OTHER INTERNATIONAL DEVELOPMENTS

Antarctica

New Challenges Pose New Management Problems

– The Permanent Installation of a Bronze Sculpture –

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I. Introduction

The number of activities in Antarctica is growing continuously. At the same time their diversity is increasing as well. Besides classical types such as scientific research, related logistic activities, tourism and fishing, we can also find 'new' types of commercial and non-commercial non-governmental activities in Antarctica today. Photography, documentaries and sport activities are well-known examples.[1] Adventure sports such as glacier climbing and marathons are enjoying an increasing popularity.[2] Additionally, more and more art projects for commercial and non-commercial purposes as well as advertising events are being carried out in Antarctica.[3]

Although these activities do not play such an important role in respect to activities in Antarctica as a whole, they are often difficult to manage, especially from the point of view of a competent authority which has to decide whether or not such an activity may proceed in Antarctica.

Why might it be difficult for Parties to regulate such activities under their domestic law? The following text illustrates some of theses difficulties. It begins by describing the international legal background for the assessment of Antarctic activities. Following this, a recent example of an intended art project organised in Germany will be given, raising several important questions on the adequacy of the existing legal provisions. Finally, the handling of this case under German implementing legislation will be outlined. It has led to a decision by a German Administrative Court which is probably one of the first court decision in the Antarctic Treaty context.

II. Legal background for the assessment of Antarctic activities under the Environmental Protocol

Under international law, all Antarctic activities are governed by the Protocol on Environmental Protection to the Antarctic Treaty of 4 October 1991. This entered into force in 1998 and has been implemented by the Parties under their respective national legislations. It requires each Party to assess the environmental impact of almost any activity in Antarctica proceeding from its territory or under its jurisdiction. This is done in a procedure of several steps (see Figure 1).

Activities which are seen as having 'less than a minor or transitory impact' on the environment may then proceed straight away. For activities whose effects are seen at least as 'minor or transitory', an Initial Environmental Evaluation must be carried out. In this, the proponent will have to forward additional information, *e.g.*, an account of the impacts of the activity as well as relevant alternatives. If this initial evaluation indicates that no more than a minor or transitory impact is likely, the activity may proceed, provided that appropriate procedures are put in place to assess and verify the impact of the activity. If, on the other hand, it is determined that the activity is likely to have more than a minor or transitory impact, a Comprehensive Environmental Evaluation will follow. For this, the proponent of the activity has to submit detailed information on the activity, its environmental impact, alternatives, measures for preventing or mitigating negative effects, measures for monitoring the effects, etc. This draft Comprehensive Environmental Evaluation will be made publicly available and circulated to all Parties. In addition, the Committee for Environmental Protection under Article 11 of the Protocol (CEP) and the Antarctic Treaty Consultative Meeting (ATCM) will be able to comment. The Party will then have to take into account the opinion of the ATCM and any other comments when finally deciding on the activity. Any decision on whether a proposed activity – likely to have more than a minor or transitory impact – should proceed, and, if so, whether in its original or in a modified form, shall be based on the Comprehensive Environmental Evaluation as well as other relevant considerations (Article 4 of Annex I to the Protocol). At the same time, this provision also implies the possibility of prohibiting the activity.

The substantive requirements for carrying out an activity are laid down in Article 3, paragraph 2, of the Protocol, which states, *inter alia*, that:

'a) activities in the Antarctic Treaty Area shall be planned and conducted so as to limit adverse impacts on the Antarctic environment and dependent and associated ecosystems;

b) activities in the Antarctic Treaty area shall be planned and conducted so as to avoid:

i) adverse effects on climate or weather patterns;

ii) significant adverse effects on air or water quality;

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iii) significant changes in the atmospheric, terrestrial (including aquatic), glacial or marine environments;
iv) detrimental changes in the distribution, abundance or productivity of species or populations of species of fauna and flora;
v) further jeopardy to endangered or threatened species or populations of such species;
vi) degradation of, or substantial risk to, areas of biological, scientific, aesthetic or wilderness significance'.

This general Environmental Assessment approach covers all activities in Antarctica. It requires an examination of each individual case and allows modifications or even the prohibition of an activity, if the expected impact on the environment warrants such a decision. In certain cases, however, the Protocol follows another approach: some specific activities are prohibited outright. In particular, Article 7 bans 'any activity relating to mineral resources, other than scientific research'.

