974, p. 297, 297; K.N. Scott, "Managing Sovereignty and Jurisdictional Disputes in the Antarctic: The Next Fifty Years", 20 *Yearbook of International Environmental Law*, 2009, pp. 3, 9-10; E.W. Johnson, "Quick Before It Melts: Towards a Resolution of the Jurisdictional Morass in Antarctica", 10 *Cornell International Law Journal*, 1976, p. 173, 175.

(10) The United Kingdom, France, New Zealand and Norway mutually recognize their claims on the continent. Argentina and Chile also recognize each other's claims but have not agreed on the limits of these.

(11) J. Jabour, "Strategic Management and Regulation of Antarctic Tourism", in T. Tin *et al.* (eds), *Antarctic Futures*, Dordrecht, Springer, 2014, p. 275, 277.

adoption of laws and regulations, administrative actions and enforcement measures, to ensure compliance with this Protocol". (12)

This obligation is an obligation of conduct, as opposed to an obligation of result. Accordingly, States have to do their best efforts to ensure that those under their jurisdiction comply with the provisions of the 1991 Madrid Protocol. (13)

To adequately comply with their obligation, States should ensure both "legal implementation" and "practical implementation". While the former requires that States adopt laws and regulations necessary to ensure that individuals and activities under their jurisdiction comply with the 1991 Madrid Protocol and its Annexes, the latter imposes on States to take practical measures to enforce national laws. Article 13, however, does not determine the persons or activities to which the law should apply (jurisdiction to prescribe), nor the persons or activities with respect to which enforcement measures can be taken (jurisdiction to enforce). (14)

Echoing Article X of the Antarctic Treaty, paragraph 2 of Article 13 further indicates that "[e]ach Party shall exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity contrary to this Protocol". While it is clear that this article aims at ensuring universal compliance with the 1991 Madrid Protocol, the concrete steps States should take to comply with this article remain unclear. Is it enough for States to exert pressure through diplomatic means or should States also use legislative jurisdiction to govern activities involving nationals and ships of non-Contracting States? The latter suggestion is consistent with the objectives of the 1991 Madrid Protocol and its Annexes and may be the best option to ensure effective compliance with the 1991 Madrid Protocol in Antarctica. However, as Article 13 (2) only binds States Parties to the 1991 Madrid Protocol, relying on this article alone may not suffice to convince

(12) 1991 Madrid Protocol, *supra* note 5, Article 13.

(13) As was made clear by the the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea: "The expression 'to ensure' is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law (see ILC Articles on State Responsibility, Commentary to article 8, paragraph 1)". This obligation is an obligation of conduct: "it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation 'of conduct' and not 'of result', and as an obligation of 'due diligence'". *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, International Tribunal for the Law of the Sea, Advisory Opinion, 1 February 2011, *ITLOS Reports*, 2011, paras 112 and 110.

(14) K. Bastmeijer, "Implementing the Environmental Protocol Domestically: An Overview", in D. Vidas (ed.), *Implementing the Environmental Protection Regime for the Antarctic*, Dordrecht, Springer, 2000, p. 287, 288.

non-Contracting States of the need to exercise jurisdiction towards their own nationals. (15)

In the absence of clear criteria as how States should implement the 1991 Madrid Protocol in Article 13, this section will seek to identify relevant rules on jurisdiction (16) in Antarctica. In this regard, it is argued that one should distinguish between measures taken by Contracting Parties to implement the 1991 Madrid Protocol vis-à-vis activities that only involve other Contracting Parties and measures adopted to implement the 1991 Madrid Protocol towards activities that also involve non-Contracting States. Indeed, while Contracting Parties have agreed to jurisdictional principles in Antarctica flowing from the Antarctic Treaty, the 1991 Madrid Protocol and general international law, non-Contracting States are only bound by general international law.

In attempting to solve jurisdictional issues, this article will also make a distinction between jurisdiction to prescribe and jurisdiction to enforce. While jurisdiction to prescribe seeks to answer the question of the scope of application of the law, the jurisdiction to enforce relates to the question of who is competent to ensure the application of that law. (17) Logically, the latter type of jurisdiction is intrinsically linked to the former one: "there can be no enforcement jurisdiction unless there is prescriptive jurisdiction". (18) The reverse is not true though: a State entitled to exercise prescriptive jurisdiction is not necessarily entitled to enforce it. (19)

1. — *Applying the 1991 Madrid Protocol between Contracting Parties*

Nothing in international law prevents States from determining rules applying between themselves with respect to the exercise of jurisdiction. This section will seek to identify such rules, on the basis of the Antarctic Treaty and the 1991 Madrid Protocol, and of measures, decisions and resolutions adopted during ATCM.

(15) K. Bastmeijer, The Antarctic Environmental Protocol and its Domestic Legal Implementation, The Hague, Kluwer, 2003, pp. 116-117.

(16) For the purpose if this contribution, jurisdiction refers to "the subjection of persons, goods or activities to the legal order of a state as an expression of its sovereignty over those persons goods or activities". "The Exercise of National Jurisdiction on Assets in Antarctica", submitted by Belgium, 2014, ATCM XXXVII/IP80.

(17) F. Orrego Vicuña, *Antarctic Mineral Exploitation. The Emerging Legal Framework*, Cambridge, Cambridge University Press, 1988, p. 84; Bastmeijer, *supra* note 15, p. 104; C. Ryngaert, "The Concept of Jurisdiction in International Law", in A. Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law*, Cheltenham, Edward Elgar Publishing, 2015, p. 50, 57; F.A. Mann, "The Doctrine of Jurisdiction in International Law", *R.C.A.D.I.*, Leiden, A.W. Sijthoff, 1964, p. 1, 13.

(18) D.W. Bowett, "Jurisdiction: Changing Patterns of Authority over Activities and Resources", 53 *British Yearbook of International Law*, 1983, p. 1, 1.

(19) Mann, *supra* note 17, p. 13.

A. — *Jurisdiction to Prescribe in the Antarctic Treaty System*

a. — The Antarctic Treaty

During the 1959 negotiations, Parties disagreed on the principle that should govern the exercise of jurisdiction. On the one hand, States like the United Kingdom, Norway and all States that do not recognize claims of sovereignty favored jurisdiction based on the principle of nationality. A few States expressly stated their exclusive jurisdictional competence towards their own nationals. For example, the USSR affirmed that "[t]he Soviet Union has considered and continues to consider that Soviet citizens in the Antarctic are subject to the jurisdiction of the Soviet Union alone". (20) South Africa also indicated that "the government of South Africa is not able to foresee that it will be possible to renounce its jurisdiction over its nationals in any place in Antarctica". (21) On the other hand, States like France, Chile and Argentina supported the territorial principle. For example, France made it clear that "it does not renounce any of the privileges of its sovereignty in Adélie Land especially those concerning the general power of jurisdiction, which it exercises over the said territory". (22) At the end of the conference, both positions could not be reconciled, as any choice would have entailed pronouncement on the question of territorial sovereignty. (23)

In the absence of a general solution, Contracting Parties, however, agreed on a partial solution, limited to three categories of individuals: observers, scientific personnel, and members of the staff accompanying any such persons. According to Article VIII of the Antarctic Treaty, these individuals shall be subject only to the jurisdiction of the Contracting Party of which they are nationals. This Article clarifies that it is "without prejudice to the respective positions of the Contracting Parties relating to jurisdiction over all other persons in Antarctica". (24)

As States understood that this solution might not be sufficient, Article IX (e) provides that Contracting Parties should regularly meet in order to discuss and adopt measures including regarding "questions relating to the exercise of jurisdiction in Antarctica". (25) Until now however, the ATCM has

(20) Statement by USSR in relation to Article VIII of the Treaty at the Plenary Committee of the Conference in Antarctica, 30 November 1959, in W. Bush, *Antarctica and International Law: A Collection of Inter-state and National Documents*, London, Oceana, 1982, pp. 38-43, cited by Orrego Vicuña, *supra* note 17, p. 91.

(21) Statement by South Africa in relation to Article VIII of the Treaty at the Plenary Committee of the Conference in Antarctica, 30 November 1959, in Bush, *supra* note 20, pp. 38-43, cited by Orrego Vicuña, *supra* note 17, p. 91.

(22) Orrego Vicuña, *supra* note 17, pp. 91-92.

(23) *Ibid.*, p. 87.

(24) Antarctic Treaty, *supra* note 3, Article VIII.

(25) *Ibid.*, Article IX (e).

not adopted any measure pursuant to this article. (26) Hence, Article VII (2) fully applies. This article provides that "pending the adoption of measures in pursuance of subparagraph 1 (e) of Article IX, the Contracting Parties concerned in any case of dispute with regard to the exercise of jurisdiction in Antarctica shall immediately consult together with a view to reaching a mutually acceptable solution". (27)

Although not specifically related to the issue of jurisdiction, other articles offer indications as to relevant jurisdictional principles. To start with, it is quite clear that no State can pretend to regulate all activities in Antarctica, as such an interpretation would be contrary to Article IV of the Antarctic Treaty. (28) As was argued by France in a document presented to the XXXVth ATCM in 2012, "Article IV of the Antarctic Treaty prohibits Parties to take any measure that would imply an exercise of their sovereignty on a territorial basis". (29)

Article VII (5) is also relevant when discussing jurisdiction. It indicates jurisdictional connections that could be used by States when implementing the Antarctic Treaty and its 1991 Madrid Protocol. This Article requires that States give other Contracting Parties advanced notice of

> "a) all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory; b) all stations in Antarctica occupied by its nationals; and c) any military personnel or equipment intended to be introduced by it into Antarctica subject to the conditions prescribed in paragraph 2 of Article I of the present Treaty". (30)

Finally, taking a look at the Antarctic Treaty as a whole, it may also be argued that States should take into account the sensitive balance it enshrines and the cooperative spirit that transcends all its provisions, when defining their scope of jurisdiction. Thus, jurisdictional principles invoked by Sates should be reasonable and based on legitimate interests. This seems also the best way to ensure compliance with the obligation set out in Article VIII (2) to consult in order to reach a "mutually acceptable solution". (31)

b. — The ATCM

Following the adoption of the Antarctic Treaty, States refrained from substantially discussing "questions relating to the exercise of jurisdiction

(26) "Final report of the Intersessional Contact Group (ICG) on the exercise of jurisdiction in the Antarctic Treaty area", submitted by France, 14 March 2014, XXXVII ATCM/WP37, p. 2.

