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Frozen in Time: The Antarctic Mineral Resource Convention

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NOTE

FROZEN IN TIME: THE ANTARCTIC MINERAL RESOURCE CONVENTION

The final text of the Convention on the Regulation of Antarctic Mineral Resource Activities (the Convention) was adopted on June 1, 1988.[1] Representatives of the twenty decisionmaking parties to the Antarctic Treaty of 1959 (the Treaty)[2] negotiated and drafted the Convention. The Treaty, as well as the agreements and recommendations that have arisen under its auspices, are known collectively as the Antarctic Treaty System (the Treaty System). For the past thirty years, the Treaty System has been the governing international legal regime in Antarctica.[3]

The Convention's drafters intended to establish an administrative system to regulate the exploitation of mineral resources on the Antarctic Continent and adjacent continental shelf.[4] Somewhat ironically, the proposed Convention ignited an international debate which has rendered uncertain the future of Antarctic mineral re-

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1 27 I.L.M. 868 [hereinafter Convention]. The Convention was opened for signature on November 25, 1988. States that participated in its negotiation and drafting are entitled to sign, subject to domestic ratification. In November 1989, the Convention was opened for accession by all states which were contracting parties to the Antarctic Treaty. *See infra* text accompanying notes 91-93.

2 Also referred to as The Treaty of Washington, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 [hereinafter Treaty or Antarctic Treaty].

3 *See generally* THE ANTARCTIC LEGAL REGIME (Christopher C. Joyner & Sudhir K. Chopra eds. 1988).

4 Mineral resource exploitation in Antarctica is not economically feasible at this time. Commentators disagree, however, as to the continent's future mineral potential. *See* F.G. Larminie, *Mineral Resources: Commercial Prospects for Antarctic Minerals*, in THE ANTARCTIC TREATY REGIME 176 (Gillian D. Triggs ed. 1987). Larminie concludes that the commercial prospects for Antarctic minerals are "virtually nil." *Id.* at 176; *see also* Franz Tessensohn, *Present Knowledge of Non-Living Resource in the Antarctic, Possibilities for their Exploitation and Scientific Perspectives*, in ANTARCTIC CHALLENGE 189 (Rüdiger Wolfrum ed. 1984); Franz Tessensohn, *Antarctic Mineral Resources: Tell Us Where the Riches Are . . .*, in ANTARCTIC CHALLENGE II 19 (Rüdiger Wolfrum ed. 1986); James H. Zümberge, *Potential Mineral Resource Availability and Possible Environment Problems in Antarctica*, in THE NEW NATIONALISM AND THE USE OF COMMON SPACES 115, 116 (Jonathan I. Charney ed. 1982) [hereinafter COMMON SPACES] ("While a potential mineral resource may exist on the Antarctic continent, no mineral deposits of economic value in the present marketplace are known.").

Offshore drilling for hydrocarbons is considered to be the most promising area for development. *See id.* at 127-28. Scientific data with respect to the mineral resource potential of Antarctic land areas remain largely inconclusive. *Id.* at 124-27; *see* Larminie, *supra*, at 180-81.

source exploitation itself.[5] This debate not only casts in doubt whether the Convention will ever enter into force,[6] but also raises serious questions regarding the legitimacy of the current legal regime governing Antarctica.

Both the Treaty and the Convention invite universal participation, and claim to further the interests of the international community.[7] In reality, however, limits on meaningful participation in the Treaty System regime[8] and the self-selecting membership of its decisionmaking bodies[9] reveal that the Treaty System is based upon outmoded principles of exclusive territorial sovereignty.[10] As the international community has become increasingly interested in Antarctica, due in large part to the potential economic benefits of its mineral resources, this exclusive jurisdiction has been the subject of growing criticism by states outside the Treaty System.[11]

This Note proposes an alternative legal regime that incorporates the basic principles of the "common heritage of mankind."[12] Such a regime would recognize the international community's vested interest in Antarctica by allowing for truly universal participation. The common heritage principle was embodied in two recent international agreements providing for the internationalization

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5 Australia and France have proposed a permanent ban on mining in Antarctica. New Zealand, with the support of five European nations, advocates an Antarctic "world park." *The Antarctic: An Ice Point*, THE ECONOMIST, Nov. 24, 1990, at 46. The United States has favored a moratorium on mining, without deciding its exact duration. *U.S. Seeks Moratorium on Antarctic Minerals*, N.Y. Times, Nov. 14, 1990, at A10, col. 4; *see* Catherine Redgwell, *Current Developments: International Law—Antarctica*, 39 INT'L & COMP. L.Q. 474 (1990).

6 To enter into force, the Convention must be ratified by each of the 20 decisionmaking parties to the Treaty. As of February 7, 1991, 16 states had signed the Convention. None had ratified it. Telephone interview with Mary Brandt, Treaty Analyst, U.S. Dep't of State (Feb. 7, 1991).

7 Treaty, *supra* note 2, at preamble ("it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord"); Convention, *supra* note 1, at preamble ("the effective regulation of Antarctic mineral resource activities is in the interest of the international community as a whole").

8 *See infra* text accompanying notes 220-29.

9 *See infra* text accompanying notes 72-76, 94-110.

10 Territorial sovereignty is the general principle underlying the traditional state system. Territorial sovereignty grants a nation-state "the competence to prescribe and apply law to persons, things, and events within its territorial domain to the exclusion of other states." LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 117 (1989); *see* GEORG SCHWARZENBERGER & E.D. BROWN, A MANUAL OF INTERNATIONAL LAW 51-54 (6th ed. 1976); MALCOLM N. SHAW, INTERNATIONAL LAW 240-42 (1986).

11 Organized political opposition to the Treaty System has been led by those less-developed states often identified as the "Group of 77." *See* Moritaka Hayashi, *The Antarctica Question in the United Nations*, 19 CORNELL INT'L L.J. 275 (1986); M.C.W. Pinto, *The International Community and Antarctica*, 33 U. MIAMI L. REV. 475 (1978).

12 *See infra* text accompanying notes 271-310.

of areas beyond national jurisdiction, the United Nations Convention on the Law of the Sea of 1982 (UNCLOS III),[13] and the "Moon Treaty" of 1979.[14] Although neither attempt at implementation of the common heritage principle has been completely successful, this Note contends that this failure resulted from the institutionalization of political and economic principles not essential to the common heritage doctrine.

Section I of this Note provides a brief history of human activity in Antarctica, and describes the main features of both the Antarctic Treaty and the Mineral Resources Convention. Section II considers the need for authority in international law for any exercise of jurisdiction, and assesses legal doctrines that may support the exercise of jurisdiction over Antarctica. Section III assesses the operation of the Treaty System over the past three decades, emphasizing the System's legal and political shortcomings. Finally, Section IV proposes a modification of the Treaty System to provide for broader and more open participation by the international community, incorporating the basic principles of the common heritage doctrine.

I
BACKGROUND

A. Early History of Antarctica

Substantial human activity in Antarctica began during the nineteenth century,[15] when Great Britain, the United States, Russia, and France undertook a series of exploratory expeditions.[16] Apart from exploration, the main activity during this period consisted of commercial whaling and sealing voyages in the ocean surrounding Antarctica.[17] Whaling from mainland shore stations commenced

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13 United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982) [hereinafter UNCLOS III]. *See infra* notes 283-305 and accompanying text.

14 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, *opened for signature* Dec. 10, 1979, U.N. Doc. A/34/664 (1979) (entered into force July 11, 1984). *See infra* notes 284-85 and accompanying text; *see also* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

15 Captain James Cook circumnavigated the Antarctic Continent from 1773 to 1774. Cook, who was less than overwhelmed by the magnitude of his accomplishment, wrote of Antarctica: "I make bold to declare that the world will derive no benefit from it." PHILIP W. QUIGG, ANTARCTICA: THE CONTINUING EXPERIMENT 3 (1985). The mainland itself was not reported sighted until 1820. The first sighting has been claimed by Bellingshausen of Russia, Bransfield of the United Kingdom, and Palmer of the United States. F.M. AUBURN, ANTARCTIC LAW AND POLITICS 2 (1982).

16 ROBERT FOX, ANTARCTICA AND THE SOUTH ATLANTIC: DISCOVERY, DEVELOPMENT AND DISPUTE 97-98 (1985).

17 *Id.* at 97. The primary quarry consisted of blue, fin, right, and sperm whales, and

around the turn of the century, and led to the establishment of temporary settlements.

After World War II, scientific research became the predominant activity in Antarctica.[18] Technological developments in transportation and communication facilitated the establishment of large-scale, permanent scientific research stations.[19] During the International Geophysical Year (IGY),[20] an international research program which ran from July 1957 to December 1958, twelve countries established some sixty staffed bases to gather scientific data.[21] This emphasis upon scientific research in Antarctica continued through the 1960s and 1970s.[22]

Beginning in the mid-1970s, and increasingly in the past decade, the focus in Antarctica has shifted from pure scientific research to the possibility of mineral resource exploitation.[23] The 1973 oil embargo and the consequent desire of the industrialized nations to secure new sources of energy provided the impetus behind this change in focus.[24] In addition to potential hydrocarbon deposits,[25] geologists have speculated that the Antarctic continent may contain exploitable quantities of minerals such as iron, copper, molybdenum, chromium, platinum, nickel, zinc, tin, silver, and gold.[26] Such speculation, however, remains largely unsubstantiated.[27] Finally, there has been growing acceptance of the once-ridiculed concept of

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during the brief interval between their discovery and depletion, colonies of fur seals. J. A. Gulland, *The Management Regime for Living Resources*, in THE ANTARCTIC LEGAL REGIME, *supra* note 3, at 219, 221.

18 FRANCISCO ORREGO VICUNA, ANTARCTIC MINERAL EXPLOITATION: THE EMERGING LEGAL FRAMEWORK 3 (1988).

19 F. AUBURN, *supra* note 15, at 3.

20 In 1950 a group of American scientists suggested that a coordinated international polar research program be undertaken, initially conceived as the Third International Polar Year. This later evolved into the International Geophysical Year (IGY), administered by the International Council of Scientific Unions. The goal of the IGY was to contribute to scientific knowledge of uniquely polar phenomena such as ice sheets, the auroras, and effects on global weather patterns, as well as general phenomena such as cosmic rays, the ionosphere, and ocean dynamics. P. QUIGG, *supra* note 15, at 9-10.

