



What lessons does the Antarctic Treaty System offer for the future of peaceful relations in the South China Sea?



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A B S T R A C T

Tensions in the South China Sea are typically analysed either from a power perspective, which emphasises the ambitions of a rising China and the potential for conflict; or from an international law perspective, which typically assesses the scope for resolution of competing claims under the United Nations Convention on the Law of the Sea and the impact of the South China Sea arbitration. There have also been efforts to analyse the potential for creative legal solutions, including consideration of the Antarctic Treaty System as a potential model. This paper revisits the Antarctic analogy. Rather than view this from a law *or* politics perspective, the paper suggests that viewing Antarctic Treaty provisions as having been championed by a rising power whose interests were not closely supported by application of the existing legal regime yields rather different lessons and offers cautious grounds for optimism.

1. Introduction

Law and power are typically treated as polar opposite determinants of political outcomes and the literature on the South China Sea (SCS) is no exception. Emphasis in the ‘power-centric’ literature has been on a rising China being increasingly strident in its claims and activist in its behaviour. According to Mearsheimer’s offensive realism, for example, China’s attitude toward the SCS is comparable to the Monroe Doctrine of the United States and, even if war itself is not inevitable, there is no doubt that the rise of China is leading to intense security competition [18: 393–411]. Power Transition Theory as espoused by Organski [24] does not focus on the SCS specifically, but views the period when a rising power approaches parity with the dominant power as a time of enhanced danger of war, especially if the rising power is dissatisfied with the international order. Lim [14] identifies the nature of China’s engagement with the East Asian security architecture, including in respect of the SCS, as evidence of China being a strongly dissatisfied power. While at least some viewing the SCS through a power-centric lens may have tried to remain optimistic [10], few would deny that tensions have increased.

Analysts within the ‘rules-centric’ category, on the other hand, somewhat stubbornly retain faith in the value of international law. International lawyers typically believe that ‘the existing rules of international law are more than capable of accommodating the peculiar historical contexts of East Asia in the resolution of territorial and maritime disputes’ [21: 55]. Writing in 2015, Tønnesson appeared hopeful that China would ‘realize the futility of force and internalize the

need to base its regional diplomacy in international law’ [34: 477]. Most still retain their faith in the potential of a legal solution even in the face of China’s reaction to the outcome of the *Philippines-China* arbitration.

It is perhaps unsurprising that those seeking rules-based solutions by which to avoid potential conflagration in the SCS have looked to see whether there are lessons that could be learnt from the Antarctic Treaty System (ATS) ([1: 237]; [2,5,12: 124]; [17,33,39]). As ‘the whole complex of arrangements made for regulating relations among states in the Antarctic’ (The Scientific Committee on Antarctic Research [28]), the ATS has long been lauded as a model of successful international cooperation [27,31,35]; via the 1959 Antarctic Treaty, competing claims, tensions and threatened confrontation were replaced with a system of collective governance, prioritising Antarctica as a region of peace and routinized cooperation. The lessons typically drawn from the Antarctic analogy have pertained to whether or not substantive provisions of the Antarctic Treaty could be transferred to the SCS.

This approach to the Antarctic analogy thereby retains and embodies the pervasive law-power dichotomy. Rather than consider the impact of an increasingly powerful and assertive China on SCS disputes, these authors focus on the possibility of transplanting specific legal provisions into a new regime. Even if mention is made of contemporary geopolitical tensions in respect of the SCS relative to those surrounding Antarctica in the 1950s [17], the provisions of the Antarctic Treaty have not been analysed in relation to the interests of the rising power or dominant state at the time the Treaty was concluded. As such they sustain a false dichotomy. Power does not exclude law and law must

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ultimately function within a political context. This is particularly pertinent in respect of the Antarctic analogy because the US as the dominant power of the day was dissatisfied with the prevailing international law of territorial acquisition as applied to Antarctica, just as the *Philippines-China* arbitration has highlighted the extent to which China is dissatisfied with the implications of applying the United Nations Convention on the Law of the Sea (UNCLOS) to the SCS.

2. The potential to transfer specific legal provisions from the Antarctic Treaty to the South China Sea

This section will briefly review some of the provisions of the Antarctic Treaty that have been identified as of potential utility and the practical likelihood at this point in time of each providing the necessary breakthrough.

2.1. Demilitarization and peaceful purposes

By article I of the Antarctic Treaty, ‘Antarctica shall be used for peaceful purposes only.’ The principle of peaceful purpose is incorporated not only in the Antarctic Treaty but in UNCLOS, and indeed in the Charter of the United Nations. According to Zou [39], ‘[n]o country adjacent to the SCS would object to this principle’. Article I of the Antarctic Treaty goes further, however: ‘There shall be prohibited, inter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, as well as the testing of any types of weapons’. Military personnel and equipment may still be used for scientific research or for other peaceful purposes.