(27) Antarctic Treaty, *supra* note 3, Article VIII (2).

(28) W. Bush, "Means and Methods of Implementation of Antarctic Environmental Regimes and National Environmental Instruments: An Exercise in Comparison", in Vidas, *supra* note 14, pp. 40-41.

(29) "Jurisdiction in Antarctica", submitted by France, 27 April 2012, ATCM XXXV/WP28, p. 4.

(30) Antarctic Treaty, *supra* note 3, Article VII (5).

(31) Johnson, *supra* note 9, p. 192.

in Antarctica". (32) While this question was occasionally brought up during ATCM, States generally decided to ignore it. For example, when, following an incident that caused the death of a Russian station employee and involved a member of the Uruguayan station, Uruguay called upon States to "lay down complementary rules in the field of jurisdiction", (33) States turned a deaf ear to the call. Although States recognized "the importance of this question, the solution of which was left deliberately open in Article IX (1) of the Antarctic Treaty", they decided to postpone the discussion for the reason that "the question raises some delicate and sensitive problems which need more and careful deliberations". (34) After having been postponed once again for two other meetings, the question was then swept away.

States' reluctance to address in a comprehensive manner the question of jurisdiction was made clear once again in 2012. Following an incident which involved damages caused to the *Wordie House* (35) by French tourists, the ATCM decided to establish an Intersessional Contact Group (ICG), dedicated to cooperation on questions related to the exercise of jurisdiction in the Antarctic Treaty area. (36) The final report of this study, issued in 2014, does not entail any substantial recommendation as how States should deal with jurisdictional issues. Instead, the report takes note of the States' satisfaction with the current situation and their desire to deal with each situation on a case-to-case basis. It emphasizes the need for cooperation between States in accordance with Article VIII (2) of the Antarctic Treaty and recommends the adoption of several measures aimed at fostering information exchanges between States such as the publication of a list of all national contact points on the question of the exercise of jurisdiction in Antarctica on the Secretariat's website and the organisation of an informal meeting at each ATCM in order to monitor the progress and the trends made with respect to the exercise of jurisdiction. (37)

States' decision to solve the jurisdictional question procedurally rather than substantially should however not come as a surprise. Jurisdiction is closely associated with sovereignty and the decision to favor national principle of jurisdiction over territorial principle of jurisdiction, or vice-versa, would undoubtedly entail the weakening or strengthening of existing territorial claims. Moreover, jurisdiction is considered by several States as closely related to national measures of implementation and, therefore, as belonging

(32) Antarctic Treaty, *supra* note 3, Article IX (e).

(33) "Issues relating to the exercise of jurisdiction in Antarctica", submitted by Uruguay, 1994, ATCM XVIII/WP32.

(34) Final Report of the 18th Antarctic Treaty Consultative Meeting, Kyoto, 1994, p. 29.

(35) Wordie house is a hut located on Winter Island.

(36) "Jurisdiction in Antarctica", submitted by France, 27 April 2012, WP28.

(37) "Final report of the Intersessional Contact Group (ICG) on the exercise of jurisdiction in the Antarctic Treaty area", submitted by France, 14 march 2014, ATCM XXXVII/WP37.

exclusively to internal matters, which should be exempted from any form of international control. (38)

c. — The 1991 Madrid Protocol

The 1991 Madrid Protocol and its Annexes apply to "activities", (39) "all activities in the Antarctic Treaty area", (40) "activities undertaken in the Antarctic Treaty area pursuant to scientific research programs, tourism and all other governmental and non-governmental activities in the Antarctic Treaty area for which advance notice is required in accordance with Article VII (5) of the Antarctic Treaty including associated logistic support activities". (41) In other words, the 1991 Madrid Protocol aims at covering most, if not all, activities occurring in Antarctica.

However, with the exception of Annexes IV and VI, neither the 1991 Madrid Protocol, nor its Annexes determine the authority in charge of ensuring the respect of the provisions incorporated in those texts. For example, both Annexes II and V, which concern the conservation of Antarctic fauna and flora and protected areas, respectively, provide that certain activities are prohibited except in accordance with a permit issued by an appropriate authority. Yet, none of these articles offers criteria as to identify the State entitled to deliver permits. Article 1 (e) in Annex II and Article 1 (a) in Annex V merely defines it as "any person or agency authorized by a Party to issue permits under this Annex". The ATS website which determines for each State which is the appropriate authority does not further specify the connecting links which is required between an activity and the State entitled to act. (42)

In the absence of clear jurisdictional criteria in the 1991 Madrid Protocol, it is generally accepted that States can refer to the jurisdictional connections set out in Article VII (5) of the Antarctic Treaty, since Articles 3, 8 and 15 of the 1991 Madrid Protocol as well as Annex III and VI cover "activities for which advance notice is required in accordance with Article VII (5) of the Antarctic Treaty". Although jurisdiction based on departure State is still debated among some States as will be explained below, state practice as well as legal doctrine attest of the general acceptance of these criteria among Consultative Parties. (43) Some authors have even suggested that the reference to Article VII (5) entails an obligation for States to ensure that

(38) P. Gautier, "The Exercise of Jurisdiction over Activities in Antarctica: A New Challenge for the Antarctic System", in L. del Castillo (ed.), *Law of the Sea, from Grotius to the International Tribunal for the Law of the Sea, Liber Amicorum Hugo Caminos*, Leiden, Brill, 2015, p. 193, 199; Vanstappen, *supra* note 8, p. 27.

(39) 1991 Madrid Protocol, *supra* note 5, Articles 3, 6, 8 and 16.

(40) *Ibid.*, Preamble and Article 3.

(41) *Ibid.*, Articles 3 (4), 8 (2) and 15.

(42) As available at https://www.ats.aq (consulted on 1 September 2018).

(43) *Ibid.*; Gautier, *supra* note 38, p. 197; Bush, *supra* note 28, p. 40.

all expeditions organized by their nationals, all expeditions on their ships and all expeditions to Antarctica organized in or proceeding from their territory comply with the obligations enshrined in those articles. (44) In practice, several States have endorsed this interpretation and incorporated Article VII (5) when implementing the 1991 Madrid Protocol and its Annexes, ensuring in this way a large scope of application of the provisions of the 1991 Madrid Protocol. However desirable, this interpretation must be rejected. Article VII (5) relates to activities for which a notification is needed and does not *per se* determine the scope of the responsibility of States to ensure the implementation of the 1991 Madrid Protocol. Furthermore, nothing in the *travaux préparatoires* suggests that Contracting Parties intended to apply such a broad understanding. (45)

In contrast with the 1991 Madrid Protocol and other Annexes, Annex IV and Annex VI determine the scope of application of implementing measures taken by States. Pursuant to Article 2 of Annex IV concerning the "[p]revention of marine pollution", States must ensure that all ships entitled to fly their flag as well as any other ship engaged in or supporting their Antarctic operations respect this Annex while operating in the Antarctic Treaty area.

Notwithstanding the limitation of this Annex to flag State jurisdiction, it should be also noted that the MARPOL Convention (46) is subject to port State control. (47) According to Article 5 (3) of this Convention, all ships in the ports or offshore terminals under the jurisdiction of a Contracting Party can be inspected by officers duly authorized by that Party. This is worth emphasizing as, as has been reported by several authors, Annex IV mainly incorporates standards similar or even lower to the ones in the MARPOL Convention. (48) Besides, Article 14 of Annex IV concerning the relationship between the Annex and the Convention provides that "[w]ith respect to those Parties which are also Parties to MARPOL 73/78, nothing in th[e] Annex shall derogate from the specific rights and obligations thereunder". Consequently, as all Contracting Parties to the 1991 Madrid Protocol are also parties to the MARPOL Convention, both port States and flag States can ensure compliance with the obligations enshrined both in the MARPOL Convention and in Annex IV.

(44) Bastmeijer, *supra* note 15, p. 112.

(45) *Ibid.*

(46) International Convention for the Prevention of Pollution from Ships. Multilateral Convention, 2 November 1973, 1340 *UNTS*, 1992, 184-265, as amended by Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships of 1973, adopted on 17 February 1978 (both entered into force on 2 October 1983), 1340 *UNTS*, 1992, pp. 61, 62-89, as available at https://treaties.un.org/doc/Publication/UNTS/Volume%201340/v1340.pdf (consulted on 1 September 2018). Hereinafter MARPOL Convention.

(47) It should be emphasized that port state control and port state jurisdiction are two different notions, the latter term being broader than the former.

(48) The MARPOL Convention (*supra* note 46) lists the Antarctica as one of the special area in Annexes I, II, IV.