21 *Id.* at 9.

22 *Id.* at 10.

23 F. VICUNA, *supra* note 18, at 3. The emphasis upon mineral resource activities is new, but Sir Douglas Mawson's Australian expedition of 1929-1930 demonstrated an early interest by investigating the resource potential of Antarctica. GUSTAV SMEDAL, ACQUISITION OF SOVEREIGNTY OVER POLAR AREAS 6-7 (1931).

24 Francesco Francioni, *Legal Aspects of Mineral Exploitation in Antarctica*, 19 CORNELL INT'L L.J. 163, 164 (1986). Changes in political and economic circumstances in the years since the oil crisis have ameliorated energy concerns to a certain extent. It seems reasonable to conclude, however, that this respite will last only until a sense of urgency returns sometime in the foreseeable future.

25 *See supra* note 4.

26 Zümberge, *supra* note 4, at 125.

27 *See supra* note 4.

towing Antarctic icebergs to arid regions as a source of fresh water.[28]

B. Debate over the Legal Status of Antarctica

The legal debate over the status of Antarctica began around the turn of the century and for several decades was characterized by broad disagreement. At one extreme, a number of legal commentators advocated the exercise of traditional territorial sovereignty over Antarctica.[29] Those maintaining this position asserted that legal title to Antarctica derived either from an act of acquisition, or from some other claim of right.[30] Great Britain made the first public territorial claim in 1908.[31] Following Great Britain, six other states made territorial claims: New Zealand (1923), France (1924), Australia (1933), Norway (1939), Chile (1940), and Argentina (1942).[32]

Other commentators refused to recognize the validity of territorial claims in Antarctica, and during the early years those who favored some form of international ownership dominated the debate.[33] As early as 1910, the highly respected commentator, T. W. Balch, suggested that the known Antarctic territories should "become common possessions of all of the family of nations."[34] The current Treaty regime incorporates aspects of both territorial sovereignty and international ownership, yet as the debate has reintensified in recent years, sentiments are again polarized around the two extremes.

C. The Antarctic Treaty System

The current legal regime in Antarctica, the Antarctic Treaty System, is comprehensive in scope, dealing with such issues as sovereignty,[35] civil and criminal jurisdiction,[36] conservation,[37] military

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28 Zümberge, *supra* note 4, at 129. The First International Conference on Iceberg Utilization, sponsored by the National Science Foundation, produced a cautiously favorable report. *Id.*; *see* Peter Schwerdtfeger, *Antarctic Icebergs as Potential Sources of Water and Energy*, in ANTARCTIC CHALLENGE II, *supra* note 4, at 377. In terms of potential, it should be noted that Antarctica contains three-fourths of the earth's fresh water. P. QUIGG, *supra* note 15, at 35.

29 *See* G. SMEDAL, *supra* note 23; Laura H. Martin, *Sovereignty in Antarctica*, 29 J. GEOGRAPHY 112, 119 (1930).

30 *See infra* text accompanying notes 132-84.

31 F. AUBURN, *supra* note 15, at 2.

32 Patrick T. Bergin, *Antarctica, The Antarctic Treaty Regime, and Legal and Geopolitical Implications of Natural Resource Exploration and Exploitation*, 4 FLA. INT'L L.J. 3, 3 n.8 (1988).

33 *See, e.g.*, *id.* at 6.

34 Thomas Willing Balch, *The Arctic and Antarctic Regions and the Law of Nations*, 4 AM. J. INT'L L. 265, 275 (1910).

35 Treaty, *supra* note 2, art. IV; *see infra* text accompanying notes 63-71, 230-37.

36 Treaty, *supra* note 2, art. VIII.

37 Convention on the Conservation of Antarctic Marine Living Resources, *opened for*

matters,[38] and ownership of Antarctic resources.[39] The Treaty System was, however, initially conceived as a more limited undertaking. The original Treaty had relatively narrow objectives,[40] primarily addressing concerns which arose during the intensification of scientific activity in the 1950s.[41]

The cooperative international efforts under the auspices of the IGY[42] led directly to the creation of the Antarctic Treaty. Led by the Soviet Union,[43] the twelve IGY participants[44] decided to expand their presence on the Antarctic Continent upon conclusion of that program. Accordingly, a mutual recognition arose as to the need for a legal regime to formalize the cooperative arrangements that had proved effective during the IGY.[45] At the invitation of the United States,[46] the twelve states undertook a series of discussions that culminated in the International Conference on Antarctica, held in Washington in 1959.[47] This meeting produced the Antarctic Treaty, which was signed on December 1, 1959.[48] Following ratification by all twelve original parties, the Treaty entered into force on June 23, 1961.[49]

In addition to the Treaty itself, the Treaty System participants have produced over 150 related agreements.[50] Most of these agreements concern either scientific or environmental matters,[51] and many were promulgated in the form of nonbinding recommenda-

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signature May 20, 1980, 80 Stat. 271, T.I.A.S. No. 10240 (entered into force Apr. 7, 1982); Convention for the Conservation of Antarctic Seals, June 1, 1972, 27 U.S.T. 441, T.I.A.S. No. 882; Agreed Measures for the Conservation of Antarctic Fauna and Flora, June 2-13, 1964, 17 U.S.T. 996, T.I.A.S. No. 6058.

38 Treaty, *supra* note 2, art. I ("There shall be probibited . . . any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.").

39 Convention, *supra* note 1.

40 *See infra* text accompanying notes 55-57.

41 *See supra* text accompanying notes 18-21.

42 *See supra* note 20 and accompanying text.

43 F. AUBURN, *supra* note 15, at 4.

44 Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom, and the United States. Tore Gjelsvik, *Scientific Research and Cooperation in Antarctica*, in ANTARCTIC CHALLENGE, *supra* note 4, at 42. For a list of the seven claimant states, see *supra* text accompanying note 32.

45 Finn Sollie, *The Development of the Antarctic Treaty System- Trends and Issues*, in ANTARCTIC CHALLENGE, *supra* note 4, at 17; *see* F. AUBURN, *supra* note 15, at 4.

46 *United States Proposes Conference on Antarctica*, 38 DEP'T ST. BULL. 910, 911 (1958).

47 Frank C. Alexander, Jr., *A Recommended Approach to the Antarctic Resonrce Problem*, 33 U. MIAMI L. REV. 371, 378-79 (1978).

48 *See supra* note 2 and accompanying text.

49 *See* Treaty, *supra* note 2.

50 THE ANTARCTIC TREATY REGIME, *supra* note 4, at 55.

51 *See supra* note 37 and accompanying text. The full texts of agreements adopted by Treaty parties through 1981 are collected in 1 W.M. BUSH, ANTARCTICA AND INTERNATIONAL LAW: A COLLECTION OF INTER-STATE AND NATIONAL DOCUMENTS (1982).

tions adopted at periodic meetings of Treaty members.[52] The most recent component of the Treaty System is the Mineral Resources Convention.[53]

1. *The Antarctic Treaty*

a. *Substantive Provisions of the Treaty*

Consistent with its origins,[54] the Treaty has two main objectives: restricting Antarctica to peaceful uses, and promoting scientific research.[55] Article I provides that "Antarctica shall be used for peaceful purposes only."[56] Article II states that "[f]reedom of scientific investigation in Antarctica and cooperation toward that end . . . shall continue, subject to the provisions of the present Treaty."[57]

The substantive provisions of the Treaty elaborate upon these two stated objectives. To ensure that Antarctica "shall not become the scene or object of international discord,"[58] the Treaty prohibits military bases and fortifications,[59] and explicitly bans nuclear explosions and nuclear waste disposal.[60] In the interests of economy and efficiency, the parties agreed to exchange information and personnel and to cooperate in planning scientific research.[61] To ensure the effective operation of the Treaty, the parties have the right to designate observers to monitor compliance.[62]

Article IV, dealing with territorial claims,[63] has critical signifi-

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52 The Treaty provides that parties shall meet "at suitable intervals and places, for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty." Treaty, *supra* note 2, art. IX(1). *See* Rules of Procedure of Antarctic Treaty Consultative Meetings, adopted on 10 July 1961, Rule 23, *reprinted in* 1 W. BUSH, *supra* note 51, at 117-18.

53 *See infra* text accompanying notes 82-112.

54 *See supra* notes 40-49 and accompanying text.

55 *See* John J. Barceló, III, *The International Legal Regime for Antarctica*, 19 CORNELL INT'L L.J. 155, 157 (1986).

56 Treaty, *supra* note 2, art. I, para. 1.

57 *Id.* art. II.

58 *Id.* at preamble.

59 *Id.* art. I, para. 1.

60 *Id.* art. V.

61 *Id.* art. III.

62 *Id.* art. VII.

63 *See supra* text accompanying notes 29-32. The seven individual state claims together cover approximately 85% of the land area of Antarctica. Three of these claims, those of the United Kingdom, Chile, and Argentina, partly overlap one another. In addition, the United States and the Soviet Union, not having made formalized claims, reserve the right to do so in the future. Barceló, *supra* note 55, at 156-57. The status of the United States and the Soviet Union is included within the Treaty's reference to states having a "basis of claim." Treaty, *supra* note 2, art. IV, para. 1(c).

cance for the operation of the entire Treaty System. Unfortunately, no general agreement exists as to the exact manner in which Article IV operates.[64] Paragraph one of Article IV states that the Treaty does not prejudice any pre-existing claim, or basis of claim,[65] to territorial sovereignty. It also states that the position of parties who do not recognize the territorial claims shall not be prejudiced. Paragraph two states that no new claims may be asserted while the Treaty is in force, and that no acts occurring during such time may constitute a basis for any future claim.[66]

Article IV thus neither recognizes nor disavows existing territorial claims; it merely reinforces existing ambignity. Each claimant state asserts that its own claim is valid, but not all claimant states recognize the validity of other claims.[67] Furthermore, the nonclaimant states do not recognize the validity of any claim.[68] Since the positions of claimant and nonclaimant states are mutually exclusive, it is unclear which situation Article IV preserves.[69] Despite this ambignity,[70] Article IV allows the parties to cooperate with respect to

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64 One commentator has aptly characterized Article IV of the Treaty as casting Antarctic territorial sovereignty into "a purgatory of ambiguity." J. Michael Marcoux, *Natural Resource Jurisdiction on the Antarctic Continental Margin*, 11 VA. J. INT'L L. 374, 379 (1971).