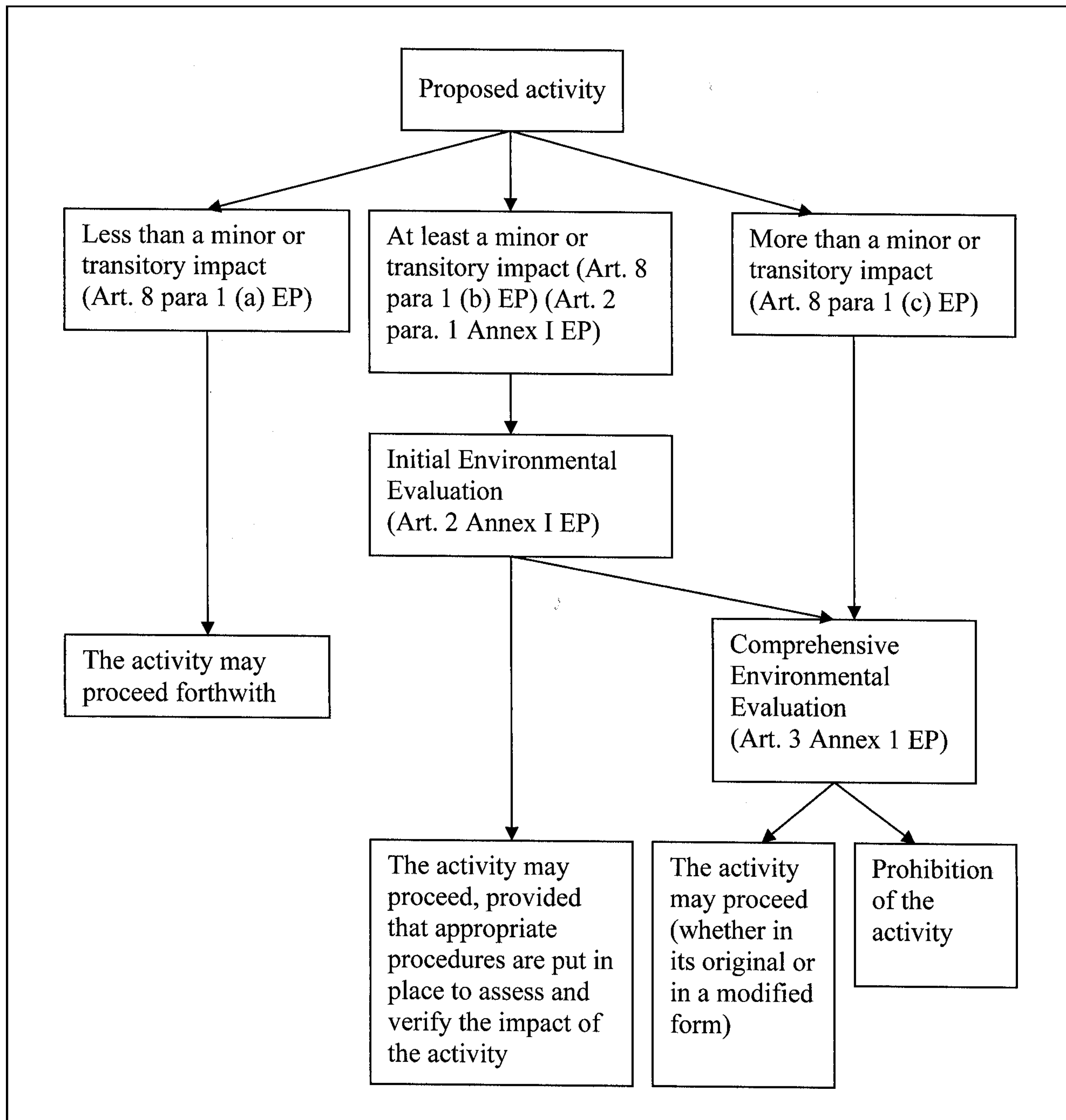

Figure 1: Assessment procedure of activities under the Environmental Protocol (EP)

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III. Difficulties in managing 'new' types of activities

A. The example: Permanent installation of a bronze sculpture in Antarctica

In 2002 an application was made to grant a permit under German law to install a bronze sculpture in Antarctica for an unlimited time period. The sculpture was to be about 7 metres high and would include samples of human hair, wrapped in small aluminium boxes, and microchips saving human data of individuals (*e.g.,* age, sex, etc.). This art project aimed to inform future species – maybe in a time where there was no longer any human life on earth – about the presence of humans in the past. The sculpture was intended to be hidden in the snow so that it would drift with the ice-flow over the years.