As has been repeatedly reported during ATCMs, port State jurisdiction offers an interesting tool to ensure that all tourist activities in Antarctica comply with internationally recognized maritime standards related to marine pollution as all the traditional southern hemisphere countries of departure are Parties to the 1991 Madrid Protocol. Moreover, most of them are Parties to one or more Regional Memoranda of Understanding on port State control (MoU). (49) Aimed at protecting human life at sea and the marine environment, these instruments have confirmed the possibility for port States to take measures to ensure that *all* vessels visiting their waters comply with the MARPOL Convention, irrespective of whether their flag State is Party to that Convention. (50) During the 33rd ATCM held in Punta del Este in 2010, Consultative Parties confirmed this, through the adoption of resolution 7 entitled "Enhancement of port State control for passenger vessels bound for the Antarctic Treaty area". It recommends that "Parties proactively apply, through their national maritime authorities, the existing regime of port State control to passenger vessels bound for the Antarctic Treaty area", an expression which seems to include vessels registered in non-Contracting States. (51) It should also be noted that, while MoU are essentially concerned with ensuring that all vessels respect marine pollution standards while in their ports, Article 218 of United Nations Convention on the Law of the Sea (1982 LOSC) (52) further allows port States to take actions against vessels that discharge pollutants in contravention with existing international standards prior to their entry in port. (53) Consequently, tourist vessels that breached the MARPOL Convention while in Antarctica can be prosecuted when returning to the port of a State Party to this Convention.

Annex VI concerning "Liability Arising From Environmental Emergencies" requires that States impose upon their operators different obligations

(49) The first Regional MoU was created in Europe: The 1982 Paris Memorandum of Understanding. It has served as a model for subsequent agreements. The other MoU include the 1992 Latin American Agreement on Port State Control (Viña del Mar Agreement); the 1993 Asia-Pacific MoU on Port State Control in the Asia-Pacific Region (Tokyo MoU); the 1996 Caribbean MoU on Port State Control; the 1997 MoU on Port State Control for the Mediterranean Region; the 1998 Indian Ocean MoU; the 1998 West and Central African MoU and the 2004 Riyadh MoU on Port State Control in the Gulf Region.

(50) The MARPOL Convention is a "relevant instrument" under all the memoranda of understanding on port state control.

(51) Final Report of the Thirty-third Consultative Meeting, Punta del Este, 3-14 May 2010, p. 72. The preamble of the resolution emphasizes that its is "Conscious that many passenger vessels operating in the Antarctic Treaty area are not flagged to States which are Parties to the Antarctic Treaty or to its Protocol on Environmental Protection", that the Consultative Parties decided to adopt this resolution.

(52) Multilateral convention, 10 December 1982, 1833 *UNTS*, 1998, pp. 3, 397-581. This convention entered into force on 16 November 1994, as available at www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf (consulted on 1 September 2018).

(53) *Ibid.*, Article 218. Orrego Vicuña, "Port State Jurisdiction in Antarctica: A New Approach to Inspection, Control and Enforcement", in Vidas, *supra* note 14, p. 45, 65.

related to environmental emergencies management. Article 2 d) defines the notion of "operator of the party" as

> "an operator that organizes, in that Party's territory, activities to be carried out in the Antarctic Treaty area, and: (i) those activities are subject to authorization by that Party for the Antarctic Treaty area; or (ii) in the case of a Party which does not formally authorize activities for the Antarctic Treaty area, those activities are subject to a comparable regulatory process by that Party". (54)

While this Article does not clarify which State is entitled to authorize activities in Antarctica, it makes it clear that the State that issued that authorization has jurisdiction over the activities it authorized for the purpose of obligations laid down in Annex VI.

Whether the jurisdictional links provided for by these two Annexes are exclusive remains unanswered.

B. — *Jurisdiction to Enforce in the Antarctic Treaty System*

Irrespective of the question of who should regulate activities in Antarctica, the question also arises as regards how to enforce these laws in Antarctica. As may be expected, no Antarctic police exists so as to record infringements and take law enforcement actions. Instead, enforcing compliance with the 1991 Madrid Protocol rests with the Contracting Parties. This, in turn, represents a challenge! Enforcement requires not only on-site personnel, but also personnel who has jurisdiction over the infractions it witnesses. The Antarctic Treaty and the 1991 Madrid Protocol provide an enforcement system based both on national measures and on an international inspection system. (55)

According to Article 13 of the 1991 Madrid Protocol, it is up to the Contracting Parties to adopt enforcement measures to ensure compliance with the 1991 Madrid Protocol. Hence, each State should take steps to ensure that all individuals and all activities governed by their own laws respect the Antarctic Treaty and the 1991 Madrid Protocol. In the absence of clear enforcement requirements, cooperation and self-restraint are thus of prime importance.

In addition to these national enforcement measures, the Antarctic Treaty system also provides for an inspection system. Pursuant to Article VII of the Antarctic Treaty and Article 14 of the 1991 Madrid Protocol, the Antarctic Treaty Consultative Parties can designate, individually or collectively, observers to carry out inspections to ensure compliance with the provisions of the Antarctic Treaty and the 1991 Madrid Protocol. These observers can

(54) 1991 Madrid Protocol, *supra* note 5, Article 2 (d) of Annex VI.
(55) JABOUR, *supra* note 11, p. 277.

access all areas of Antarctica, including stations, installations, equipment, ships and aircrafts and should write reports following their inspections. (56)

Tourist activities are also covered by this inspection mechanism. The Antarctic inspection checklist, adopted in Resolution 5 in 1995 even comprises a section specifically entitled "tourist and non-governmental activities". (57) Nevertheless, this mechanism has so far failed to effectively monitor tourist activities for two main reasons. Firstly, the wording of Articles VII of the Antarctic Treaty and 14 of the 1991 Madrid Protocol do not cover all tourist activities. (58) It only authorizes inspections on ships "at points of discharging or embarking cargoes or personnel", (59) thereby excluding inspections on vessels underway, for example. (60) This is particularly problematic for yachts "as it is difficult to coordinate an inspection team visit with yachts that normally do not hold to set schedules (as a general rule)". (61) Secondly, tourist vessels, facilities and activities have received little attention under the existing inspection system so far. (62) Only few tourist vessels have been inspected. (63) Moreover, until now (semi-)permanent tourist facilities such as hotels and camps as well as important activities such as marathons have been excluded from the inspection mechanism. As was emphasized by Norway in a report, "the fact that land-based tourist facilities and activities are not permanent [...] makes it impossible to have an updated overview over exact locations of activities, which would make it challenging to conduct inspections". (64)

2. — *Jurisdiction in Antarctica from the Perspective of General International Law*

In the absence of clear rules on jurisdiction in the 1991 Madrid Protocol and in the Antarctic Treaty, general international law may provide guidance

(56) Antarctic Treaty, *supra* note 3, Article VII and 1991 Madrid Protocol, *supra* note 5, Article 14.

(57) Resolution 5 (1995), "Antarctic Inspection Checklists" and Resolution 3 (2010), "Revised Antarctic inspection Checklist A".

(58) "Tourism accreditation and inspection under the Antarctic Treaty", submitted by ASOC, 2004, ATCM XXVII/IP108, p. 4.

(59) Antarctic Treaty, *supra* note 3, Article 7 (3).

(60) Orrego Vicuña, *supra* note 53, p. 50.

(61) "Report of the Intersessional Contact Group on Inspections in Antarctica under Article VII of the Antarctic Treaty and Article 14 of the Environmental Protocol", submitted by the Netherlands, the United States and Korean, 7 April 2017, ATCM XL/WP40.

(62) *Ibid.*

(63) Orrego Vicuña, *supra* note 53, p. 50. Information on inspections is to be found on the inspection database of the ATS website, as available at https://www.ats.aq/devAS/Ats/InspectionsDatabase?lang=e (consulted on 1 September 2018).

(64) "Report of the Intersessional Contact Group on Inspections in Antarctica under Article VII of the Antarctic Treaty and Article 14 of the Environmental Protocol", submitted by the Netherlands, the United States and Korean, 7 April 2017, ATCM XL/WP40.

as to applicable jurisdictional principles. It is therefore necessary to identify these rules and determine whether these are applicable to the specific situation of the Antarctic. As they derive from international law itself, these principles can be invoked both by Contracting and non-Contracting Parties to the 1991 Madrid Protocol to regulate activities in Antarctica.

A. — *Jurisdiction to Prescribe*

In international law, rules relating to the jurisdiction to prescribe are unclear. When the Permanent Court of International Justice (PCIJ) first ruled on this question, it held that,

> "[f]ar from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property or acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable". (65)

Under this principle, States are free to legislate over a situation as they please unless a prohibitive rule prevents them from doing so. To the contrary, most authors consider now that international law on jurisdiction has a prohibitive nature: States cannot regulate a situation unless a permissive principle allows them to do so. While it is generally accepted that these principles should be based on a link that can substantially connect the regulated conduct and the State, the list of heads of jurisdiction pursuant to which States can assert the applicability of their law is debated. (66) The most important ones include the territoriality principle, the nationality principle, the universality principle and the protective principle. (67) However, even when States agree on certain principles, their application in each country varies greatly. For example, although States generally agree that the nationality is a legitimate ground for jurisdiction, they differ in their implementation of this principle. For instance, does the nationality principle entail both active and passive personality? What are the limits to the assertion of this principle? Therefore, it is generally accepted that customary law on jurisdiction is very flexible and that only few restrictions exist as to States' right to regulate a peculiar situation. (68)

Whatever the exact content of jurisdictional rules may be, it is doubtful whether they are pertinent for the exercise of jurisdiction in the specific case of Antarctica. Traditional rules have developed from practice in circumstances very different from the case of Antarctica. Besides, it is generally

(65) The Case of the S.S. 'Lotus' (French Republic v. Turkish Republic), PCIJ, Judgement, 7 September 1927, Series A, No. 10, p. 19.

(66) JOHNSON, *supra* note 9, p. 188.

(67) BASTMEIJER, *supra* note 15, p. 104.

