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THE INTERNATIONAL LEGAL REGIME FOR ANTARCTICA

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FOREWORD

In a world of shrinking natural resources, Antarctica's hydrocarbon and mineral potential—a potential as yet unproved—has aroused steadily growing interest in the continent. The nations that have governed Antarctica under the 1959 Antarctic Treaty¹ are now seeking a mineral regime to allow exploration and exploitation of the continent's mineral wealth. Certain non-treaty nations have challenged the right of the members of this special club, the Antarctic Treaty parties, to decide the minerals question among themselves. They argue that the issue should be decided by the United Nations and that the "common heritage of mankind" concept that gained such currency in the U.N. law-of-the-sea negotiations should apply to all Antarctic minerals and resources.²

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1. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71. The complete text of the Treaty appears in the Appendix, *infra*.

2. The 1982 U.N. Law of the Sea Convention expressly adopts the "common heritage of mankind" principle for the seabed area beyond national jurisdiction. Under that principle no state may exercise sovereignty over or appropriate any right in the resources of this area. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, arts. 136, 137, U.N. Doc. A/CONF. 62/122, 21 I.L.M. 1261 (1982).

Another threat to the current Antarctic regime comes from the difficulty of accommodating within the 1959 treaty system the special set of national interests tied to minerals development. For instance, the 1959 Treaty calls for decisions to be taken by consensus. If that rule is carried over into the minerals regime, however, each of the current decision-making parties—including the United States and Soviet Union—would have a stranglehold on future hydrocarbon development in Antarctica. Neither superpower is likely to enjoy the prospect of giving such a veto to the other. But the search for a less-than-consensus rule has the paradoxical potential of driving the treaty parties toward a system that gives too much recognition to the territorial claims of the claimant states. For example, one such arrangement might require the relevant claimant state's consent to any mineral exploration or exploitation in that state's claimed region. The virtue of a consensus regime, by contrast, lies in its continued finesse of the rights of states who claim territorial sovereignty in areas of Antarctica. Under a consensus rule nothing happens in any part of Antarctica of which the respective claimant state does not approve. At the same time no state's territorial claim is directly acknowledged.

The prospect of a mineral regime for Antarctica evokes a different set of misgivings in environmentalists. They justly fear that any significant exploration or exploitation of Antarctica's supposed mineral wealth will destroy the continent's fragile ecosystem.

For a fuller understanding of these issues, which are among those taken up by the papers in this symposium, it may be helpful to review briefly the development and content of the current governing regime for Antarctica: the "Antarctic Treaty System."

A. THE ANTARCTIC TREATY SYSTEM³

From 1908 to the early 1940's the following seven countries, in the order listed, claimed sovereignty over different sectors of Antarctica (totaling approximately 85% of the land area): the United Kingdom, New Zealand, France, Australia, Norway, Chile, and Argentina.⁴ The claims were based not on effective occupation, but on early exploratory and scientific expeditions, and to some extent on marine resources exploitation.⁵ The claims of the United Kingdom, Chile, and Argentina overlap,⁶ thus these countries refuse to recognize

3. For a concise but informative discussion of the Antarctic Treaty System, see Kimball, "Antarctica: Testing the Great Experiment," 27 ENVIRONMENT 14 (1985). Much of the factual information on the Antarctic Treaty System that follows is drawn from this source.

4. *Id.* at 16.

5. *Id.*

6. See map, Appendix, *infra*.

one another's claims. Moreover, the United States and the Soviet Union (and all other countries of the world not making territorial claims to Antarctica themselves) have refused to recognize any territorial claims. Both the United States and the Soviet Union engaged in early activities on the subcontinent and thus have a basis for a territorial claim, but each has refused to reduce that claim to specific territory—in effect reserving the right to claim all of Antarctica, or at least an interest in all of Antarctica. About 15% of Antarctica is not expressly claimed by any country.

In the two decades prior to adoption of the Antarctic Treaty of December 1, 1959,⁷ the countries in the region seemed at times on the verge of open conflict. There were various flare-ups among the states with overlapping claims. The seven claimant states sought at every turn to reaffirm their claims vis-à-vis nonclaimants. There was also a growing fear, especially during the 1950's, that the cold-war military rivalry between the United States and the Soviet Union would spread to Antarctica.