65 "Basis of claim" refers to the position taken by the United States and the Soviet Union. *See supra* note 63.

66 Article IV reads in its entirety:

> 1. Nothing contained in the present Treaty shall be interpreted as:
> (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
> (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
> (c) prejudicing the position of any contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereiguty in Antarctica.
> 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 sovereiguty 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.

Treaty, *supra* note 2, art. IV.

67 Chile does not recoguize the claims of Argentina or the U.K.; Argentina does not recognize the claims of Chile or the U.K.; and the U.K. does not recoguize the claims of Argentina or Chile. *See* Barceló, *supra* note 55, at 156-57.

68 *Id.* at 157.

69 *See* F. AUBURN, *supra* note 15, at 104-05. For a thorough discussion of the ambiguous content of Article IV, see *id.* at 104-10.

70 It has been suggested that the ambiguity inherent in Article IV is both functional and deliberate. As one commentator asserted, "Article IV was deliberately drafted to enable States with conflicting interests to adopt differing views as to its meaning." *Id.* at 104. During the United States Senate's ratification deliberations, Senator Gruening's sentiments regarding Article IV, as paraphrased by Auburn, were that "it stated what it

their common objectives without compromising their strongly held, mutually exclusive positions on sovereignty.[71] In the spirit of cooperation, Article IV thus represents an agreement to disagree.

b. *Membership*

The Treaty has a two-tiered membership structure. Each Treaty party is either a fully participating, decisionmaking consultative party, or a nonvoting, nonconsultative party.[72] Article IX provides that, in addition to the twelve original parties, any other acceding state may become a consultative party and participate in consultative meetings "during such time[73] as [it] demonstrates its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the dispatch of a scientific expedition."[74] Only through representation at these consultative meetings, however, may a party participate in policymaking decisions.[75] Furthermore, only the consultative parties may vote on modifications or amendments to the Treaty itself.[76]

Any United Nations member state may become a nonconsulta-

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did not mean, and did not state what it did mean." *Id.* For a further discussion of the mechanics of Article IV, see *infra* text accompanying notes 230-37.

71 One commentator has described Article IV as "[t]he cornerstone of the Antarctic Treaty . . . . Without that article, the Treaty would not have come into existence." Rolph Trolle-Anderson, *The Antarctic Scene: Legal and Political Facts*, in THE ANTARCTIC TREATY REGIME, *supra* note 4, at 59.

72 Treaty parties are also referred to by commentators as "contracting parties." The Treaty itself does not explicitly distinguish between consultative and nonconsultative parties. Rather, the Treaty refers to all acceding states as "Contracting Parties," some of which are allowed to participate in consultative meetings. Article IX creates the distinction by limiting to certain parties the right to appoint representatives for consultative meetings. Treaty, *supra* note 2, art. IX, para. 2.

73 The Treaty discriminates between permanent consultative parties, comprised of the twelve original signatories, and temporary consultative parties, comprising the states subsequently attaining consultative status. Whereas the latter may hold consultative status only "during such time as" they are active in Antarctica, permanent consultative parties are under no obligation to maintain their activities, and cannot lose their consultative status. *See* W. BUSH, *supra* note 51, at 83.

74 Treaty, *supra* note 2, art. IX, para. 2 (footnote added). The Treaty itself does not establish a procedure by which nonconsultative parties may be granted consultative status. Such a procedure was not created until 1977, when Poland became the first state to attain consultative status. W. BUSH, *supra* note 51, at 92. Pursuant to this procedure, applications are examined to determine whether the applicant has complied with the requirements of Article IX, and must be unanimously approved by the current consultative parties in order for consultative status to be granted. *Final Report of the First Special Antarctic Treaty Consultative Meeting, London, Concerning the Procedures by which Acceding States May Become Consultative Parties*, July 29, 1977, *reprinted in* W. BUSH, *supra* note 51, at 331-37; *see* F. AUBURN, *supra* note 15, at 147-53.

75 *See infra* text accompanying notes 220-25.

76 Treaty, *supra* note 2, art. XII, para. 1(a). For a list of specific privileges accorded consultative parties see W. BUSH, *supra* note 51, at 84.

tive party by acceding to the Treaty.[77] The benefits of nonconsultative status, however, are unclear. Nonconsultative parties are bound by Treaty obligations, but are denied meaningful participation in the decisionmaking process.[78] The history of the Treaty System suggests that the sole incentive for acceding to the Treaty as a nonconsultative party is the expectation of later attaining consultative status.[79]

In addition to the twelve original parties to the Treaty,[80] fourteen states have gained consultative status: Ecuador, Finland, the Netherlands, the Republic of Korea, Peru, Spain, Sweden, Poland, Germany,[81] Brazil, India, China, Uruguay, and Italy. Currently, there are eight nonconsultative parties: Bulgaria, Canada, Cuba, Czechoslovakia, Denmark, Hungary, Papua New Guinea, and Rumania.

2. *The Mineral Resources Convention*

As interest in the mineral resource potential of Antarctica gained momentum during the 1970s, the general outlines of a formal regime to govern exploitation gradually took shape.[82] In 1982, representatives of the consultative parties gathered at the Fourth Special Consultative Meeting and began work on a comprehensive mineral resources regime. The deliberations of the consultative parties during the next six years resulted in adoption of the Convention, which was opened for siguature at Wellington, New Zealand on November 25, 1988. The Convention will not enter into force until

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77 Treaty, *supra* note 2, art. XIII, para. I. Any state that is not a member of the United Nations must be unanimously approved by the consultative parties before it may accede to the Treaty. *Id.*

78 *See infra* text accompanying notes 220-25.

79 F. AUBURN, *supra* note I5, at I71. Only states which are currently parties to the Treaty can apply for consultative status. *Id.*

80 Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom, and the United States.

81 Both East and West Germany gained consultative status independently. As of October 3, 1990, their status merged.

82 The potential for mineral resource activities in Antarctica was formally addressed at a meeting of experts sponsored by the Nansen Foundation in 1973. Nansen Foundation, Antarctic Resources, Report from the Meeting of Experts, May 30-June I0, 1973, *reprinted in U.S. Antarctic Policy: U.S. Policy with Regard to Mineral Exploration and Exploitation in the Antarctic: Hearing before the Subcomm. on Oceans and International Environment of the Senate Comm. on Foreign Relations*, 94th Cong., Ist Sess. 68 (I975). The basic principles for an administrative regime were elaborated at the Special Preparatory Meeting of consultative parties, held in Paris in 1976. This set of principles was adopted in Recommendation IX-1 of the consultative parties. Report and Recommendations of the Ninth Antarctic Treaty Consultative Meeting, London, Sept. I9-Oct. 7, 1977, *reprinted in* W. BUSH, *supra* note 5I, at 337, 343-45. *See generally* Christopher C. Joyner, *The Antarctic Minerals Negotiating Process*, 81 AM. J. INT'L L. 888 (1987) (analyzing the process by which concerned states have pursued national priorities within the decisionmaking framework and context of the Antarctic minerals negotiations).

sixteen consultative parties have either ratified or acceded to it.[83]

a. *Objectives of the Convention*

The central objective of the Convention is to regulate Antarctic mineral resource activities, including prospecting,[84] exploration,[85] and development.[86] The Convention seeks to provide an orderly administrative system to prevent conflicts among those undertaking mineral resource exploitation,[87] to promote cooperation among the parties, and to create and enforce adequate safeguards to protect the fragile Antarctic environment.[88] The Convention also requires that all mineral resource activities within Antarctica[89] comply with the Convention.[90]

b. *Membership in the Convention*

The Convention is open for accession by any party to the

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83 Convention, *supra* note 1, art. 63. The 16 must include each of the claimant states. In addition, at least five developing and 11 industrialized nations must accede to the Convention. *Id.*; *see* R.W. Bentham, *Antarctica: A Minerals Regime*, 8 J. ENERGY & NAT. RESOURCES L. 120, 127 (1990).

84 "Prospecting" is defined as "activities, including logistic support, aimed at identifying areas of mineral resource potential for possible exploration and development." Convention, *supra* note 1, art. 1, para. 8. Prospecting does not require prior authorization, but must be conducted in compliance with the Convention. Furthermore, prospecting does not confer rights to mineral resources. *Id.* art. 37, para. 1.

85 "Exploration" refers to activities aimed at "identifying and evaluating specific mineral resource occurrences or deposits." *Id.* art. 1, para. 9. Exploration requires a permit from the appropriate Regulatory Committee, which then prescribes "the specific terms and conditions for exploration and development." *Id.* art. 47.

86 "Development" consists of "activities, including logistic support, which . . . are aimed at or associated with exploitation of specific mineral resource deposits." *Id.* art. 1, para. 10. Development requires a permit issued by the Regulatory Committee. *Id.* arts. 53-54.

87 The preamble declares that Antarctica "shall not become the scene or object of international discord." *Id.* at preamble.

88 "[T]he protection of the Antarctic environment and dependent and associated ecosystems must be a basic consideration in decisions taken on possible Antarctic mineral resource activities." *Id.*; *see* E. Paul Newman, *The Antarctic Mineral Resources Convention: Developments from the October 1986 Tokyo Meeting of the Antarctic Treaty Consultative Parties*, 15 DEN. J. INT'L L. & POL'Y 421, 426 (1987).

89 The Convention applies to all land areas and ice shelves south of 60 degrees South Latitude, and to the "seabed and subsoil of adjacent offshore areas up to the deep seabed." Convention, *supra* note 1, art. 5, para. 2. The 60 degree boundary is a political one, corresponding to the northern limit of the territorial claims. F. AUBURN, *supra* note 15, at 130. This political boundary lies to the north of the Antarctic Circle, yet well south of the geographically and scientifically siguificant Antarctic Convergence, the circumpolar zone where cold Antarctic waters and warmer northern waters meet. Christopher C. Joyner, *The Antarctic Legal Regime: An Introduction*, in THE ANTARCTIC LEGAL REGIME, *supra* note 3, at 1.