(68) JOHNSON, *supra* note 9, p. 188.

agreed that rules related to jurisdiction are not absolute; they can vary depending on the legal system to which they apply. (69) For this reason, "[t]he lawfulness of a jurisdictional assertion in one field of the law has no bearing on the lawfulness of a jurisdictional assertion in another field of the law". (70) Hence, while they may provide an interesting framework for analysis, the importance of traditional rules for jurisdiction to Antarctica should not be overemphasized. (71) This is very clear concerning territorial jurisdiction, for example. Although territory has been considered "the most fundamental of all principles governing jurisdiction", (72) Article IV prevents the assertion of jurisdiction on that principle. (73)

Taking into account both traditional jurisdictional principles and the specificities of Antarctica, there are at least two principles that can be used by States, both Contracting Parties and non-Contracting States, to regulate behaviors south of 60° South Latitude. Firstly, States can exert their jurisdiction over ships and aircrafts flying their flag. The Antarctic Treaty emphasizes that it applies without prejudice of "the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area". (74) In accordance with Article 94 of the 1982 LOSC, States shall then "effectively exercise [their] jurisdiction and control in administrative, technical and social matters over ships flying [their] flag". (75) The significance of this jurisdictional principle should be emphasized, as tourism in Antarctica is mainly shipborne. (76) Secondly, States can assert jurisdiction based on nationality. According to the latter principle, "a state may exercise jurisdiction over the conduct of its nationals, regardless of their territorial location". (77) This jurisdictional principle can be used to exert control both on their nationals and on activities organized by operators of their nationality in Antarctica. Article VIII of the Antarctic Treaty, which is a practical application of this principle confirms the relevance of this traditional jurisdictional principle in Antarctica.

B. — *Jurisdiction to Enforce*

In general international law, enforcement jurisdiction is almost exclusively territorial. Enforcement authorities of a State can only operate within

(69) *Ibid.*, p. 192.
(70) C. Ryngaert, *Jurisdiction in International Law*, Oxford, Oxford University Press, 2015, p. 46.
(71) *Ibid.*
(72) Bowett, *supra* note 18, p. 4.
(73) Gautier, *supra* note 38, p. 205.
(74) Antarctic Treaty, *supra* note 3, Article VI.
(75) 1982 LOSC, *supra* note 52, Article 94.
(76) Sànchez and Roura, *supra* note 2, p. 42.
(77) A. Mills, "Rethinking Jurisdiction in International Law", 84 *British Yearbook of International Law*, 2014, p. 187, 198.

their territory, except with the authorization of other States or by virtue of a permissive rule. (78) In Antarctica, Article IV of the Antarctic Treaty excludes the possibility for States to enforce rules on a territorial basis. For this reason, general international law is not helpful in this regard and only specific rules, such as Article 13 of the Antarctic Treaty, should be taken into account when defining State's jurisdiction to enforce in Antarctica.

3. — *Applying the 1991 Madrid Protocol Towards Activities Involving Non-Contracting States*

In accordance with the jurisdictional principles developed above, there are potentially many tourists and tourist activities falling under the jurisdiction of non-Contracting States. It is estimated that almost 50 per cent of tourist vessels in Antarctica are registered in non-Contracting States. (79) Besides, during last season, nearly 7% of tourists traveling with IAATO operators, *i.e.* 3881 travelers, were nationals of non-Contracting States. (80)

As these States have generally not regulated activities taking place south of 60° South Latitude, tourists under their jurisdiction are potentially left free from any legal constraints. In this regard, some authors have developed legal arguments in order to bypass this difficulty and to ensure nevertheless compliance with the 1991 Madrid Protocol towards those activities. A few authors have sought to argue that the Antarctic regime is objective. Accordingly, all rules embedded in the Antarctic Treaty and the 1991 Madrid Protocol would be valid *erga omnes* and Contracting Parties could expect that non-Contacting States ensure compliance with the 1991 Madrid Protocol. This argument however has generally been discarded for several reasons, not the least because of the ambiguous attitude of Contracting Parties themselves in this regard. (81) Some have also defended that the Antarctic regime

(78) *Ibid.*, p. 195. See also *The Case of the S.S. 'Lotus' (French Republic v. Turkish Republic)*, *supra* note 65, p. 18: "Now the first and foremost restriction imposed by international law upon a State is that failing the existence of a permissive rule to the contrary it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention".

(79) Orrego Vicuña, *supra* note 53, p. 65; Sànchez and Roura, *supra* note 2, p. 55; J. Swanson, D. Ligett and G. Roldan, "Conceptualizing and Enhancing the Argument for Port State Control in the Antarctic Gateway States", *The Polar Journal*, 2015, p. 1, 1, estimate that 44% of tourist vessels in Antarctica were flagged by States that are not Parties to the 1991 Madrid Protocol.

(80) The International Association of Antarctica Tour Operators (IAATO) is an international association regrouping over 100 member companies operating in Antarctica and dedicated to developing safe and environmentally sound private-sector travel to the Antarctic. IAATO statistics are based on information provided to IAATO by its operators. Consequently, they reflect only the number of tourists that travel with IAATO operator companies.

(81) B. Simma, "The Antarctic Treaty as a Treaty Providing for an Objective Regime", 19 *Cornell International Law Journal*, 1986, pp. 189, 189-209; S. Vöneky and D. Wisehart, *Analysis and Enhancement of the Legal Framework — The Need for Action in the Light of Current Developments of Antarctic Tourism*, Dessau-Roßlau, Umweltbundesamt, 2016, p. 61.

is customary and therefore is binding upon third States. This argument is not persuasive either. (82) Quite on the contrary, third States practice evidences reluctance and even opposition to the rules enshrined in the Antarctic Treaty and the 1991 Madrid Protocol. Thus, it is difficult to argue that *opinio iuris* exists in support of such claim. (83)

Yet, when activities carried out in Antarctica under the supervision of a third State are in violation of obligations enshrined in the 1991 Madrid Protocol, they are likely to face strong opposition from the Claimant State asserting territorial jurisdiction where that activity took place. Indeed, if a non-Contracting State relies on the *inter partes* effects of the Antarctic Treaty system to justify the legality of behaviours contrary to it, Claimant States might be induced to refer to the same principle to argue that they do not need to comply with Article IV towards third States.

The question also arises whether Contracting Parties can legally assert their jurisdiction based on principles flowing from the Antarctic Treaty (in particular Article VII (5)) and the 1991 Madrid Protocol, (84) towards activities that also possibly fall under the jurisdiction of a non-Contracting Party. Contrary to Contracting Parties, non-Contracting States have not agreed to Article VII (5). Thus, in accordance with the maxim *pacta tertiis non nocent nec prosunt*, Contracting Parties can only invoke these jurisdictional principles towards non-Contracting States activities, if these links are valid under general international law. In particular, the question arises whether Contracting Parties can use departure State jurisdiction to ensure that tourist expeditions leaving "gateways ports" for Antarctica comply with the 1991 Madrid Protocol. In that respect, it has already been argued above that port States can inspect all tourist vessels in their ports to ensure they respect the MARPOL Convention, irrespective of whether their flag State is Party to that Convention.

As for ensuring compliance with the 1991 Madrid Protocol, it is well-established that port States can enact and enforce regulations against foreign vessels for acts that occur while these vessels are in their ports, in their territorial seas or in their exclusive economic zone. (85) Indeed, "by entering foreign ports and other internal waters, ships put themselves within the territorial sovereignty of the coastal State". (86) What is less clear however is whether port States can assert jurisdiction over the conduct of ships leaving

(82) Vöneky and Wisehart, *supra* note 81, p. 62.

(83) Scott, *supra* note 9, pp. 3-40.

(84) See the Section "Applying the 1991 Madrid Protocol between Contracting Parties".

(85) T.L. McDorman, "Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention", 28 *Journal of Maritime Law and Commerce*, 1997, p. 305, 307.

(86) R.R. Churchill and A.V. Lowe, *The Law of the Sea*, Manchester, Manchester University Press, 1999, p. 54.

their ports once in areas beyond their national jurisdiction. (87) Admittedly, "there is in principle no objection to setting conditions for the departure from ports as a condition for entry". (88) For example, Article 7 of Directive 2000/59/EC of 27 November 2000 provides mandatory disposal of all types of waste in port to ensure that these will not be illegally discharged after departure. (89) Yet, requiring that vessels leaving their port comply with the 1991 Madrid Protocol once in Antarctica seem to be quite problematic. In fact, in 1997, during the 21st ATCM, in reaction to the proposition of the United Kingdom considering that there was already "sufficient justification for the exercise of departure State jurisdiction to ensure more comprehensive compliance with the Protocol", (90) even towards vessels flying the flag of non-Contracting States, "concern was expressed by some delegations about the legality of asserting jurisdiction over future acts of foreign expeditions outside territorial waters". (91)

On the other hand, considering the specificities of Antarctica as well as the *Lotus* principle, the legality of these jurisdictional principles could be supported. In fact, several States have asserted jurisdiction on vessels flying the flag of non-Contracting States departing from their ports and there has been no objection by third States. (92)

In addition to the issues of legality, one should also emphasize the practical difficulties raised by departure State jurisdiction: how to assert jurisdiction on activities that have barely a link or no link at all with the State asserting jurisdiction? How are departure States supposed to exercise jurisdiction on ships once they have left their ports? Using such broad jurisdictional principles may also raise human rights concerns, notably in relation to the right to a *due process* and to legal certainty. In practice, although several States with gateways ports to Antarctica, *i.e.* the United Kingdom, New Zealand, have affirmed in their national law their power to ensure that vessels leaving their port should comply with the 1991 Madrid Protocol, little information is

(87) K.N. Scott and D.L. VanderZwaag, "Polar Oceans and Law of the Sea", in D.R. Rothwell, A.G. Oude Elferink, K.N. Scott, T. Stephens, *The Oxford Handbook of the Law of the Sea*, Oxford, Oxford University Press, 2015, p. 724, 745.

(88) E.J. Molenaar, Port State Jurisdiction, *Max Planck Encyclopedia of Public International Law*, April 2014, as available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2052 (consulted on 1 September 2018), para. 15.