Writing in 1988, Mark Valencia suggested that the ‘Spratly island area could be a regional analogue to Antarctica – a demilitarised zone as a first step towards a neutrality in Southeast Asia’ [37: 443]. Could, then, the demilitarization provision of the Antarctic Treaty be transplanted to the SCS? If this would ever have been possible, it is difficult to see how this could be brought about at the present time. Unlike Antarctica, the SCS is adjacent to the states in dispute, and their navies require ocean access. The US Navy sails through the SCS and, particularly given China’s reclaiming land on which to build military assets, it would likely already be too late to apply this principle in practice.

2.2. Denuclearization

The Antarctic Treaty is sometimes categorized as an arms control treaty because nuclear explosions and the disposal in Antarctica of radioactive material are, by article V, prohibited. Zou [39: 153] has raised the question as to whether this provision could be transferred to the SCS, possibly taking the form of a nuclear weapons free zone, such as that established by the Association of Southeast Asian Nations in 1995. Zou [39:153-4] notes that the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor extends the non-nuclear zone seawards beyond the territorial seas of its parties.

While the issues at stake in the SCS are frequently said to be freedom of navigation, resources, and sovereignty, there appears likely to be additional issues at play. According to Duchatel and Kazakova of the Stockholm International Peace Research Institute, one of the key strategic interests of the People’s Liberation Army in respect of the SCS is for a credible undersea nuclear deterrent, which is important to understanding China’s land reclamation work [9]. The development of a ballistic missile nuclear submarine force as a reliable undersea nuclear deterrent is complicated by the difficulty of moving undetected to the deep waters of the Pacific Ocean, and so having appropriate bases in the SCS may be an important strategic means by which to develop a reliable second strike capability [9]. Such developments may be thwarted, or at least slowed, by ongoing surveillance by the US and allies, including by nuclear powered aircraft carriers [20]. Once again, although it might in

principle be desirable to transfer the de-nuclearizing provisions of the Antarctic Treaty to the SCS region, it is difficult at this point in time to see that as a realistic proposition.

2.3. Agreement to disagree in relation to questions of sovereignty

When reference is made to the ATS as a model that might be emulated in the SCS, the primary feature of the ATS in question is its formula for addressing competing sovereignty claims. The Antarctic continent had been the subject of territorial contestation in the first half of the twentieth century, to the extent that there was concern in the post World War Two years that it would become a site of conflict. By article IV of the Antarctic Treaty, parties ‘agreed to disagree’ about who owns what. Those already asserting rights or claims were not required to renounce their claims; the Treaty was not to diminish such claims, or to prejudice the position of any Contracting Party in respect of its recognition or non-recognition of the claims or rights, or basis of claim, of any other Party. In addition, by article IV (2):

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

This is likely the core provision that attracts interest to the potential utility of the analogy, because this was the cornerstone of the Antarctic Treaty and indeed, of the whole ATS arrangement. Beckman [2], for example, suggested that states might ‘set aside’ claims to sovereignty over the islands, set out principles for cooperation and use of the SCS, and agree that such cooperation is without prejudice to sovereignty claims. This is certainly an attractive thought. Given China’s aggressive stance since the time Beckman proposed this solution, however, it is simply not realistic to think that even if this might have been a possibility fifty years ago ([17], 318) it is any longer a viable option.

2.4. Freedom of scientific enquiry

With the fundamental issue of sovereignty neatly ‘put on ice’ via article IV, the ATS could function as a collective governance mechanism for agreed uses of the continent and surrounding oceans. The key alternative use of Antarctica was scientific enquiry. Science had been inextricably interlinked with other Antarctic activities including exploration and territorial claim making in the pre-Treaty international politics of Antarctica. Indeed, it could be said that the success of international cooperation in respect of science, particularly the 1957-8 International Geophysical Year, served as impetus for conclusion of the Treaty. The value of Antarctic science was recognized in the preamble of the Antarctic Treaty, which acknowledged ‘the substantial contributions to scientific knowledge resulting from international cooperation in scientific investigation in Antarctica’. By article II of the Treaty, ‘[f]reedom of scientific investigation in Antarctica and cooperation toward that end, as applied during the International Geophysical Year, shall continue, subject to the provisions of the present Treaty’. Parties are to share information regarding scientific programs and the Treaty aimed to ensure cooperative working relations with international organizations with a scientific interest in the area south of 60 degrees South.

The political significance of designating Antarctica a land of science goes beyond the merit of the knowledge resulting from scientific projects; science has served as the ‘currency of Antarctic politics’ [11]. The ATS is a two-tiered structure, decisions in which are taken at meetings of the ‘Consultative Parties’, the original signatories and acceding parties ‘during such time as that Contracting Party demonstrates its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the despatch of

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