This case raises different problems, not only questions in respect of the environmental impact of the planned activity, but also questions in relation to the permanence of the activity, to its influence on the wilderness values of Antarctica and to possible imitations and their consequences.

B. Degree of environmental impacts

Regarding the expected environmental effects, including those due to the logistics of transport and the possible character of the installation, this activity would have to be identified as having 'less than a *minor* impact' on the Antarctic environment or the dependent or associated ecosystems (cf. Article 8, paragraph 1 (a) of the Protocol). As to substantive law, the requirements for conducting the activity laid down in Article 3 paragraph 2 of the Protocol – as stated above – would be met.

On the other hand, the sculpture would certainly have 'more than a *transitory* impact' on the Antarctic environment (cf. Article 8, paragraph 1 (a) of the Protocol). As intended by the proponent, the sculpture was to be installed, and thus in some sense 'released' to the Antarctic environment, for an unlimited time period. This intention implies more than (only) a transitory impact. In this context, it is important to note that the criteria 'minor' and 'transitory' are not to be considered cumulatively. The Protocol uses both criteria explicitly in an alternative sense by saying 'minor *or* transitory' (Article 8 paragraph 1 (a)). Consequently, a Comprehensive Environmental Evaluation according to the provisions of Annex I to the Protocol would have to be carried out.

Prima facie, there seems to be no reason which would preclude this consequence; Article 3, paragraph 2 (c), containing the basic obligation to carry out an Environmental Impact Assessment (EIA), does not exclude any type of activity from this obligation. Kees Bastmeijer arrived at the same conclusion in his comprehensive assessment of the application of EIA procedures by summarising that 'all activities – governmental as well as non-governmental activities – in the Antarctic Treaty area are subjected to the EIA provisions of the Protocol, except for fishing, sealing, whaling and emergency operations'.[4] Nevertheless, this result appears unsatisfying in the case of the art project, especially for 'reasons of proportionality', in relation to the rather limited extent of environmental impacts.

Thus, the example raises doubts whether the Environmental Protocol, linked with the assessment of the expected environmental impacts, provides, for all cases, appropriate methods and instruments to decide whether or not an activity may proceed or not, in particular if new types of activities are concerned which were not taken into account when the Environmental Protocol was negotiated and adopted.

The problem here is, of course, that the Protocol does not give a clear and simple answer to the main essential question in the background – whether it is *desirable* that an activity should proceed in Antarctica. Except in the case of the prohibition on mineral resource activities (Article 7) and a few other activities, it defers the decision to the Parties and to their individual assessments of the likely environmental impact of the activity. Although priority is given to scientific research, as laid down in the Antarctic Treaty and set forth in greater detail particularly in Article 2 and Article 3, paragraphs 1 and 3 of the Protocol, the Protocol applies equally to all types of activities and provides no legal arguments to prohibit an undesirable activity outright.

C. Further questions arising from the example

1. The question of introduction of non-native species

In the example of the bronze sculpture and its contents, of course, one would also have to think about the introduction of non-native species, parasites and diseases, except in accordance with a permit (cf. Article 4, paragraph 1 of Annex II to the Protocol). According to paragraph 3 of this Article, permits 'shall be issued to allow the importation only of the animals and plants listed in Annex B to this Annex', which only mentions (a) domestic plants and (b) laboratory animals and plants including viruses, bacteria, yeasts and fungi. In the example, though, the applicant did not intend to introduce any non-native plants or animals in the sense of Annex II into the Antarctic. The fact that the aluminium boxes were to contain samples of human hair (and thus possibly micro-organisms) would not warrant a refusal of the permit, since Annex II to the Protocol at present does not deal with such cases. Another view could be taken, possibly, if micro-organisms were covered by the scope of Annex II as has been proposed during the ongoing discussion of the review of Annex II.[5] However, this review process is not yet finalised, the proposed amendments have not yet been adopted, and it is doubtful whether they could be applied in the example.

2. The question of wilderness protection

In addition, the question how the sculpture would influence the Antarctic wilderness should be addressed. Admittedly, the art project would have no 'more than a minor impact' on the Antarctic environment and thus would not contradict the requirements laid down in Article 3, paragraph 2 (b) (vi) of the Protocol. Nevertheless, according to Article 3, paragraph 1 of the Protocol, Con-

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tracting Parties are obliged to recognise the protection of wilderness issues as a fundamental consideration in the planning and conducting of all activities in the Antarctic Treaty area.