(89) 1982 LOSC, *supra* note 52, Article 219, provides another example. When a vessel is unseaworthy and thereby threatens damage to the marine environment, port States are authorized to take measures to prevent the vessel from sailing. See also: *M/V Louisa Case (Saint Vincent and the Grenadines v. Spain)*, International Tribunal for the Law of the Sea, Order, Provisional Measures, Case No. 18, 23 December 2010, *ITLOS Reports 2008-2010*, para. 109. In that case, the Tribunal emphasizes that the freedom of navigation on the high seas does not give ships a right to leave ports.

(90) "Enhancing compliance with the Protocol: departure state jurisdiction", submitted United Kingdom, April 1997, ATCM XXI/WP22, p. 5.

(91) Final Report of the Twenty-first Antarctic Treaty Consultative Meeting, Christchurch, 19-30 May 1997, p. 9.

(92) *Ibid.*

available as to how these States have enforced departure State jurisdiction. In fact, based on information received from several tourism operators, several authors consider that "gateway checks" do not occur in practice. (93)

4. — *Conclusion*

The 1991 Madrid Protocol provides a framework for the protection of the Antarctic environment that applies to all activities south of 60° South, including tourism. However, the Antarctic Treaty and the 1991 Madrid Protocol do not determine in a general way who should be responsible for ensuring the respect of their provisions. In the 2014 ICG Report, States made it clear that they do not consider the current absence of rules relating to jurisdiction to be problematic. On the contrary, they believe it is preferable to resolve issues raising jurisdictional questions on a case-to-case basis and to avoid applying uniform rules.

In the absence of general jurisdictional criteria in the Antarctic Treaty system, it is up to States to determine the jurisdictional scope of their implementing measures in Antarctica. It is submitted, however, that the power left to Contracting Parties in this regard is not without limits. Concerning jurisdiction to prescribe, one should distinguish obligations for which the 1991 Madrid Protocol and the Annex have defined jurisdictional criteria from the others. Thus, Article VIII of the Antarctic Treaty, Annex IV and Annex VI provide quite precise jurisdictional principles. For all other articles, it has been argued that States can only assert their jurisdiction when they can justify an interest for doing so. In this respect, Article VII (5) of the Antarctic Treaty as well as other ATCM regulations and measures suggest different types of jurisdictional links. Finally, conflicts related the exercise of jurisdiction should be resolved through cooperation.

The vague character of these rules entails two antagonistic jurisdictional risks, exacerbated by the rise of tourist activities in Antarctica. First, in light of the abovementioned criteria, there are many sets of situations where several States may be entitled to regulate a same situation. Yet, neither the Antarctic Treaty system, nor international law provides rules to solve conflicts as to which State should try and punish offenders, from among States having concurrent jurisdiction. Instead, international law leaves it to States to solve these questions. (94) As expressed by F.A. Mann, "conflict rules are a product of national law which has to stand the test of the international doctrine of jurisdiction. In other words, it is the function of jurisdiction to define the international scope, which the municipal legislator is entitled to give to his enactments. The conflict rules implement and give effect to the

(93) Bastmeijer, *supra* note 15, p. 400. See also Scott and VanderZwaag, *supra* note 87, p. 745.

(94) Mann, *supra* note 17, p. 19; R.B. Bilder, "Control of Criminal Conduct in Antarctica", 52 *Virginia Law Review*, 1966, p. 231, 273.

requirement of international law". (95) The second and most problematic risk concerns the lack of effective jurisdiction. Although Article 13 provides that States should adopt measures so as to ensure compliance with the 1991 Madrid Protocol, this Article does not provide jurisdictional criteria. Besides, it only binds the 37 States that ratified it. Therefore, it is very likely that certain situations in Antarctica, especially the ones involving third States Parties, will be left unregulated. (96)

III. — Jurisdiction in Antarctica from the Perspective of Domestic Law

While the 1991 Madrid Protocol manages to regulate the protection of the Antarctic environment without settling the question of jurisdiction, domestic implementation measures need to ascertain their scope of application. In the absence of common jurisdictional criteria, the approach used by Contracting Parties to implement the 1991 Madrid Protocol provisions varies from one country to another. The present section will examine how Belgium, the United Kingdom and France have addressed the issue of jurisdiction, by analyzing both jurisdiction to prescribe (1) and jurisdiction to enforce (2) as regards tourist activities in Antarctica. While these three Europeans countries are all Consultative Parties with specific interests in Antarctica, only France (97) and the United Kingdom (98) have territorial claims on the continent.

1. — *Jurisdiction to Prescribe*

As could reasonably be expected from the absence of clear rules regarding jurisdiction, the analysis of implementation measures in Belgium, in the United Kingdom and in France evidences a great diversity in the ways these countries ensure compliance with the 1991 Madrid Protocol.

(95) Mann, *supra* note 17, p. 19.

(96) "Enhancing compliance with the Protocol: departure state jurisdiction", submitted United Kingdom, April 1997, ATCM XXI/WP22, p. 1; Jabour, *supra* note 11, p. 277.

(97) France proclaimed its sovereignty on Adélie Land by a decree issued the 27 March 1924, following the discovery of this territory by Jean Dumont D'Urville in 1840. The Law of 6 August 1955 provides for the applicability of French Law on this territory and designates a superior administrator as the representative of the French State on that territory.

(98) The United Kingdom claims sovereignty over the British Antarctic Territory that is administered by the Foreign and Commonwealth Office as an Overseas Dependent Territory. This claim overlaps with both Chilean and Argentinian claims.

A. — *Belgium*

In Belgium, the 1991 Madrid Protocol was first implemented through the law of 7 April 2005. (99) This law contains all environmental principles enshrined in the 1991 Madrid Protocol and its Annexes, with the exception of Article 15 of the 1991 Madrid Protocol and Annex VI thereto, and covers all activities organized in, and proceeding from, Belgium, conducted by Belgian individuals or entities or by nationals of another Contracting Party to the 1991 Madrid Protocol. (100) In 2017, that law was abrogated and replaced by the law of 21 July 2017. (101) The purpose of this change was to simplify certain procedures, implement Article 15 of the 1991 Madrid Protocol as well as its Annex VI, to introduce administrative sanctions and to clarify questions related to property rights and jurisdiction in Antarctica. (102)

In comparison with the previous law, the 2017 law has also broadened the scope of application of the Antarctic protection regime. Pursuant to Article 3, 4°, 5° and 10°, and Article 5, §1, this law applies to: (1) all activities undertaken in the Antarctic Treaty area organized in, or proceeding from, Belgium as well as to (2) all activities undertaken in or on a vehicle or an infrastructure registered in Belgium.

The reference to activities organized in, or proceeding from, Belgium refers to two of the criteria exposed in Article VII (5) of the Antarctic Treaty. According to the *travaux préparatoires* of the law of 21 July 2017, an activity is organized in Belgium when the main decisions and the authority for their execution are taken and exercised on the Belgian territory. An activity is considered to be proceeding from Belgium when the starting point of the activity is located in Belgium, regardless of whether the expedition stops in other ports, before reaching Antarctica. Conversely, it is not enough that an expedition stops in Belgium to consider that this activity proceeds from Belgium. (103)

The reference to vehicles and infrastructures registered in Belgium is a Belgian specificity. According to Belgian law, all infrastructures built and all vehicles introduced in accordance with a Belgian permit in Antarctica must be registered in the National Registry. (104) Then, all activities undertaken

(99) *Travaux préparatoires* of the Law of 21 July 2017, 20 July 2017, doc. 54 2276/001, pp. 4-7. It should also be noted that this law was adopted in the context of a dispute opposing the International Polar Foundation (IPF) and the Belgian State. During the debates preceding the adoption of this law, several members of parliament argued that this law was adopted to bypass judicial decisions favourable to the IPF.

(100) See Article 3, 4° of the Law of 7 April 2005 implementing the 1991 Madrid Protocol (in French : Loi du 7 avril 2005 portant exécution du Protocole au Traité sur l'Antarctique relatif à la protection de l'environnement, de l'Appendice et des Annexes I, II, III et IV, faits à Madrid le 4 octobre 1991, et Annexe V, faite à Bonn le 7 à 18 octobre 1991).

(101) In French : Loi relative à la protection de l'environnement et à la régulation des activités menées sous juridiction belge en Antarctique du 21 juillet 2017. Hereinafter Law of 21 July 2017.

(102) The IPF lodged an action for annulment against this law to the Belgian Constitutional Court.

(103) *Travaux préparatoires* of the Law of 21 July 2017, 20 July 2017, doc. 54 2276/001, p. 9.

(104) Law of 21 July 2017, *supra* note 101, Articles 5, 61, a).

in, on or by means of an infrastructure or a vehicle registered in Belgium are submitted to the Belgian jurisdiction. (105) The definition of the notion of infrastructure in Article 3, 10° of the Law of 21 July 2017 is extremely broad. It covers all fixed or mobile installations, built or placed on the ground or on the ice shelf which can accommodate persons or goods or where activities can take place. Thus, it includes a variety of structures ranging from a simple tent to scientific stations, such as the Princess Elisabeth Station. (106)

Although unique in Antarctica, national jurisdiction by registration is not in itself a new idea; it is well known in maritime law, in aviation law and space law. The idea to introduce this type of jurisdiction within Antarctica was suggested first by Belgium in an information paper entitled "The exercise of national jurisdiction on assets in Antarctica", issued during the XXXVIIth Consultative Meeting held in Brasilia. The objective of such proposal was to

> "help to clarify the legal status of assets in Antarctica, but also serve as an inventory instrument based on objective data. It would also allow the recognition of individual rights — including those of private entities — on the considered assets, without jeopardizing the State responsibility with regard to their placements, use and removal". (107)

However, the proposal did not generate much reaction. That being said, from a general point of view, this jurisdictional link appears to be in conformity with international law since jurisdiction is this instance based on a genuine link between vehicles and infrastructures and Belgium. Moreover, as the idea is to exert jurisdiction on infrastructures and vehicles in Antarctica, rather than on Antarctica itself, this mechanism is in accordance with Article IV of the Antarctic Treaty. In fact, different ATCM recommendations already suggest jurisdictional links between stations and the State operating them as well as between vehicles and the State that introduced them. For example, recommendation ATCM IV-27 provides that tourist expeditions to a foreign station should receive permission from the State managing that station and that this latter should ensure that the activity within the station complies with the provisions of the Antarctic Treaty and with ATCM recommendations. It is hereby assumed that the State managing the station has jurisdiction over it. Similarly, recommendation VIII-11, although no longer in force, recommended that governments respect the code of conduct annexed to the Recommendation in their station. Recommendation VIII-6 further enunciates that States should inform other Contracting Parties of the introduction of vehicles and other transportation facilities as well as of the establishment of facilities.