90 "No Antarctic mineral resource activities shall be conducted except in accordance with this Convention and measures in effect pursuant to it . . . ." Convention, *supra* note 1, art. 3.

Treaty.[91] Since membership in the Treaty is open to all without significant restriction,[92] the only requirement for admittance to the Convention is a willingness to accede to the Treaty. However, significant participation in decisionmaking and policy matters depends upon satisfaction of the requirements for obtaining membership in the Antarctic Mineral Resources Commission.[93]

c. *Administrative Structure*

The Antarctic Mineral Resources Commission (the Resources Commission)[94] is the main legislative and executive body created by the Convention, having exclusive competence to decide matters of policy. Its functions include supervising scientific research, designating areas for development, adopting environmental protection measures, setting standards for prospecting, deciding budgetary matters, allocating revenue, adopting measures relating to the dissemination of data, and ensuring compliance with the substantive provisions of the Convention.[95]

The initial membership of the Resources Commission will consist of those parties who were Antarctic Treaty consultative parties as of the date the Convention was opened for signature.[96] In addition, any other party that is "actively engaged in substantial scientific, technical or environmental research . . . directly relevant to decisions about Antarctic mineral resource activities,"[97] or who is sponsoring exploration or development,[98] may apply for membership in the Resources Commission. The application of a nonconsultative party to the Treaty requires the unanimous approval of the current Resources Commission. The application of a consultative party requires only two-thirds approval.[99]

The Convention also provides for the establishment of an indeterminate number of Regulatory Committees.[100] Each committee has an executive function including responsibility for regulating and monitoring mineral resource activities within a particular develop-

91 *Id.* art. 61.
92 *See supra* text accompanying notes 72-81.
93 *See id.*
94 Convention, *supra* note 1, arts. 18-22.
95 *Id.* art. 21.
96 *Id.* art. 18, para. 2(a). The Convention was opened for signature on November 25, 1988. On that date the following states were consultative parties to the Treaty: Argentina, Australia, Belgium, Brazil, Chile, China, France, East Germany, West Germany, India, Italy, Japan, New Zealand, Norway, Poland, South Africa, the Soviet Union, the United Kingdom, the United States, and Urugnay.
97 *Id.* art. 18, para. 2(b).
98 *Id.* art. 18, para. 2(c).
99 *Id.* art. 18, para. 4.
100 *Id.* arts. 29-32.

ment area.[101] A primary function of each Regulatory Committee is to consider applications for exploration and development permits and to issue such permits as it deems appropriate.[102] Each Regulatory Committee must have ten members, with the Resources Commission determining the exact composition.[103] However, the Convention requires that the state or states asserting a territorial claim within the relevant area be represented.[104] In addition, the two members asserting a basis for claim[105] must be on every Regulatory Committee.[106] The remaining seats must be occupied by Resources Commission members selected by the Resources Commission. In total, each Regulatory Committee must represent four claimant and six nonclaimant states.[107] Furthermore, at least three out of the ten members must be representatives of developing countries.[108]

The Convention provides for two bodies whose membership is open to all parties: the Scientific, Technical and Environmental Advisory Committee,[109] and the Special Meeting of Parties.[110] These bodies serve a purely advisory function, with competence to produce only nonbinding recommendations. Ultimate decisionmaking authority remains with the Resources Commission and the Regulatory Committees.

d. *Finance*

The operating budget will be financed by permit fees and levies imposed upon Operators[111] as determined by the Resources Com-

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101 The Resources Commission is to designate such development areas. *Id.* art. 21. Each area must constitute a "coherent unit for the purposes of resource management." *Id.* art. 41, para. 1(a).

102 An earlier version of the Convention granted this power of approval to the Commission, whereas the final version merely gives the Commission a right of review. Draft Antarctic Minerals Regime, *reprinted in* GREENPEACE INTERNATIONAL, THE FUTURE OF THE ANTARCTIC (1985).

103 Convention, *supra* note 1, art. 29, para. 2.

104 *Id.* art. 29, para. 2(a).

105 The United States and the Soviet Union. Treaty, *supra* note 2, art. IV, para. 1(c).

106 The United States and the Soviet Union would be granted the widest representation of any party. The justification for this priority is unclear.

107 Convention, *supra* note 1, art. 29, para. 2(c). Important decisions are to be made by a qualified majority, requiring two-thirds approval by members present and voting, including simple majorities of both claimant and nonclaimant members. *Id.* art. 32, para. 1. This voting procedure gives claimant states a de facto veto, assuming they vote as a bloc.

108 *Id.* art. 29, para. 3(b). The Convention seeks to ensure "adequate and equitable representation of developing country members of the Commission, having regard to the overall balance between developed and developing country members of the Commission." *Id.* The Convention does not provide its own definition of "developing country."

109 *Id.* arts. 23-27.

110 *Id.* art. 28.

111 An Operator is any individual or organization "which is undertaking Antarctic

mittee. Such revenues will fund the cost of administering the Convention.[112] The Convention does not require Operators to share profits from mineral resource development, and does not provide any form of direct financial benefit for either parties or nonparties.

II
ABSENCE OF AUTHORITY TO EXERCISE JURISDICTION IN ANTARCTICA

A precondition to the existence of any legal order is recognized authority. Whether the authority comes from a formalized "rule of recognition,"[113] or from a fluid set of shared community values,[114] the existence of some basic norm from which all valid legal principles originate distinguishes a legal order from a system based upon the arbitrary exercise of power.[115] In international law the fundamental source of authority is consensus in the recognition of the legitimacy of a legal norm.[116] To be consistent with interuational law, then, any exercise of state action in the international realm must be recognized as legitimate. This requirement of recognized legitimacy applies to the exercise of jurisdiction.[117] In order to

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mineral resource activities and for which there is a Sponsoring State." *Id.* art. 1, para. 11.

112 If there is an available surplus, such amount is to be used to promote scientific research in Antactica. *Id.* art. 35, para. 7(a). If there is a shortfall, the deficit is to be made up by equitable contributions from Commission members. *Id.* art. 35, para. 5.

113 H.L.A. HART, THE CONCEPT OF LAW 97-119 (1961).

114 Donald W. Grieg, *Sovereignty, Territory and the International Lawyer's Dilemma*, 26 OSGOODE HALL L.J. 127, 131 (1988).

115 *See* Hans Kelsen, *The Pure Theory of Law*, 51 LAW Q. REV. 517 (1935). *But see* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832) (stating the positivist view of law as enforceable command); ALFRED ZIMMERN, THE LEAGUE OF NATIONS AND THE RULE OF LAW 94 (1969) (dismissively characterizing international law as "an attorney's mantle artfully displayed on the shoulders of arbitrary power").

The analysis contained in this Note rests upon a presumption of the validity of international law as a means of ordering relations among states. It is herein contended that there is an objective point of reference as between differing interpretations of the content of international law, and this Note strongly advocates one such interpretation. It is conceded, however, that there is no such objective reference as between international law per se, and any distinct, alternative conception of international relations (*e.g.*, one reconciled to anarchy, or advocating "world law"). The fundamental jurisprudential inquiry into the validity of international law is a worthy, but perilous undertaking, and it is one which lies beyond the scope of this Note.

Austin contended that law is the enforced command of sovereign to subject. Austin, however, distinguished international law, stating that: "The so called law of nations consists of opinions or sentiments current among nations generally. It therefore is not law properly so called." J. AUSTIN, *supra*, at 142. The Austinian position thus does not address the content of international law, but rather its fundamental validity.

116 *See* Thomas M. Franck, *Legitimacy in the International System*, 706 AM. J. INT'L L. 705 (1988); Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300 (1968).

117 The term "jurisdiction" has been variously defined. In the international context,

claim the authority to prescribe or enforce a rule of law, an actor must be able to point to a principle of international law which grants that authority.

A. The Exercise of Jurisdiction in Antarctica

There is a continuing debate over whether the Treaty System purports to exercise jurisdiction over nonparty states in Antarctica.[118] If the Treaty applies only to Treaty member states and their nationals,[119] then nonparty states presumably have no strong grounds for objecting to the current regime.[120] The Treaty would not compromise rights of nonparties, and nonparties would not be constrained by externally imposed obligations. As to the Convention, however, the outcome of this debate is not conclusive.

In contrast to the Treaty, the Convention clearly contemplates the exercise of jurisdiction over Antarctica, and over the activities of nonparty states in Antarctica.[121] Article 3 of the Convention[122] states that "[n]o Antarctic mineral resource activities shall be con-

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jurisdiction may be defined as "the capacity of a state under international law to prescribe or to enforce a rule of law." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 20 (1965). More generally, jurisdiction is the "legal authority to assert control over persons, events and property." Rosalyn Higgins, *The Legal Bases of Jurisdiction*, in EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO 3 (Cecil J. Olmstead ed. 1984). Higgins's definition is appropriate to the question of the consultative parties' authority to apply Convention law to Operators undertaking Antarctic mineral resource activities.

118 For the view that the Treaty System does not bind third parties, see F. AUBURN, *supra* note 15, at 115-29; Richard B. Bilder, *The Present Legal and Political Situation in Antarctica*, in COMMON SPACES, *supra* note 4, at 173-74. For the contrary view, see W. BUSH, *supra* note 51, at 99-100; Patricia Birnie, *The Antarctic Regime and Third States*, in ANTARCTIC CHALLENGE II, *supra* note 4, at 239; Rüdiger Wolfrum, *Means of Ensuring Compliance with an Antarctic Mineral Resources Regime*, in ANTARCTIC CHALLENGE II, *supra* note 4, at 177.