This, however, is difficult for two reasons: First, some Parties do not see this provision as legally binding.[6] Second, it might be difficult to quantify the concept of wilderness values, as pointed out by the Czech Republic during the discussion on the Comprehensive Environmental Evaluation for its research station at the 7th Meeting of the CEP in Cape Town 2004. In that debate, the 'Czech Republic advised that they acknowledge the impacts that the base would likely have on wilderness values, but in following the Madrid Protocol they focused on the impact on measurable factors, and contend that on this basis the likely environmental effects of the project are acceptable. They noted that the concept of wilderness values is very philosophical and difficult to quantify objectively, and possibly of greater relevance to the consideration of tourism activities …'.[7]

3. The question of precedent-setting

In close context to the question of wilderness protection, another problem arises from the point of view of imitation. Currently, there is only a small number of such intended 'new' activities being applied for. Some of them will become stuck for ever at the application stage or even before it; others may be conducted in Antarctica, but will never be known about by the general public.

But what will happen if such applications are the beginning of a 'new commerce'? One activity will be the first, others will follow and within a few years many people will use Antarctic's intrinsic and wilderness values for their individual interests. Obviously, the commercial aspect behind such projects should not be ignored. In the given example, the proponent was and is advertising, with the offer to be immortalised in the ice of Antarctica. The price demanded for this is €30 for a hair sample, and €100 for a microchip containing personal data.

This leads to additional questions of a general kind: is such business compatible with the objectives of the Environmental Protocol and the designation of Antarctica as a natural reserve devoted to peace and science? Should Antarctica be offered for such a commercial use?

D. Supplement

1. Legal background for the assessment of Antarctic activities under German implementing legislation

In Germany, the requirements of the Protocol have been transferred into national law by the Act Implementing the Protocol on Environmental Protection to the Antarctic Treaty.[8] This Act follows the provisions of the Protocol quite closely. The decision procedures and the substantive legal requirements are basically the same as those laid down in the Protocol. However, the main difference in relation to the Protocol consists of an elaborate permission system. According to this system, activities in Antarctica are allowed to proceed from Germany or to be organised within its territory *only* in conformity *with a permit* issued by a competent authority, namely the Federal Environmental Agency. Such a permit is obligatory for each kind of activity, scientific or non-scientific. It will be issued according to specific impact assessment procedures determined by the respective degree of environmental impacts (see Figure 2).

Regarding a possible prohibition of an applied activity, the German legislation has laid down a catalogue of environmental impacts which have strictly to be avoided in each case. With this catalogue, the Act has more or less copied the substantial requirements laid down in Article 3 paragraph 2 (b) of the Protocol.

2. First court decision in the example

In the example, the German competent authority did not grant a permit for the art project. This decision was based on a specific provision under German domestic law implementing the Protocol which states that each permit 'has to be restricted to a specific (time) period'.[9] Consequently, this legislation prohibits any activity which will be carried on over an indefinite time period.

In the meantime, the authority's decision to refuse a permit for the sculpture has been confirmed by the Administrative Court of Berlin.[10] This decision seems to be one of the first relevant court rulings in the Antarctic Treaty context. For this reason, it should be useful to take notice of it as a first example of jurisdiction concerning the domestic legal implementation of the Protocol, even though in a very specific case.

The Administrative Court ruled that the art project as a whole constituted an 'activity' within the meaning of the German legislation (and thus the Protocol). It rejected the argument of the plaintiff that only the transport of the sculpture to the location in Antarctica and its introduction into the snow should be considered as activities, but not the subsequent leaving of the sculpture in Antarctica. Consequently, the court noted that the whole project required a permit, and also applied the provision of the German Act that each activity will have to be limited to a specific period.

The court also held the prohibition of the art project to be in line with German constitutional law. While the Federal Constitution (*Grundgesetz*), on the one hand, grants the freedom of art, it also requires the state, on the other, to protect the environment. The court pointed out that this obligation constitutes a general limit, *inter alia*, to art activities.

Basically, therefore, this court decision was determined by a specific domestic provision. Perhaps other Antarctic Treaty Parties cannot revert to such a clause in their respective national legislation. In that case most of the questions mentioned above will have to be discussed.