(105) *Ibid.*, Article 24.

(106) *Ibid.*, Article 3, 10°. See also: *Travaux préparatoires* of the Law of 21 July 2017, 20 July 2017, doc. 54 2276/001, p. 8.

(107) "The Exercise of National Jurisdiction on Assets in Antarctica", submitted by Belgium, 2014, ATCM XXXVII/IP80.

When applied to infrastructures that also involve scientific personnel, such as scientific stations, this jurisdictional link may, however, prove to be problematic. Indeed, the 2017 law considers that all activities undertaken within a Belgian infrastructure are submitted to Belgian laws. Yet, applying Belgian laws on scientific personnel and their staff would be contrary to Article VIII of the Antarctic Treaty which places this category of people under the jurisdiction of the Contracting Party of which they are nationals.

Two provisions of the law have a distinct scope of application. Firstly, the prohibition of activities relating to mineral resources applies not only to all activities covered under the general scope of the law, but also to all activities undertaken by Belgian individuals and entities, including when those activities are undertaken indirectly through a foreign entity in which they have interests or with which they are contractually bound. Considering the importance of this prohibition in the 1991 Madrid Protocol, the Belgian legislator sought to ensure a large scope of application for this rule. This provision hence applies to all categories identified in Article VII (5) of the Antarctic Treaty and goes even a little beyond. (108) Secondly, in accordance with Article 2 of Annex IV, obligations arising out of Annex IV apply specifically to all vessels flying the Belgian flag as well as to all other vessels engaged in expeditions conducted by Belgium. (109) On the other hand, no specific scope of application is determined for obligations implementing Annex VI. Therefore, the obligations apply to all activities covered under the general scope of application of the law, which is far broader than the one determined in Annex VI.

Finally, no provision determines in a general sense how to resolve conflicts of jurisdiction. Nevertheless, concerning the specific question of issuance of permit, the law specifies that the competent authority can decide to exempt some activities from the obligation to ask for a permit if these activities were already granted by another Contracting Party. (110)

Concretely, when a tourism operator intends to travel to Antarctica, it must apply for one of the two following permits, depending on the activities it plans to undertake: the "permit for Belgian land-based non-governmental activities" or the "permit for the entry of non-governmental Belgian-registered vessels in Antarctica". (111) As the title of the latter permit emphasizes, the criteria foreseen in the law have been restrictively interpreted. Only Belgian vessels are able to apply for a permit for non-governmental ship-based expeditions. This excludes ship-based expeditions on foreign vessels, even though these are organized from or in Belgium. (112)

(108) Law of 21 July 2017, *supra* note 101, Article 4.

(109) Vöneky and Wisehart, *supra* note 81, p. 52.

(110) Law of 21 July 2017, *supra* note 101, Article 5 § 4.

(111) There exists also a permit for Belgian governmental activities. As available at https://www.health.belgium.be/en/environmental-permits-required-all-actiovities-antarctica (consulted on 1 September 2018).

(112) The Electronic Information Exchange System (EIES) confirms that so far only vessels registered in Belgium have been authorized by Belgium to travel to Antarctica. The EIES is to

So far, maximum three operators per years have traveled to Antarctica on ship-based expeditions under a Belgian permit. (113) Only one of them, called "Latitude Océane", organizes several expeditions annually. It offers two to three trips to Antarctica, for groups of ten passengers maximum with a crew of three to four people. All other expeditions are organized on a one-time basis and comprise fewer passengers. (114) As to land-based expeditions, only three expeditions have been authorized under a Belgian permit: two during the 2016/2017 season and one during the 2017/2018 season. (115) As for Belgian tourists, 402 of them travelled to Antarctica during the 2017/2018 season, according to IAATO statistics. This is the 14th most represented nationality among tourists in Antarctica. Yet, most of these tourists are not covered by the Belgian law. (116)

B. — *United Kingdom*

In the United Kingdom, the 1994 Antarctic Act (117) implements the Antarctic Treaty, the 1991 Madrid Protocol as well as Annexes I to V while the 2013 Antarctic Act (118) gives effect to Annex VI. (119) Provisions relating to Annex VI have not yet entered into force. (120)

The 1994 Antarctic Act does not define its scope of application in general terms. Instead, each article separately indicates its own scope of application. Among the different provisions implementing the 1991 Madrid Protocol, it

be found on the ATS website, as available at https://eies.ats.aq/Ats.IE/genLogin.aspx?ReturnUrl=%2fAts.ie%2f (consulted on 1 September 2018).

(113) Data for Belgium on the EIES are only available starting from 2012.

(114) This number excludes staff members.

(115) This information is available on the EIES, *supra* note 112, under the headings: "Operational Information — Non Governmental Expeditions — Vessel Based Operations" and "Operational Information — Non Governmental Expeditions — Land Based Operations".

(116) This information is to be found on the IAATO website, as available at https://iaato.org/tourism-statistics (consulted on 1 September 2018). No information concerning the 2018/2019 season for Belgium is yet available.

(117) An Act to make new provision in connection with the Antarctic Treaty signed at Washington on 1st December 1959; to make provision consequential on the Protocol on Environmental Protection to that Treaty done at Madrid on 4th October 1991; to make provision consequential on the Convention on the Conservation of Antarctic Marine Living Resources drawn up at Canberra on 20th May 1980; to provide for the taking of criminal proceedings against, and the punishment of, British citizens and others in respect of certain acts and omissions occurring in that part of Antarctica that lies between 150° West longitude and 90° West longitude; and for connected purposes, 5 July 1994, 1994, Chapter 15. Hereinafter 1994 Antarctic Act.

(118) An Act to make provision consequential on Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty; to amend the Antarctic Act 1994; and for connected purposes, 26 March 2013, 2013, Chapter 15. Hereinafter 2013 Antarctic Act.

(119) The 2013 Antarctic Act also amends the 1994 Act "primarily to respond to the increasing internationalisation of Antarctic expeditions, to protect historic sites and monuments and address the increasing vulnerability of the Antarctic environment as a result of climate change. These amendments include those necessary to implement revisions to Annex II to the Protocol adopted by the Antarctic Treaty Consultative Meeting in 2009". See Explanatory Notes of the 2013 Antarctica Act.

(120) According to Section 18 (3): "Part 1 comes into force on such day as the Secretary of State may by order made by statutory instrument appoint (and different days may be appointed for different purposes)".

is possible to make a distinction between provisions concerning the regulation of activities in Antarctica and those regulating more specifically human conduct.

Sections 3 and 5 require permits for all individuals on British expeditions as well as for British vessels and British aircrafts entering Antarctica. (121) Section 4 also requires a permit for any person intending to visit a station maintained by or on behalf of a United Kingdom national. (122) According to Subsection 3 of Section 3, an expedition is British if "(a) it was organised in the United Kingdom, or (b) the place of final departure for Antarctica of the persons on the expedition was in the United Kingdom". (123) Thus, contrary to the Belgian legislation, which focuses on the departure point of an expedition to determine whether an activity is submitted to Belgian law, the United Kingdom takes into account the final departure place. The Antarctic Act 1994 (Overseas Territories) Order 1995 extends the notion of British expeditions to expeditions organized in or whose final place of departure was a British oversea territory. (124) This implies that South Georgia and the Falkland Islands (Port Stanley), from which many tourists depart to go to Antarctica, should normally ensure that expeditions leaving from their ports obtain a British permit. (125)

To avoid the obligation for an activity to acquire several permits, Subsection 4 of Section 3 provides that "[a]n expedition organised in and authorised in writing by another Contracting Party shall not be regarded as a British expedition". (126)

The obligations arising out of the 2013 Antarctic Act apply to activities connected with the United Kingdom as well as to the persons organizing the activities when they are based in the United Kingdom. According to Subsection 9 of Section 13, activities are connected to the United Kingdom when they are organized in this country and if "they are, or are to be, either carried out on a British expedition within the meaning of the 1994 Act [...] or, in all the circumstances in which they are or are to be carried out, the activities

(121) 1994 Antarctic Act, *supra* note 117, Section 5.

(122) *Ibid.*, Section 4.

(123) *Ibid.*, Section 3.

(124) See also F.C.O., "Guidance Notes: Application for a permit for a British expedition, vessel or aircraft to enter Antarctica", June 2018.

(125) Bastmeijer, *supra* note 15, p. 415, emphasized in 2004 that authorities did not check compliance with the 1991 Madrid Protocol before tourist expeditions left to Antarctica. 1994 Antarctic Act, *supra* note 117, Section 3 addresses any person intending to enter or remain in Antarctica and not the person who organises the expedition. However, subsection 8 of Section 3 makes it possible for one person of the expedition to obtain a person for other individuals on the expedition. According to the guidelines "visiting Antarctica", as available at: https://www.gov.uk/guidance/visits-to-antarctica-how-to-apply-for-a-permit (consulted on 1 September 2018): "It is also unlikely that you will need a permit if you are a passenger on an organised visit to Antarctica, as your tour operator would usually arrange this. However you should confirm this with them before travelling".