119 If the Treaty applied only to member states and their nationals, there would not necessarily be an exercise of territorial jurisdiction. Treaty provisions, however, may apply to other than member states. *See, e.g.*, *supra* note 111. The exercise of jurisdiction over nationals of Treaty parties would be based on international legal principles of extraterritorial jurisdiction. The authority to exercise extraterritorial jurisdiction is derived from the exercising state's sovereign authority within its own territory. *See* JOSEPH MODESTE SWEENEY, COVEY T. OLIVER & NOYES E. LEECH, THE INTERNATIONAL LEGAL SYSTEM 90-118 (3d ed. 1988) [hereinafter INTERNATIONAL LEGAL SYSTEM].

120 Nonparty states would presumably object only to the extent that they themselves sought to exercise exclusive territorial jurisdiction over Antarctica. This, however, is not in fact the case.

121 *See* Sollie, *supra* note 45, at 17, 36 ("The problem with mineral resources is that they do raise questions of property rights and jurisdiction with direct application to land and territory in such a way that the question of sovereignty . . . must be tackled directly . . . .").

122 Article 3 of the Convention is the analog to Article X of the Treaty. Article X states that "[e]ach of the Contracting Parties undertakes to exert appropriate efforts . . . to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty." Treaty, *supra* note 2, art. X.

ducted except in accordance with this Convention."[123] The parties to the Convention thereby assert that they will grant the right to undertake mineral resource activities only to those who comply with their terms and conditions. Article 3, of course, assumes that the right to develop mineral resources is theirs to grant. Furthermore, it assumes that they may deny that right to any entity unwilling to abide by the terms of the Convention.[124]

The Convention's claim to jurisdiction over all mineral resource activities, including those of nonparty states,[125] together with an administrative structure which limits participation in the decisionmaking process[126] necessitates the assertion of some legitimate basis of authority. Absent such recognized authority, the Convention is fundamentally inconsistent with international law.[127]

B. Possible Sources of Authority

There is no clearly defined set of legal principles that supports the exercise of territorial jurisdiction. The international lawmaking process is continuous and fluid, dependent upon consensus to establish its legitimacy.[128] Although the fluidity of international law makes its content difficult to define, three generally recognized legal

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123 Convention, *supra* note 1, art 3. Article 3 does not explicitly refer to third parties. When integrated with other provisions of the Convention, however, it is apparent that Article 3 is intended to bind third parties. The preamble, for example, states that the parties to the Convention are "[c]onvinced that participation in Antarctic mineral resource activities should be open to all States which have an interest in such activities and subscribe to a regime governing them." *Id.* at preamble.

Article 7 also applies to third parties, requiring the Resources Commission to "draw the attention of any State which is not a Party to this Convention to any activity . . . which, in the opinion of the Commission, affects the implementation of the objectives and principles of this Convention." *Id.* art. 7, para. 8. This provision concerns the highly sensitive issue of enforcement, and is not entirely explicit as to the degree of authority that Convention parties are entitled to exercise over third parties.

124 The Convention states that only Operators are entitled to carry out mineral resource activities. An "Operator" is defined as a party, an agency or instrumentality of a party, or a "juridical person established under the law of a Party." *Id.* art. 1, para. 11. The Convention also requires that "Antarctic mineral resource activities, should they occur, take place in a manner consistent with all the components of the Antarctic Treaty system and the obligations flowing therefrom." *Id.* art. 2, para. 2. Under this provision Operators are obligated to comply with the strict environmental protection standards established under earlier agreements. *See* agreements cited *supra* note 37. Operators are also subject to inspection of "all stations, installations and equipment relating to Antarctic mineral resource activities . . . as well as ships and aircraft supporting such activities." Inspections are to be carried out by Commission-appointed observers. Convention, *supra* note 1, art. 12, para. 1. Pursuant to article VII of the Treaty, Operators are also subject to inspections. *Id.* art. 11. These provisions impose significant obligations upon any entity undertaking mineral resource activities.

125 *See supra* text accompanying notes 121-24.

126 *See supra* text accompanying notes 94-110.

127 *See supra* text accompanying notes 113-17.

128 *See id.*

principles would be most likely to support the exercise of jurisdiction in Antarctica: territorial sovereignty,[129] the objective treaty doctrine,[130] and customary international law.[131] For various reasons, however, none of the three justifies the current legal regime established by the Treaty System.

1. *Territorial Sovereignty*

Territorial sovereignty describes a sovereign's competence to exercise legislative, executive, and judicial functions within its dominion.[132] The authority of a territorial sovereign generally is absolute and exclusive, and thus is analogous to the authority that an owner exercises over his property under private law.[133] Under this principle, the establishment of a legal order such as the Treaty System, with its imposition of rights and obligations, is within the competence of the territorial sovereign of Antarctica.

Either the claimant states severally, or the Treaty consultative parties collectively, may assert territorial sovereignty in Antartica. If each of the individual claimants holds valid title[134] to its claimed sector, then their participation in the Treaty System provides a legitimate basis for the sovereignty of the consultative parties. The Treaty System could thus be viewed as a regional arrangement, competent to determine regional matters of "peace and security" as provided for in the United Nations Charter.[135]

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129 *See infra* text accompanying notes 132-84.

130 *See infra* text accompanying notes 185-95.

131 *See infra* text accompanying notes 196-218.

132 Historically there was a distinction between *dominium*, the authority which a sovereign exercises over its territory-as-object, and *imperium*, which is the sovereign's authority over his subjects. Both, however, had a territorial element: The extent of the sovereign's *imperium* was delineated by the bounds of his territory. The distinction reappears in the context of Antarctica. The territorial claims asserted during the first half of this century sought to establish *dominium* over the claimed area. The authority claimed by the consultative parties under the Treaty System is not explicitly tied to the territory-as-object, and thus more closely resembles *imperium*. *See* F. VICUNA, *supra* note 18, at 80-84. Under the Convention, however, the consultative parties propose to grant what amount to ownership rights in Antarctic minerals. By determining rights with respect to the territory-as-object, the consultative parties are exercising *dominium*. *See infra* note 219.

133 F. VICUNA, *supra* note 18, at 80. *But see* R. Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 4 (1963). Jennings agrees that there are certain points of similarity, but cautions that "in the context of the society of modern sovereign States the points of difference are much more significant than any resemblances." *Id.* at 3.

134 "Title" refers to "the vestitive facts which the law recognizes as creating a right." R. JENNINGS, *supra* note 133, at 4. In this case the right created is the right to exercise sovereignty.

135 Chapter VIII of the United Nations Charter recognizes the legitimacy of "regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action,

Alternatively, if the individual claims are amalgamated, a de facto condominium may exist.[136] According to this view, the consultative parties are entitled to exercise a form of collective sovereignty over Antarctica by virtue of either their collective activity or the pooling of their independent claims.[137] Declaration of a de facto condominium[138] has two significant advantages for the consultative parties. First, it would not require the resolution of conflicting territorial claims.[139] Second, even if an individual territorial claim is not legally strong enough to stand on its own, the consultative parties together would have a consolidated claim to traditional territorial sovereignty stronger than any other state or group of states.[140] Assertion of territorial sovereignty, either individually or as a condominium, must be supported by a principle of territorial acquisition. To claim territory as part of a sovereign's dominion, international law must recognize the means of acquisition as legitimate.[141] The category of principles of territorial acquisition is ill-defined, but the following survey considers principles that are at least colorable as applied to Antarctica.[142]

a. *Discovery*

According to the discovery principle, valid legal title to territory and the right to exercise territorial sovereignty accrues from the act of discovery itself.[143] While none of the states that currently asserts

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provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations." U.N. CHARTER art. 52, para. 1. An example of a regional arrangement is the Organization of American States. *See* Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2416, 119 U.N.T.S. 3.

136 A condominium in international law is defined as territory "under the *joint tenancy* of two or more States, these several States exercising sovereignty conjointly over it, and over the individuals living thereon." 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 453 (H. Lauterpacht 8th ed. 1962) (emphasis in original). For the purposes of jurisdiction, a condominium is considered to be a single state. An example of such an arrangement was the British-French condominium in the New Hebrides. *See* D.P. O'Connell, *The Condominium of the New Hebrides*, 43 BRIT. Y.B. INT'L L. 71 (1968-69).

137 *See* F. VICUNA, *supra* note 18, at 320-21; Alexander, *supra* note 47, at 414-17; Bilder, *supra* note 118, at 189-91.

138 Antarctica would be a de facto condominium, as opposed to a general or de jure condominium, because the Treaty itself does not purport to establish a condominium. *See* Bilder, *supra* note 118, at 190.

139 F. VICUNA, *supra* note 18, at 320.

140 Bilder, *supra* note 118, at 189-90.

141 *See supra* text accompanying notes 113-17.

142 Omitted are such principles as conquest and cession, which apply only to inhabited lands. *See* Grieg, *supra* note 114, at 140. Also omitted is symbolic annexation, which is closely related to discovery. *See* F. AUBURN, *supra* note 15, at 9-11. For a discussion of Chile's claim based on "geological affinity," and the political notion of Pan-American primacy, see Bergin, *supra* note 32, at 11-12, 13-14.

143 *See* WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 126 (8th ed. 1924) ("In the early days of European exploration it was held, or at least every state

a claim in Antarctica relies solely on the principle of discovery, seven states utilize discovery as partial support for their claim: France, Australia, New Zealand, Norway, the United Kingdom, the United States, and the Soviet Union.[144]

Discovery, however, is no longer widely recognized as a sufficient basis for sovereignty.[145] The *Island of Palmas* case[146] supports this view. *Island of Palmas* involved a dispute between the United States and the Netherlands, both of which claimed sovereignty over the Island of Palmas, or Miangas, in the Philippines. The Netherlands based its claim upon actual occupation of the island, whereas the United States claim derived from an earlier Spanish claim based on discovery. The Permanent Court of Arbitration held in favor of the Netherlands, stating that acts of discovery alone, without any attempt to exercise control, cannot confer title to territory.[147]

Furthermore, there are a number of practical difficulties with the discovery principle. For example, its does not set forth which specific acts constitute discovery.[148] Nor does it provide for the verification of claims,[149] or the resolution of disputes between conflicting claims. Finally, discovery alone does not determine the geographical extent of a claim.[150]

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maintained with respect to territories discovered by itself, that the discovery of previously unknown land conferred an absolute title to it upon the state by whose agents the discovery was made.").