B. THREE GOALS: DEMILITARIZATION, SCIENTIFIC COOPERATION, AND ENVIRONMENTAL PRESERVATION

To avoid these pitfalls, the seven claimant states and five others (U.S., U.S.S.R., Japan, Belgium, and South Africa)—twelve states in all—entered the 1959 Antarctic Treaty. The Treaty has two primary goals: 1) to preserve Antarctica as an area for peaceful uses only; and 2) to promote freedom of scientific investigation throughout the continent. To achieve these ends, the Treaty prohibits all military activities, weapons testing, nuclear explosions, and disposal of nuclear wastes in Antarctica.⁸ It also guarantees freedom of scientific enquiry in Antarctica and obligates the parties to exchange scientific personnel and experimental results.⁹ The treaty parties have taken decisions within the treaty system that articulate a third goal: protecting the unique environment and ecosystem of Antarctica. Although no treaty language announces this purpose with complete clarity, the Treaty does prohibit nuclear explosions and radioactive waste disposal in Antarctica and calls for the treaty parties to consult on the "preservation and conservation of living resources in Antarctica."¹⁰

7. Antarctic Treaty, *supra* note 1.

8. *Id.* at arts. I, V, (1).

9. *Id.* at arts. II, III.

10. *Id.* at art. IX (f).

C. ARTICLE IV: STANDSTILL ON TERRITORIAL CLAIMS

Article IV, concerning the rights of the claimant and nonclaimant states, is the cornerstone of the Treaty. It uniquely sidesteps the intractable issue of territorial claims by providing that none of the agreed upon cooperative activities under the Treaty is to prejudice or affect in any way the legal rights and claims of either the claimant or nonclaimant states. No new claims are to arise; no enlargement of existing claims is to occur; and no renunciation, diminution, or denial of claims is to be grounded upon the parties' cooperative activities under the Treaty. Because of Article IV's pivotal role, its operative language is worth repeating here:

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.¹¹

Two other treaty provisions buttress this central feature of the Antarctic legal regime: 1) all decisions are to be taken by unanimity;¹² and 2) all decision-making parties are entitled to free and unhindered on-site inspection of all installations and all vessels and aircraft (at points of loading and unloading) in Antarctica.¹³ The unanimity provision assures both claimants and nonclaimants that nothing will be permitted in Antarctica that would prejudice their respective claims or legal positions. On-site inspection ensures full compliance with the treaty provisions and subsequent implementing agreements.

The treaty parties have also bound themselves to prevent even non-party states from acting in any way inconsistent with the goals and principles of the Antarctic Treaty. Article X provides that each treaty party "undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty." Thus, under Article X the treaty parties would be obligated to resist any efforts of non-party states to assert new claims to sovereignty over any area of Antarctica,¹⁴ to infringe the freedom of scientific inquiry, to use any part of Antarctica for military purposes, or to act in a way that imperils the fragile Antarctic ecosystem.

11. *Id.* at art. IV.

12. *Id.* at art. XII.

13. *Id.* at art. VII.

14. Presumably a non-party's refusal to recognize the claims of the claimant states would be entirely consistent with Article IV and would not require the treaty parties to take any particular opposing action under Article X. This point is central to the analysis in Professor Bruno Simma's article, *The Antarctic Treaty as a Treaty Providing for an "Objective Regime,"* 19 CORNELL INT'L L.J. 189 (1986).

During or after the year 1991, if any decision-making party so requests, the treaty parties are obligated to hold a conference to review the operation of the Antarctic Treaty system.¹⁵

D. TWO-TIERED TREATY PARTY STRUCTURE

For decision-making purposes the parties to the Antarctic Treaty fall into two groups: 1) the so-called "consultative parties" (who have the power to make decisions); and 2) the "non-consultative parties" (who technically have no vote).