(126) 1994 Antarctic Act, *supra* note 117, Subsection 4 of Section 3.

require a permit under any other provision of the 1994 Act". (127) Thus, the scope of application is here broader than the one proposed in Annex VI.

Concerning obligations directed towards individuals, while the prohibition of activities involving mineral resources applies only to United Kingdom nationals, (128) all other obligations, *i.e.* obligations implementing Annex II and Annex V, apply to both United Kingdom nationals and to non-nationals on British expeditions. (129)

Despite the broad scope of application of the 1994 Antarctic Act, tourism operators in Antarctica under a British permit are not numerous. Each year, they are between three and six operators to organize vessel-based tourist expeditions and between one and four operators to organize land-based expeditions to Antarctica. Besides, the size of these expeditions is quite limited: until now no expedition under a British permit exceeded 26 passengers. (130) The nationalities of the operators as well as the nationalities of the vessels used vary considerably. Operators are from the United Kingdom but also from other States such as South Africa, the Netherlands Antilles and Malta. As to vessels, they are registered *inter alia* in Panama, Marshall Islands, Saint Kitts and Nevis. (131) The low numbers of operators under a British permit contrasts with the high number of British tourists in Antarctica. Indeed, Brits are the fourth most represented nationality among tourists in Antarctica, behind Americans, Chinese, and Australians. They account for 8% of the visitors on the South Pole. During the 2018/2019 season, 4,221 British citizens traveled to Antarctica. (132) In this regard, the interest of applying the 1994 Antarctic Act to British individuals, irrespective of the nationality of their expedition, appears strikingly.

C. — *France*

In France, the 1991 Madrid Protocol was approved in 1992 (133) and published in the Official Journal of the French Republic in 1998. (134) Through the law of 15 April 2003, (135) it was then implemented and incorporated in

(127) 2013 Antarctic Act, *supra* note 118, Subsection 9 of Section 13.

(128) 1994 Antarctic Act, *supra* note 117, Section 6.

(129) *Ibid.*, Sections 7 to 11.

(130) This number does not include the crew.

(131) This information is available on the EIES, *supra* note 112, under the headings: "Operational Information — Non Governmental Expeditions — Vessel Based Operations" and "Operational Information — Non Governmental Expeditions — Land Based Operations".

(132) This information is to be found on the IAATO website, as available at https://iaato.org/tourism-statistics (consulted on 1 September 2018).

(133) In French : Loi n° 92-1318 du 18 décembre 1992 autorisant l'approbation du protocole au traité sur l'Antarctique relatif à la protection de l'environnement.

(134) In French : Décret n° 98-861 du 18 septembre 1998 portant publication du protocole au traité sur l'Antarctique, relatif à la protection de l'environnement, signé à Madrid le 4 octobre 1991.

(135) In French : Loi n° 2003-347 du 15 avril 2003 relative à la protection de l'environnement en Antarctique.

Book VII of the French Environment Code. (136) According to Article L711-3, the scope of application of these rules extends to a) all individuals exercising an activity in Adélie Land, b) to all French nationals as well as to all French entities that organize or participate in activities in Antarctica, as well as to all vessels and aircrafts registered in France and to c) any person, whatever its nationality, which organizes in or from France activities in Antarctica. Thus, the French Environment Code refers to the two traditional principles of jurisdiction: nationality and territoriality, and uses one of the jurisdictional principles enshrined in Article VII (5) of the Antarctic Treaty: the place where the activity was organized. (137)

When individuals listed in Article L711-3 plan to participate or organize an activity in Antarctica, they must declare it or obtain an authorization to do so, depending on the impact of the activity on the environment. (138) Requests for authorization must include an environmental impact assessment. (139) Nevertheless, pursuant to Article 711-2, activities authorized by another Contracting State to the 1991 Madrid Protocol do not require to be authorized under French law.

France is one of the States that delivers most of the permits authorizing vessel-based expeditions to Antarctica. During the 2017-2018 season, (140) it authorized 17 tourism operators to travel to Antarctica, including "Ponant", one of the major IAATO tour operators. They own three ships with a transport capacity of 264 people each, traveling to Antarctic between 5 to 11 times a year. Their expeditions comprise tourists coming mainly from Australia, Canada, Japan, the United States, Switzerland and France. France is also one of the only State that has published on the EIES the authorizations that have been denied. (141) Grounds that are generally invoked to deny such authorization are security deficiencies and incomplete or late demands. (142) Last year, 2,121 French tourists visited Antarctica according to IAATO

(136) In French: Ordonnance n° 2000-914 du 18 septembre 2000 relative à la partie législative du code de l'environnement. Hereinafter French Environment Code. D. Sombetzki-Lengagne, "Commentaire de la loi n° 2003-347 du 15 avril 2003 relative à la protection de l'environnement en Antarctique", 4 *Revue Juridique de l'Environnement*, 2003 pp. 447, 447-460.

(137) The decision of France to apply its jurisdiction towards all activities on the French Antarctic is surprising in light of France assertion in a working paper it submitted during an ATCM that "the exercise of jurisdiction on a territorial basis would enter in conflict with this article IV" (in "Jurisdiction in Antarctica", submitted by France, 27 April 2012, ATCM XXXV/WP28, p. 4).

(138) French Environment Code, *supra* note 136, Articles L711-2, L712-1, L712-3. See also Arrêté du 29 janvier 2009 définissant la liste des activités relevant de l'article R. 712-3 du code de l'environnement.

(139) French Environment Code, *supra* note 136, Article L712-2.

(140) No information is yet available concerning the 2018/2019 season.

(141) Belgium has also published a denial of authorization concerning an activity organized by the IPF.

(142) This information is available on the EIES, *supra* note 112, under the headings: "Operational Information — Non Governmental Expeditions — Vessel Based Operations", "Operational Information — Non Governmental Expeditions — Land Based Operations", and "Operational Information — Non Governmental Expeditions — Denial of Authorizations".

data. (143) This figure represents 4 % of the total amount of tourists in Antarctica, traveling with IAATO operators. (144)

D. — *Conclusion*

Antarctica is a popular destination for Belgian, British and French tourists. In fact, about 13 % of tourists on the South Pole are nationals of one of these States. (145) As major tourist providers, Belgium, the United Kingdom and France have all broadly defined the scope of application of their laws implementing the 1991 Madrid Protocol. Jurisdictional links used include: nationality, territory claimed in Antarctica, criteria used in Article VII (5) (although States did not interpret these in the same manner) and in ATCM recommendations. However, none of them has affirmed its jurisdiction on situations with no connection to their State. It is also noteworthy that the States refer to these criteria without distinguishing activities that only involve Contracting Parties and activities that also involve non-Contracting States.

As a result of the broad jurisdictional connections used, the laws of these three States cover many foreign tourists and activities. This, in turn, is likely to raise conflicts of jurisdiction. For example, in case of an expedition organized in Belgium involving French nationals on a British ship, the laws of the three States are likely to apply. Yet, none of these three States has adopted a provision to resolve these conflicts. Nevertheless, they have all adopted provisions to ensure that activities that have already been authorized by another State can, or automatically or on demand, be exempted of requiring another permit.

Moreover, despite their broad character, the jurisdictional criteria used by these three States leave potentially many situations involving non-Contracting States unregulated. Although it would considerably broaden the scope of protection to extend the application of the 1991 Madrid Protocol to all categories defined in Article VII (5), none of the three examined countries has done so.

2. — *Jurisdiction to Enforce*

A. — *Belgium*

With regard to the enforcement of the Law of 21 July 2017, the Belgian legislator adopted provisions relating to the recording of an infringement, the definition of competent authorities as well as to sanctions.

(143) This information concerns the 2018/2019 season.

(144) This information is to be found on the IAATO website, as available at https://iaato.org/tourism-statistics (consulted on 1 September 2018).

(145) This percentage is calculated on the basis of IAATO statistic for the 2017-2018 season.

Concerning the establishment of an infringement, Article 23 enunciates that any breach of the law should be reported by the person in charge of the activity, or by any other person who has witnessed it, to the public prosecutor upon the return of the expedition in Belgium. When someone who is not part of an expedition returning to Belgium, whether Belgian or foreigner, observes an infringement to the Belgian law, that person should inform the agent appointed by Belgium for this task. In case the competent authority of another Contracting Party observes an infringement, the report established by it shall be considered a warrant of infringement under Belgian law. (146)

When it is established that an activity does not comply with conditions established in the permit, it can be withdrawn. (147) The Minister can also decide to suspend the right from the permit holder to ask for a new permit for a period of five to seven years maximum. (148) In case of non-compliance, the law also provides for criminal sanctions. The highest penalty goes as high as two to eight years imprisonment and/or a 25 000 to 250 0000 euro fine for the prohibition of activities related to mineral resources. (149)

Then, Article 24 provides that Belgian authorities and tribunals are competent for any dispute relating to vehicles and infrastructures registered in Belgium or to activities carried in, on or by means of them. The fact that activities carried out pursuant to a Belgian permit are not mentioned in this article, although puzzling, does not seem to rule out the possibility for Belgian authorities to exercise jurisdiction on this type of activity. Indeed, Article 23, that applies to all infringements of the Belgian law without distinction, preserves this possibility.