144 F. AUBURN, *supra* note 15, at 9.

145 *See id.* at 6-9 (Auburn relies upon "well-known statements that discovery alone cannot give sovereignty." *Id.* at 6).

146 Island of Palmas (U.S. v. Neth.) (Apr. 4, 1928) UNRIAA (Vol. II) 829, *reprinted in* R. JENNINGS, *supra* note 133, at 88.

147 *Id.* at 846. The court empbasized the importance of actual, effective occupation to a valid claim of sovereignty:

> It seems . . . incompatible with . . . positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such title ever conferred territorial sovereignty.

Id.

148 Do overflights or offshore sightings of land constitute discovery, or must a physical landing be made? *See* F. AUBURN, *supra* note 15, at 6-9.

149 Sightings in Antarctica are often questionable because of severe weather conditions. Clouds and icebergs have given rise to territorial claims. F. M. AUBURN, THE ROSS DEPENDENCY 17 (1982).

150 Does a landing on the coast give rise to a claim to the entire continent? Does a landing on an island give rise to a claim over the mainland?

The various difficulties inherent in the discovery principle are illustrated by the commentator who cited the Maori legend that Antarctica was discovered by the hero Uite-Rangiora in the distant past. The impossibility of evaluating the legitimacy of this claim exemplifies the weaknesses of the discovery principle. *Id.*

b. *Occupation*

Historically, an individual could obtain title to previously unclaimed territory by occupying it.[151] The more stringent doctrine of effective occupation, developed during the nineteenth century, requires state-sanctioned, permanent occupation and settlement in order to perfect title.[152] Under the effective occupation doctrine, possession must be actual, continuous, and useful.[153] An effective occupation may follow the establishment of an "inchoate title"[154] through initial acts of possession or discovery. Settlement or a consistent pattern of activity must follow such acts in order to maintain a territorial claim.[155] Inchoate title allows the claimant to relate its claim back to the initial act of possession, thereby granting it priority over subsequent competing claims.[156]

The exact quantum of activity required to establish an effective occupation is unclear.[157] Given the size of Antarctica, however, the largely scientific activities of the Treaty parties are insufficient to constitute effective occupation or to perfect inchoate title.[158] The presence of the Treaty parties in Antartica consists mainly of iso-

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151 Before the rise in European exploration and colonialization in the middle of the 15th century, the only unclaimed lands were newly formed islands. The individual who first occupied these islands acquired title. Grieg, *supra* note 114, at 140.

152 *See* F. AUBURN, *supra* note 15, at 11; W. HALL, *supra* note 143, at 125-31; R. JENNINGS, *supra* note 133, at 20-23.

153 F. AUBURN, *supra* note 15, at 11.

154 W. HALL, *supra* note 143, at 127. As Hall explained:

> An inchoate title acts as a temporary bar to occupation by another state, but it must either be converted into a definitive title within reasonable time by planting settlements or military posts, or it must at least be kept alive by repeated local acts showing an intention of continual claim.

Id.

155 *Id.* at 126-27.

156 In order for title to be perfected, effective occupation must follow the initial acts of possession within a reasonable period. What constitutes a "reasonable period," however, is an unresolved issue. Commentators have variously suggested 20, 25, 30, or 40 years as the limit. F. AUBURN, *supra* note 15, at 9.

157 The specific requirements which determine what constitutes effective occupation have not been agreed upon. One standard often cited is contained in the General Act of the Berlin Congo Conference of 1885, *reprinted in* 3 AM. J. INT'L L. 7, 24 (Supp. 1909). Chapter VI of the Act lists "THE CONDITIONS ESSENTIAL TO BE FULFILLED IN ORDER THAT NEW OCCUPATIONS UPON THE COASTS OF THE AFRICAN CONTINENT MAY BE CONSIDERED AS EFFECTIVE." *Id.* Article 35 provides that states must "assure, in the territories occupied by them, upon the coasts of the African Continent, the existence of an authority sufficient to cause acquired rights to be respected and, the case occurring, the liberty of commerce and of transit in the conditions upon which it may be stipulated." *Id.*; *see* F. AUBURN, *supra* note 15, at 11-12.

158 Benedetto Conforti, *Territorial Claims in Antarctica: A Modern Way to Deal with an Old Problem*, 19 CORNELL INT'L L.J. 249, 255-56 (1986); *see* Island of Palmas (U.S. v. Neth) (Apr. 4, 1928) UNRIAA (Vol. II) 829, *reprinted in* R. JENNINGS, *supra* note 133, at 88 (requiring "continuous and peaceful display of state functions" to establish sovereignty); W. HALL, *supra* note 143, at 126 (title over territory requires "effective control, and would last only while it continued").

lated scientific stations that occupy only small areas; this presence does not reach the level of permanent settlement and administration required under the theory of effective occupation.[159]

Commentators have argued that inhospitable environments call for a reduced standard in applying the doctrine of effective occupation.[160] In support of such a view, some commentators have cited the *Eastern Greenland* case,[161] which involved a dispute over the competing claims of Denmark and Norway to the eastern coast of Greenland. Denmark had established permanent settlements on the southern and western coasts, but proclaimed its intention to exercise sovereiguty over the entire island, including the eastern coast where it had no significant presence. Norwegian fishermen had maintained bases on the eastern coast for centuries, but Norway had not formally asserted a claim until this litigation arose. The Permanent Court of International Justice held in favor of Denmark.[162]

The commentators suggest that the court based its decision upon a finding that, given the harsh conditions prevailing in that region, Denmark's minimal presence in eastern Greenland was sufficient to establish an effective occupation.[163] However, the outcome in *Eastern Greenland* was not determined by effective occupation. Instead, the decision rested upon the fact that Denmark's claim went essentially unchallenged for centuries,[164] and that Norway made statements which could be interpreted as recognizing the validity of Denmark's claim.[165] In other words, the decision in *Eastern Green-*

159 It must also be noted that pursuant to Article IV of the Treaty, acts occurring while the Treaty is in force may not constitute a basis of claim to territorial sovereignty. *See* Note, *Allocation of Mineral Resources in Antarctica: Problems and a Possible Solution*, 10 HASTINGS INT'L & COMP. L. REV. 525, 533 (1987) (authored by Helena M. Tetzeli); *supra* notes 63-71 and accompanying text.

160 *See, e.g.*, F. AUBURN, *supra* note 15, at 13-14; E.W. Johnson, *Quick, Before it Melts: Toward a Resolution of Jurisdictional Morass in Antarctica*, 10 CORNELL INT'L L.J. 182 (1976). Claimant states themselves, such as Australia, have advanced this view. *See* Grieg, *supra* note 114, at 164.

161 Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 22 (Apr. 5).

162 *Id.*

163 *See* Grieg, *supra* note 114, at 164-71. Grieg suggests that in *Eastern Greenland*, "the Court discarded any notion of possession of, in the sense of a physical presence in, the disputed territory." *Id.* at 163. Grieg nevertheless concludes that the reasoning of *Eastern Greenland* is inapposite to the situation in Antarctica. *Eastern Greenland* was essentially a resolution of two competing claims because there was an "absence of external interest" in eastern Greenland. *Id.* at 168. In contrast, "Antarctica has been a matter of concern to states other than the claimants." Claims there have to be valid in their own right, as against all interested states. *Id.*; *see* A.C. Castles, *The International Status of the Australian Antarctic Territory*, in INTERNATIONAL LAW IN AUSTRALIA 341, 350-51, 353-56 (D.P. O'Connell ed. 1965); Humphery Waldock, *Disputed Sovereignty in the Falkland Islands Dependencies*, 25 BRIT. Y.B. INT'L L. 311, 324-25 (1948).

164 *Eastern Greenland*, 1933 P.C.I.J. at 28.

165 *Id.* at 50-53.

land did not rest upon the validity of Denmark's means of acquisition, but rather upon Norway's implicit recognition of Denmark's claim. *Eastern Greenland* does not, therefore, provide support for claimant states who assert that isolated scientific activities are sufficient to constitute an effective occupation under a reduced standard applicable to inhospitable regions.

c. *Propinquity*[166]

The theory of propinquity provides that when a state acquires sovereignty over part of a geographical unit, it acquires sovereignty over the entire unit.[167] As applied to Antarctica, sovereignty over a section of the Antarctic coast translates into a claim to sovereignty over the adjacent inland region. Thus claimant states may contend that the establishment of a small research station supports a claim to the entire geographical unit within which the station is situated. This theory has the advantage of not requiring effective occupation of an entire area. Propinquity is, however, ambiguous and uncertain in its application.[168] Given the inherent difficulty of determining what constitutes a distinct geographical unit in Antarctica, the territorial extent of such a claim would be unclear.[169] Furthermore, although scholars developed the theory of propinquity to support European colonial claims during the nineteenth century, the theory was explicitly rejected at the Berlin Congo Conference of 1885 by those for whose benefit it was developed.[170]

d. *Sector Theory*

Sector theory, developed with respect to the Arctic polar region, provides that states whose territory extends above the Arctic Circle[171] acquire sovereiguty over the triangular sector with a baseline which extends between the extreme eastern and western limits

166 Also referred to as "contiguity" and "continuity," and "hinterland" theory. *See* Quincy Wright, *Territorial Propinquity*, 12 AM. J. INT'L L. 519, 520, 522 (1918).

167 Conforti, *supra* note 158, at 254. The question of what constitutes a "unit" remains. Conforti suggests, for example, that sovereignty over an island would give rise to sovereignty over the archipelago of which it is a part. Similarly, sovereignty over a sector of coastline would extend to the hinterland up to a natural geographical border. *Id.*

168 *Id.* at 255. Propinquity also requires that the claimant hold valid title to the coastal area. However, it is herein contended that in Antarctica, no valid title to the coastal area exists.

169 Even if such a unit could be defined, it would not correspond to the boundaries of the actual claims, which uniformly follow the meridians. *Id.*

170 The Berlin Conference of 1885 was convened to determine the rights of European states asserting claims in the Congo. The Conference dealt with previously occupied territories, and also established the conditions for future occupation. *See* F. AUBURN, *supra* note 15, at 11. The Final Act explicitly rejected propinquity and reaffirmed the principle of effective occupation. Conforti, *supra* note 158, at 254.