1. *Consultative Parties*

The consultative, or decision-making, parties meet biennially to consider pending issues concerning the governance of Antarctica and implementation of the Treaty.¹⁶ The consultative parties are the original twelve parties to the 1959 Treaty and six additional countries who were later adherents: Poland (1977), West Germany (1981), Brazil (1983), India (1983), the People's Republic of China (1985), and Uruguay (1985). Any party to the Treaty can become a consultative party through demonstrating "interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the despatch of a scientific expedition."¹⁷ The six non-original consultative parties achieved consultative party status in this manner, and five of these did so in the last five years.

2. *Non-consultative Parties*

There are also fourteen non-consultative parties to the 1959 Treaty. These countries have acceded to the Treaty but have not established a scientific presence in Antarctica sufficient to give them the rights of a consultative party. Since 1983, the consultative parties have invited the non-consultative countries to attend the decision-making meetings with observer status. The fourteen non-consultative countries are: Bulgaria, Cuba, Czechoslovakia, Denmark, Finland, East Germany, Hungary, Italy, the Netherlands, Papua New Guinea, Peru, Rumania, Spain, and Sweden. Two of this group—Italy and Sweden—have recently planned and conducted scientific investigations in Antarctica and are thus poised to become full consultative parties.

15. Article XII says this obligation arises thirty years after the Treaty enters into force. It entered into force in 1961.

16. The 13th Meeting of the Consultative Parties was held in Brussels during October, 1985.

17. Antarctic Treaty, *supra* note 1, at art. IX (2).

At their biennial meetings the consultative parties have adopted a number of recommendations, covering such matters as environmental protection and preservation of species, exchange of scientific information, tourism, communications, and the procedural aspects of decision-making. They have also completed two additional treaties: (1) the 1972 Convention for the Conservation of Antarctic Seals;¹⁸ and (2) the 1980 Convention on the Conservation of Antarctic Marine Living Resources.¹⁹ As mentioned, they are currently negotiating a legal regime for minerals development.

E. THE "COMMON HERITAGE" DEBATE

The traditional division of states into East-West or North-South political groupings has little significance in the debate over Antarctica's future mineral regime and governance system. Leading free-world nations (the United States, Japan, the United Kingdom, France) and leading socialist countries (the Soviet Union, the Peoples' Republic of China, Poland) alike are full decision-making parties within the Antarctic Treaty System. Thus they favor the current system of decision-making. The North-South picture is more varied and complex. Four developing countries, Brazil, India, Chile, and Argentina are actively negotiating the minerals regime question within the Antarctic Treaty System. All four countries are consultative parties; Chile and Argentina are also claimant states. Several other developing countries participate in the negotiations as non-consultative parties. Still other developing countries, however, such as Algeria, Antigua and Barbuda, Ghana, Malaysia, Pakistan, the Philippines, Sierra Leone, Sri Lanka, and Thailand, are not parties to the Antarctic Treaty and have objected to what they consider the exclusivity of the Antarctic Treaty group. They would like to transfer jurisdiction over Antarctica to the United Nations. Some of them have called for application of the "common heritage of mankind" principle to the mineral resources of Antarctica, and the United Nations General Assembly has already begun intensive study of the "Question of Antarctica."²⁰

The issues raised by these developments, particularly the initiative by part of the Third World for a "common heritage of mankind" regime and the possibility that the United Nations will attempt to

18. Convention for the Conservation of Antarctic Seals, June 1, 1972, 27 U.S.T. 441, T.I.A.S. No. 8826 (entered into force Mar. 11, 1978). This Treaty expressly affirms Article IV of the Antarctic Treaty.

19. Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 80 Stat. 271, T.I.A.S. No 10240 (entered into force Apr. 7, 1982). This Treaty also expressly affirms Article IV of the Antarctic Treaty.

20. The current debate in the U.N. concerning Antarctica is the subject of Hayashi, *The Antarctica Question in the United Nations*, 19 CORNELL INT'L L.J. 275 (1986).

exercise some form of authority over Antarctica, can be telescoped into two broad questions: (1) will the Antarctic Treaty System, as now constituted, survive as the method of governance and decision-making for Antarctica; and (2) if not, what will replace it?

Although they raise many issues concerning the Antarctic legal regime, most of the authors in this symposium seem either to presuppose or to urge directly that the current treaty system be retained as the governing mechanism for Antarctica.