IV. Conclusion

New types of activities are now becoming attractive to carry out in Antarctica – non-governmental activities for both commercial and non-commercial purposes. These types of activities are no longer hypothetical considerations but realistic cases which have to be dealt with by domestic competent authorities. Antarctic Treaty Parties

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will have to tackle these problems and recognise that there are possible gaps or at least inadequate regulations in the existing Antarctic Treaty System in respect of these new forms of activities, especially since they were not considered when the Environmental Protocol was negotiated at the end of the 1980s and early 1990s.

However, it is natural process that the law has to be adjusted if conditions change and new ones arise. The question is whether the Environmental Protocol is flexible enough to deal with this, or whether its provisions are to be modified or extended to address these new challenges.

At the XXVIII Antarctic Treaty Consultative Meeting in Stockholm in 2005, Antarctic Treaty Parties started an intensive debate on the consistency of permanent land-based tourism facilities with the principles of the Antarctic Treaty and the Environmental Protocol.[11] And although this discussion does not raise the exact questions arising from the example – because of its focus on permanent

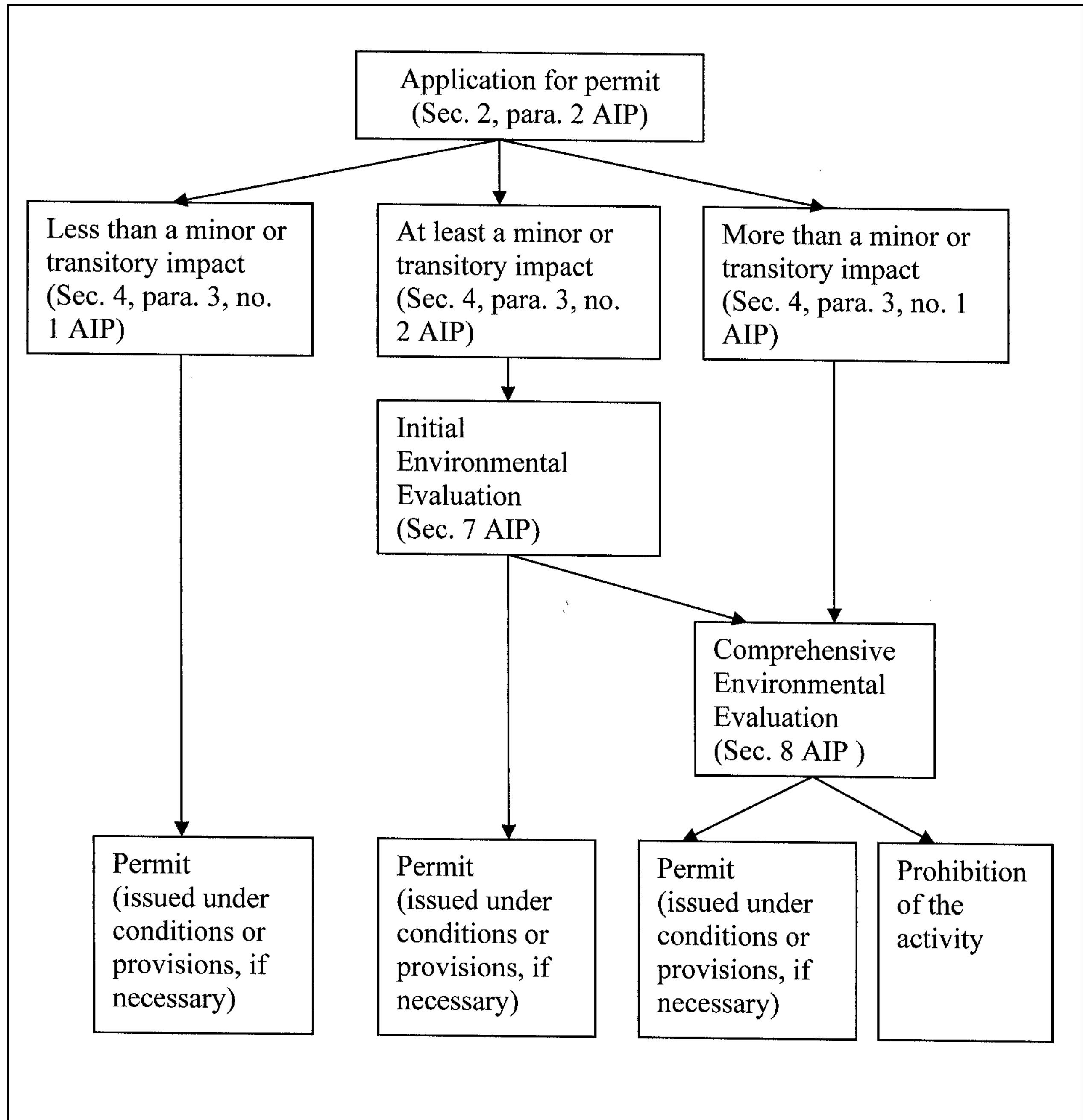

Figure 2: Assessment procedure of activities under the German Act to Implement the Protocol on Environmental Protection of the Antarctic Treaty (AIP).

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infrastructure for tourism purposes – it provides important contributions on the problems Parties might have in dealing with 'new' types of activities.

Further discussion will have to deal with the question of whether these new types of activities are consistent with the principles of the Protocol. In this context, the question of desirability of any activity in Antarctica should be included as well. Antarctic Treaty Parties will have to find answers to questions such as the extent to which each kind of activity should be allowed (except those which are already explicitly prohibited under the current provisions), or how they wish to see Antarctica in future.

From this perspective, the example should be seen as an illustration of current developments which should stimulate discussion.

Notes

1 See, among others, the last Antarctic Non-government Activity News (ANAN) Newsletter 101 from Wednesday 18 June 2003.

2 In February 2005, there were 180 participants in the marathon and half marathon carried out on King George Island, Antarctica; for further information see: http://www.coolrunning.com/engine/3/3_13/2007-antarctica-marathon-.shtml.