171 Canada, the United States, the Soviet Union, Denmark, and Norway.

of that state's northern coastline, and with the apex at the north pole.[172] States asserting claims in Antarctica, with the exception of Norway, have relied to some extent upon the sector theory.[173] The method of delineating claims under this theory superficially accords with the actual territorial claims in Antarctica, which happen to be triangular.[174] By its own definition, however, the sector theory should not apply to Antarctica since no state's territory extends below the Antarctic Circle.[175] In fact, no state's territory extends below sixty degrees south latitude, the baseline of the seven extant claims.[176]

Sector theory has never gained wide recognition in the international community.[177] The United States, Denmark, and Norway, which are all Treaty parties, and one of which (Norway) is a claimant state, have explicitly rejected the sector theory.[178] Objections have been based in part upon the conflict with the requirement of effective occupation,[179] the arbitrary placement of baselines,[180] and the conflict with freedom of the high seas.[181]

e. Uti Posseditis

The *uti posseditis* principle suggests that the Antarctic claims of Chile and Argentina are legitimate as a matter of historic right. In the Bull Inter Caetera Divinae of 1493, Pope Alexander VII divided the unclaimed regions of the world between Spain and Portugal. Antarctica falls within the half of the world ostensibly granted to Spain.[182] When Argentina and Chile seceded from Spain in 1810,

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172 For a thorough discussion of the origins and evolution of the sector theory and its application in Antarctica, see F. AUBURN, *supra* note 15, at 23-31. Auburn concludes that "[e]xtension of the sector theory to Antarctica contradicts accepted means of acquisition of territory in international law." *Id.* at 25. *But see* J.S. Reeves, *Antarctic Sectors*, 33 AM. J. INT'L L. 519, 521 (1939).

173 F. AUBURN, *supra* note 15, at 31.

174 The eastern and western boundaries of each claim follow the geographical meridians.

175 The Antarctic Circle is the appropriate demarcation line since it directly corresponds to the Arctic Circle. Sector theory in Antarctica derives directly from Arctic sector theory; therefore, the elements should correspond.

Without a northern limit, a multitude of nations would have legitimate territorial claims in Antarctica, including Uruguay, Brazil, Guatemala, Ecuador, Nicaragua, Costa Rica, Panama, and Peru in the Americas alone. F. AUBURN, *supra* note 15, at 24.

176 "The sector principle is founded on geography, but the triangle in Antarctica has no geographic base." Conforti, *supra* note 158, at 254.

177 F. AUBURN, *supra* note 15, at 31.

178 Conforti, *supra* note 158, at 253-54.

179 Subush C. Jain, *Antarctica: Geopolitics and International Law*, 17 INDIAN Y.B. INT'L AFF. 249, 266 (1974); *see supra* notes 151-65 and accompanying text.

180 F. AUBURN, *supra* note 15, at 24; *see supra* note 175.

181 F. AUBURN, *supra* note 15, at 27-28.

182 Antarctica is held to have been included in the grant, despite the fact that Antarctica had not been discovered at the time of the allocation. P. QUIGG, *supra* note 15, at 16.

they retained the Spanish claims.[183] While the grant was intended to be binding upon third parties, only Spain and Portugal, the two states who had requested papal intervention, recognized the pope's authority to make such a disposition.[184] This arcane theory has never gained wide acceptance. Given the lack of international consent to the papal disposition, it is not a convincing basis for jurisdiction over Antarctic mineral resources.

2. *Objective Treaty Regime*

The consultative parties may also assert a right to exercise jurisdiction over Antarctica on their own behalf without relying upon the authority of the claimant states as territorial sovereigns. The consultative parties may be entitled to exercise jurisdiction, binding upon third parties, if the Antarctic Treaty could be deemed an "objective" treaty.

An objective treaty is an international agreement which is binding on third parties without their consent.[185] The essence of an objective treaty regime was described in Article 63 of the International Law Commission's 1964 draft of the Vienna Treaty on Treaties.[186] The proposed Article stated that a treaty creates an objective regime when it is clear

> from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the general interest general obligations and rights relating to a particular region . . . ; provided that the parties include among their number any State having territorial competence with reference to the subject-matter of the treaty, or that any such State has consented to the provision in question.[187]

Given a loose reading of "territorial competence," the Antarctic

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183 For a more thorough discussion of *uti posseditis*, or historic right, see PHILIP W. QUIGG, A POLE APART 113-14 (1983).

184 Grieg, *supra* note 114, at 142.

185 Birnie, *supra* note 118, at 243-49; *see also* Bruno Simma, *The Antarctic Treaty as a Treaty Providing for an "Objective Regime,"* 19 CORNELL INT'L L.J. 189 (1986).

It is difficult to find an actual example of an objective treaty in international law. Supporters of the objective treaty doctrine often point to Sweden's reliance upon a convention between Britain, France, and Germany concerning the demilitarization of the Aland Islands as evidence of an objective treaty. Sweden was not a party to the agreement, but it relied upon the agreement as creating rights and obligations binding upon third parties with respect to the territory at issue. *See* Birnie, *supra* note 118, at 241.

186 Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27, 289 (entered into force Jan. 27, 1980). The Vienna Convention was essentially a codification of customary international law with respect to the interpretation, utilization, and effect of international agreements. *See* INTERNATIONAL LEGAL SYSTEM, *supra* note 119, at 993-94.

187 *Third Report on the Law of Treaties, Sir Humphrey Waldock, Special Rapporteur*, U.N. Doc. A/CN.4/167 (1964).

Treaty satisfies the above criteria.[188] The question remains whether the objective treaty doctrine is a valid legal concept.

In this respect, it is significant that the above-cited proposal was not adopted in the final version of the Vienna Convention.[189] The disagreement over the draft of Article 63 reflects the general lack of consensus among international legal commentators about the validity of the objective treaty doctrine.[190] The strongest argnment against the doctrine is that it contradicts the legal principle of *pacta tertiis*,[191] which provides that an agreement is binding only with the consent of the contracting parties.[192] One commentator has pointed out that an objective treaty "would presuppose an inherent capacity of the parties to the treaty to oblige third States and would amount to a kind of legislative power which is unknown in the present state of international law."[193] Furthermore, the objective treaty doctrine runs directly counter to both the fundamental principles of state sovereignty and independence,[194] and the requirement of consensus to establish legitimacy in international law.[195]

The lack of consensus concerning the validity of the objective treaty doctrine makes the doctrine inadequate as the sole basis for the exercise of jurisdiction contemplated by the Convention. Arguably, however, the Treaty parties' intent to create an objective regime has gained recognition as customary international law through

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188 This draft article was, in fact, expressly intended to apply to the Antarctic Treaty. Simma, *supra* note 185, at 193-94.

189 Birnie, *supra* note 118, at 244. It was, in fact, precluded by the final version of the Vienna Convention. Article 34 states that "[a] treaty does not create either obligations or rights for a third State without its consent." Vienna Convention on the Law of Treaties, *supra* note 186, art. 34.

190 The greater weight of authority holds that the concept of an objective treaty is inconsistent with international law. *See* remarks of Eckart Klein, *Panel Discussion*, in ANTARCTIC CHALLENGE II, *supra* note 4, at 338-42 ("there are no *a priori* objective treaty-based international *regimes* valid *erga omnes*. . . ." *Id.* at 338); *see also* F. AUBURN, *supra* note 15, at 117 ("the concept of an objective regime is not supported by international law"); Christopher Pinto, *The International Community and Antarctica*, 33 U. MIAMI L. REV. 475, 482 (1978). *But see* INGRID DETTER, ESSAYS ON THE LAW OF TREATIES (1967); Birnie, *supra* note 118, at 255-58; Simma, *supra* note 185, at 192-208.

191 *Pacta tertiis nec nocent nec prosunt.*

192 Birnie, *supra* note 118, at 239.

193 Klein, *supra* note 190, at 338-39.

194 *See* Luzius Wildhaber, *Sovereignty and International Law*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 425 (R. St.J. Macdonald & Douglas M. Johnston eds. 1983) [hereinafter LEGAL PHILOSOPHY]. Sovereignty is a fundamental attribute of statehood. The sovereignty of a state relative to other states (external sovereignty) "signifies independence, that is, the power of a state to determine its tasks, means and structures independently from any foreign state or organization." *Id.* at 436-37; *see also* Island of Palmas (U.S. v. Neth.) (Apr. 4, 1928) UNRIAA 829, *reprinted in* R. JENNINGS, *supra* note 133, at 88, 91 ("Sovereignty in the relation between states signifies independence.").

195 *See supra* text accompanying notes 113-17.

the acquiescence of the international community. If that is the case, then the Treaty parties have the authority to exercise jurisdiction over Antarctica regardless of the initial validity of the Treaty as an objective treaty. The following section addresses this argument by discussing the nature and effect of customary international law.

3. *Customary International Law*

Article 38 of the Statute of the International Court of Justice lists as one of the four sources of international law "international custom, as evidence of a general practice accepted as law."[196] A customary rule of law has two components: the general practice of states, and the recoguition by states that this general practice has become law (*opinio juris*).[197] The general practice element requires a demonstrable pattern of unambiguous and consistent state practice.[198] There is disagreement, however, over the amount of time which must elapse before a general practice or asserted principle becomes binding as customary law.[199] The recoguition of the practice must be widespread, but need not be universal.[200]

A multilateral agreement such as the Treaty or the Convention

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196 Statute of the International Court of Justice (entered into force Oct. 24, 1945), 1983 U.N.Y.B. 1334, art. 38, para. 1(b). The English text of the Statute is authentic, but the original was drafted in French. Bin Cheng suggests that a more accurate translation of article 38(b) reads: "International custom, as evidenced by a general practice accepted as law." Bin Cheng, *Custom: The Future of General State Practice In a Divided World*, in LEGAL PHILOSOPHY, *supra* note 194, at 513, 514.

For a general introduction to the concept of customary international law, see D.W. GREIG, INTERNATIONAL LAW 15-41 (1970).