B. — *United Kingdom*

Both the 1994 and the 2013 Antarctic Acts as well as the 1995 Antarctic Regulations (150) contain provisions aimed at ensuring compliance with the 1991 Madrid Protocol and its Annexes. (151)

To begin with, persons expressly authorized by the 1995 Antarctic Regulations can require the production of a permit when an individual has carried out, is carrying out, or may be about to carry out an activity for which a permit is required. These include not only official agents within the United Kingdom but also individuals in Antarctica such as the managers of stations being run on behalf of the Director of the British Antarctic Survey, persons

(146) Law of 21 July 2017, *supra* note 101, Article 23.
(147) *Ibid.*, Article 17 §1.
(148) *Ibid.*, Article 25.
(149) *Ibid.*, Article 26.
(150) Antarctic Regulations 1995, Statutory instruments, 1995 No. 490, made 20 February 1995. Hereinafter 1995 Antarctic Regulations.
(151) 1994 Antarctic Act, *supra* note 117, Section 29, allowing that regulations be taken with regards to arrest, custody and detention.

designated by the Secretary of State for that purpose, observers designated by a Party to the Antarctic Treaty in accordance with Article VII thereof, or inspectors designated by a Member of the Commission for the Conservation of Antarctic Marine Living Resources under Article XXIV of the Convention. The 1995 Antarctic Regulations also mention magistrates and public officers of that territory as authorized persons in the British Antarctic Territory. With respect to British vessels in the seas south of 60° South latitude, these persons include also British naval officers and the masters of vessels operated by or on behalf of the British Antarctic Survey. (152)

In case of breach of one of the conditions attached to the permit or for any other reason mentioned in Section 10 of the 1995 Antarctic Regulations, the Secretary of State may change the permit conditions, deny future permits, revoke or suspend wholly or in part the permit granted under the Act. (153) In the two last cases, the person to whom the permit was granted may appeal to a Tribunal especially created for matters in relation to Antarctica; the Antarctic Act Tribunal. (154)

Generally, however, when a United Kingdom national does not respect the conditions set out in the permit or enters or conducts activities in Antarctica without a permit, the policy of the Foreign Commonwealth Office is to proceed to criminal investigations. The objective of this policy is "to protect the integrity of the permitting process and the Environmental Protocol, thus maintaining the UK's position internationally as one of the most rigorous enforcers of the Protocol. Without this approach the support and confidence of stakeholders may also be lost". (155) In that case, a court in any part of the United Kingdom or in Britain's Oversea Territories having jurisdiction can institute proceedings, issue a warrant for the arrest of the suspect and his conveyance in custody. (156) The 1995 Antarctic Regulations also specify that the persons authorized by the warrant to take the accused to or from any place or to keep him in custody shall have all the powers, authority, protection and privileges of a constable in the United Kingdom. (157) These authorized persons are also authorized to gather evidence connected with the offence and transmit them to the United Kingdom where the accused can be tried. (158)

(152) 1995 Antarctic Regulations, *supra* note 150, Section 9.

(153) *Ibid.*, Section 10.

(154) *Ibid.*, Section 11. See also Sections 12 and 13 that determine the constitution of the tribunal as well as the details of the procedure.

(155) F.C.O., "Guidance: UK Antarctic Enforcement Policy and Procedures", 17 November 2015.

(156) 1995 Antarctic Regulations, *supra* note 150, Section 18.

(157) *Ibid.*, Section 18.

(158) *Ibid.*, Section 19.

In case of conviction, the person guilty of an offence can be liable "to imprisonment for a term not exceeding two years, to a fine or to both, and on summary conviction to a fine not exceeding the statutory maximum". (159)

C. — *France*

The French Environment Code contains provisions relating to both administrative and criminal measures of enforcement as well as to the offence reporting and judicial competence.

Concerning administrative measures, Articles L713-1 and L713-2 provide that an activity can be suspended or interrupted when it is not carried out in conformity with its authorization or when it does not respect the conditions established for activities for which an advanced notice is required. With regard to criminal measures, Article L713-5 establishes penalties for carrying out activities in Antarctica without authorization or for not respecting the conditions established in the authorization, for carrying out activities related to mineral resources and for introducing or eliminating radioactive wastes. The highest penalty relates to this last offence and is punished by two years of imprisonment and a fine of 75,000 euros. (160) The penalty for infringing the prohibition to conduct activities related to the exploitation of the prospection or the exploitation of mineral resources is two years of imprisonment and 30,000 euros fine. Organizing an activity without permit is sanctioned by one year imprisonment and 75,000 euro fine. (161)

The persons authorized to report offences include criminal police officers as well as administrative agents like custom agents, agents authorized to report violations to the regulations related to national reserves as well as different types of agents competent for maritime affairs. (162) According to Article 713-8, the Paris Tribunal of first instance is competent to judge infringement to the provisions of the French Environment Code relating to the Antarctic.

The *Wordie house* case emphasized the *lacunae* of this law. To reach a judgment, a judge needs legally binding evidence as well as an official record. In that case, the judge relied on testimonies from UK Antarctic Heritage Trust (163) employees who discovered the French nationals that were gathered by the Foreign and Commonwealth Office and then sent to the French authorities. Yet, under French law, these testimonies do not constitute

(159) 1994 Antarctic Act, *supra* note 117, Section 20 and 2013 Antarctic Act, *supra* note 118, Section 11.

(160) French Environment Code, *supra* note 136, Article L713-5.

(161) *Ibid.*, Article L713-5.

(162) *Ibid.*, Article L713-7.

(163) The UK Antarctic Heritage Trust (UKAHT) was created in 1993 as a registered British charity in order to preserve, enhance and promote British Antarctic heritage in Antarctica. As available at http://www.ukaht.org/about-us/our-mission (consulted on 1 September 2018).

binding evidence and could have been challenged by the accused. In this case, the defendants acknowledged the facts and the Paris Criminal Court sanctioned one of the French tourists who damaged the site for the unauthorized exercise of an activity in the Antarctic to a 10 000 euro fine, pursuant to Article L713-5.(164) If the defendant had challenged the facts however, the judge would have had to officially gather the testimonies of the British employees. Although French authorities have acknowledged this difficulty, they have not taken any measure to modify the law yet.(165)

D. — *Conclusion*

Enforcement in Antarctica is both challenging and resource-demanding. Still, States have adopted rules to make it possible for them to enforce their laws in Antarctica. Among others, States have designated individuals entitled to find and report infringements. These can include official agents in Antarctica but also foreign officials, expedition operators and even, in the case of the Belgian Law, individuals who witness an infringement. States have also established dissuasive sanctions. Thus, tourists under the jurisdiction of one of these three States that do not respect conditions for staying in Antarctica or who enter Antarctica without authorization can be seriously sanctioned. Penalties foreseen by the three States comprise not only expensive fines but also imprisonment. Whether these efforts are enough to ensure enforcement in Antarctica is doubtful though. To ensure more effective enforcement, it might be necessary for States to take measures so as to allow more generally agents to take police measures, to collect evidence and to recognize the competence of foreign agents in Antarctica. The absence of such measures is likely to raise difficulties in court as suggested by the *Wordie house* judgment.

IV. — Conclusion

With its unspoilt sceneries and extreme temperatures, Antarctica offers an experience, which has attracted increasing numbers of tourists over the years. Although their number remains relatively low when compared to the number of tourists visiting other countries, this rise comes at high environmental cost. In this region, "every footstep matters"!(166)

(164) Paris Court of Appeal, criminal judgement, No. 10260090130, 6th of February 2014.

(165) "Follow-up to the unauthorised presence of French yachts within the Treaty area and damage caused to the hut known as Wordie House — Observations on the consequences of the affair", submitted by France, ATCM XXXIV/WP11.

(166) R. McGuirck, "The Antarctic is Left Defenceless to Tourism", *The Independent*, 17 March 2013, as available at https://www.independent.co.uk/environment/nature/the-antarctic-is-left-defenceless-to-tourism-8537546.html (consulted on 1 September 2018).

Compliance with the 1991 Madrid Protocol is thus a primary concern. Yet, only a few States are bound by this instrument. As Article 13 requires States to take appropriate measures within their competence to ensure compliance with the 1991 Madrid Protocol, the question is raised as to whom and to what activities these measures should apply. A careful analysis of international law, the Antarctic Treaty and the 1991 Madrid Protocol, distinguishing both jurisdiction to prescribe and jurisdiction to enforce, makes it clear that, although the Antarctic Treaty system does not provide any general criteria of jurisdiction, it does not leave this question completely unregulated. The rules identified relating to jurisdiction provide guidance for States as how to implement the 1991 Madrid Protocol. The Antarctic Treaty and the 1991 Madrid Protocol are however silent on how to solve conflicts of jurisdiction and on how to avoid jurisdictional loopholes. It was also emphasized that non-Contracting States were likely to oppose jurisdiction asserted by Contracting Parties on the basis of the Antarctic Treaty or the 1991 Madrid Protocol when the exercise of jurisdiction has no valid basis under general international.

The analysis of the laws relating to the Antarctic in Belgium, in the United Kingdom and in France has evidenced a great diversity in the manner under which these States have implemented the 1991 Madrid Protocol. Three common features can nevertheless be identified concerning jurisdiction to prescribe. Firstly, these States have only founded their jurisdiction on principles contained in the Antarctic Treaty, the 1991 Madrid Protocol or ATCM resolutions. Secondly, these States do not differentiate between activities that involve only Contracting Parties and those that also involve non-Contracting Parties. Thirdly, all States have adopted provisions to avoid that activities planned in Antarctica require several permits. Concerning jurisdiction to enforce, States have partly sought to address the difficulties of enforcing laws on Antarctica by determining individuals competent to report violations and by sanctioning behaviors contrary to the 1991 Madrid Protocol. Whether these rules can ensure effective enforcement on the Antarctic remains an open question.

Despite all these deficiencies, States have managed through cooperation and self-restraint to maintain a peaceful coexistence on Antarctica and to avoid major environmental accidents. All those who had predicted that the Antarctic Treaty system would collapse as a result of jurisdictional deficiencies have been proven wrong (until now) and one can only hope that State's collaboration will last, pending the adoption of a better management regime.