3 See, among others, 'Trash People' in Antarctica, planned for 2006, information available at: <http://www.ha-schult.com/HA_Schult_Trash_People.trash people.0.html>; furthermore, some scenarios about advertising in Antarctica by Kevin Roberts for Saatchi & Saatchi at: http://www.saatchikevin.com/talkingit/antarctica.html.

4 Kees Bastmeijer, *The Antarctic Environmental Protocol and its Domestic Legal Implementation*, Kluwer Law International, The Hague, 2003, p. 174.

5 Argentina, Final Report of the Intersessional Contact Group on Annex II Review, CEP VII/ XXVII ATCM/WP 17 (2003) and Appendix 9 of CEP VII-Final Report including a draft text of Annex II.

6 For example: The US government does not consider Article 3 of the Protocol, including the obligation to take account wilderness values, to be a legally binding provision: '… Article 3 of the Protocol is implemented through the annexes to the protocol and is not capable of direct implementation. Thus, is in and of itself does not impose mandatory requirements.' For a discussion of the US position on the status of Article 3 in relation to the 'right of international travel', see W. Polk, '*Welcome to the Hotel Antarctica: The EPA's Interim Rule on environmental Impact Assessment of Tourism in Antarctica*', Emory International Law Review, Fall 1998, available at: <http//:www.law.emory.edu/EILRIvolumes/fall98/Polk.html>, pp. 14–15.

7 The subject is dealt with in detail by Kees Bastmeijer in his Article 'Managing Human Activities in Antarctica: Should Wilderness Protection Count?', *New Zealand Yearbook of International Law*, 2005, 335–353.

8 *Gesetz zur Ausführung des Umweltschutzprotokolls vom 4. Oktober 1991 zum Antarktis-Vertrag (Umweltschutzprotokoll-Ausführungsgesetz)* of 22 September 1994; Federal Law Gazette (*Bundesgesetzblatt*) 1994, part I, p. 2593 *et seq*. This act is available at <http://www.umweltbundesamt.de/antarktis/index.htm>.

9 Sec. 3, paragraph 7, second sentence of the *Gesetz zur Ausführung des Umweltschutzprotokolls vom 4. Oktober 1991 zum Antarktis-Vertrag (Umweltschutzprotokoll-Ausführungsgesetz* (cf. note 8).

10 Decision of the Administrative Court (*Verwaltungsgericht*) of Berlin of 14 September 2005, reference no. VG 10 A 228.04, available in German at <http://www.juraforum.de/jura/news/news/id/51314/f/106/>. Due to an appeal of the plaintiff, the case is now pending at the Higher Administrative Court (*Oberverwaltungsgericht*) of Berlin.

11 See in more detail paragraphs 165 to 172 of the Final Report of ATCM XXVIII (2005).

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