197 G. SCHWARZENBERGER & E. BROWN, *supra* note 10, at 26. *But see* Robert Y. Jennings, *The Identification of International Law*, in INTERNATIONAL LAW: TEACHING AND PRACTICE 3 (Bin Cheng ed. 1982) [hereinafter INTERNATIONAL LAW] (suggesting that the orthodox two-part test is "outworn and inadequate." *Id.* at 4). Some commentators contend that only the first element, state practice, is required. *See* Brian Flemming, *Customary International Law and the Law of the Sea: A New Dynamic*, in LAW OF THE SEA: STATE PRACTICE IN ZONES OF SPECIAL JURISDICTION 489, 491 (S.A. Clingan ed. 1982); Lazare Kopelmanas, *Custom as a Means of the Creation of International Law*, 18 BRIT. Y.B. INT'L L. 129-30 (1937). Others, perhaps fewer in number, claim that only the second element, *opinio juris*, is necessary. *See* Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 23, 36 (1965).

198 R.P. Anand, *U.N. Convention on the Law of the Sea and the United States*, 24 INDIAN J. INT'L L. 153, 185 (1984).

199 *Id.* ("[I]t could range from a century to a month, or even according to some writers, customary international law can be created 'instantly.' ").

200 Bin Cheng, *On the Nature and Sources of International Law*, in INTERNATIONAL LAW, *supra* note 197, at 203, 225-29; *see also* HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 191 (1958) ("If universal acceptance alone is the hall-mark of the existence of a rule of international law, how many rules of international law can there be said to be in effective existence?" *Id.* The answer is not very many.). The converse of acceptance is opposition. It may be that if even a small number of states or a single state that is directly affected protests strongly, then no customary rule could emerge. Anand, *supra* note 198, at 185-86.

may provide the source for rules of customary international law. On occasion, standards of conduct which were binding initially only by virtue of their explicit stipulation in an interuational agreement became enforceable rules of customary law through widespread acceptance among the international community. Products of such an evolution include the principle of freedom of the seas, and the minimum standards of protection owed to foreigners.[201] Furthermore, an international agreement may create customary law that binds not only the parties to the agreement, but also third parties.[202] Article 38 of the Vienna Treaty on Treaties supports this view, providing that the principle of *pacta tertiis*[203] does not "preclude[] a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."[204]

a. *The Treaty as Customary International Law*

The Antarctic Treaty exemplifies an international agreement that may give rise to customary international law.[205] Although the Treaty itself may fulfill the requirement of general practice, the world community must recognize the Treaty as law in order for its rules to crystallize into customary law.[206] Therefore, one must examine the actions and statements of both member and nonmember states during the thirty years since the creation of the Treaty to determine whether there has been general acquiescence in, and recognition of, the Treaty parties' right to exercise jurisdiction over Antarctica.

Initially, widespread, if passive, acquiescence to the operation of the Treaty existed.[207] During its early years, however, the objec-

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201 *See* G. SCHWARZENBERGER & E. BROWN, *supra* note 10, at 26-27.

Some commentators assert that a treaty may give rise to customary rules of law immediately, despite the absence of a long-established general practice among states. ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 104 (1971). Other commentators view the treaty merely as evidence of state practice, which is one element of the traditional two-part test. *See* R. R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 277 (1965-66). *But see* Cheng, *supra* note 196, at 526-30 (contending that "[t]reaties [f]orm [p]art of the [i]nternational [l]egal [s]ystem, but [a]re [n]ot a [s]ource of [g]eneral [i]nternational [l]aw." *Id.* at 526).

202 *See* Anand, *supra* note 198, at 188 ("[A] treaty which breaks entirely new ground may stimulate the crystalization of customary rules binding even on non-parties to the treaty.").

203 *See supra* notes 191-92 and accompanying text.

204 Vienna Convention on the Law of Treaties, *supra* note 186, art. 38.

205 *See* W. BUSH, *supra* note 51, at 102-03.

206 *See* Anand, *supra* note 188, at 190 ("[T]here is no doubt that strong dissent to a treaty by a small number of states, or even a single powerful and influential state, whose interests are directly affected . . . would distract from the authority of the treaty and adversely affect the emergence of customary international law on the subject.").

207 *See* Rüdiger Wolfrum, *The Use of Antarctic Non-Living Resources: The Search for a Trustee*, in ANTARCTIC CHALLENGE, *supra* note 4, at 162. Wolfrum states that "the world

tives of the Treaty were fairly limited as they were concerned primarily with scientific research and the prohibition of nonpeaceful activities.[208] Furthermore, the Treaty did not explicitly assert territorial jurisdiction over Antartica.[209] In fact, there was no need to assert jurisdiction under the original Treaty, as the only nations having a substantial interest in Antarctica were Treaty parties who were subject to the terms of the Treaty.

As the Antarctic Treaty System developed, its inherently noncontroversial nature changed.[210] The Treaty parties, particularly those with consultative status, relied increasingly upon their privileged status to justify a broader authority over activities in and around Antarctica. This evolution is manifested by the Convention, under which the Treaty parties have, in effect, claimed jurisdiction over Antarctica's mineral resources.[211] In order to legitimize their authority to undertake such activities, the consultative parties must rely upon the questionable proposition that the international community's initial acquiescence in the Treaty's limited authority may be automatically expanded to accommodate additional activities. However, even assuming the validity of this proposition, the Convention has not attained the status of customary international law.

b. *The Convention as Customary International Law*

Those who view the Antarctic Treaty System as customary international law imply that the authority to exercise jurisdiction over mineral resources derives from the international community's acquiescence in the earlier activities of the Treaty parties.[212] This view is implicit in the Convention itself. The preamble to the Convention asserts that "the Antarctic Treaty system has proved effective in promoting international harmony in furtherance of the purposes and principles of the Charter of the United Nations."[213] The Convention also refers to the "special responsibility of the Antarctic Treaty Consultative Parties to ensure that all activities in Antarctica are

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community has over twenty years [as of 1983] accepted the activities of the Consultative Parties in Antarctica and has thus acquiesced to the Consultative Parties in Antarctica, the general validity of the Antarctic Treaty as such and the special functions exercised by the Consultative Parties." *Id.*

208 *See supra* text accompanying notes 54-57.

209 *See supra* text accompanying notes 118-20.

210 *See infra* text accompanying notes 215-16.

211 *See supra* text accompanying notes 121-24.

212 *See, e.g.*, F. Orrego Vicuna, *The Antarctic Treaty System: A Viable Alternative for the Regulation of Resource-Oriented Activities*, in THE ANTARCTIC TREATY REGIME, *supra* note 4, at 66 (The Treaty System "has been an effective guarantor of peace and stability in the region, thereby ensuring the fundamental basis of the development of successive regimes applicable to the activities in the region, which include . . . the . . . question of minerals.").

213 Convention, *supra* note 1, at preamble.

consistent with the purposes and principles of the Antarctic Treaty."[214] These statements represent an attempt to portray the Convention as a continuation of the Treaty, thus establishing the international community's alleged acquiescence in the terms of the Treaty as the source of the Convention's authority.

The Convention, however, represents a significant departure from the Treaty in terms of both subject matter and the exercise of jurisdiction.[215] The fact that the rest of the world did not object to the regulation of scientific activities does not grant the consultative parties the right to exercise ownership over mineral resources. The Convention cannot derive its claim to legal status directly from the Treaty. Instead, the Convention must establish its own validity through independent recognition by the international community in order to attain the status of customary international law.[216]

The necessary recognition, however, has not occurred. As the Treaty System has focused on mineral resource exploitation, and the international community has turned its attention to Antarctica, passive acquiescence in the status quo has vanished. Growing criticism of the Treaty System has accompanied the evolution of the Convention, demonstrating the lack of widespread support for the consultative parties' attempt to extend the current regime to govern mineral resources.[217] As the Malaysian Prime Minister, Mohammad Mahathir, declared to the United Nations General Assembly in 1982, "[the Antarctic] Treaty . . . [is] an agreement between a select group of countries and does not reflect the true feelings of members of the United Nations."[218]

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214 *Id.*

215 *See supra* text accompanying notes 121-24.

216 *See* Birnie, *supra* note 118, at 257. Birnie emphasizes the need for renewed acquiescence corresponding to each incremental expansion of the consultative parties' claimed authority. Birnie suggests that the consultative parties "feel insecure" due to the international community's increasing reluctance to participate in agreements arising under the Treaty System. The cause of this reluctance is their unwillingness to "recognize the privileged role" of the consultative parties. *Id.*

217 *See* Christopher Pinto, *Comment*, in CHALLENGE I, *supra* note 4, at 164. Responding to the assertion that the international community has acquiesced to the Treaty System, Pinto declares that "the world community has done nothing of the kind. Neither the facts nor the law would support such a theory." *Id.* at 165. *See also* Hayashi, *supra* note 11. Hayashi points to the dissatisfaction with the Treaty System expressed during the 38th and 39th sessions of the United Nations General Assembly.

218 Remarks of Prime Minister Mohammad Mahathir, U.N. Doc. A/37/PV 10, at 17 (1982). Similar pronouncements were made at the Seventh Conference of the Non-Aligned Movement in 1983. U.N. Doc. A/38/132, at 98 (1983). The Organization of African Unity in 1985 adopted a resolution rejecting the current regime, and declaring "Antarctica to be the common heritage of mankind." U.N. Doc. A/40/666, at 73 (1985).

The purported "openness" of membership in the Treaty System may also be used to support the claim that the Treaty System has gained recognition as customary law. In this respect, it may be suggested that unwillingness to participate in the Treaty organiza-

III

ANALYSIS OF THE OPERATION OF THE TREATY SYSTEM

As the foregoing discussion illustrates, the Antarctic Treaty System lacks the legal authority required to exercise jurisdiction over third parties. Nor is there a valid legal basis for what amounts to a claim to "ownership" of Antarctic mineral resources.[219] In international law, however, legal arguments are rarely absolutely determinative. Given the lack of definitive rules and the continuously shifting consensus basis of international law, international arrangements such as the Treaty System must be evaluated in terms of their pragmatic effect in light of political and economic, as well as legal concerns.

Some advocates of the Treaty System have emphasized the alleged benefits of the current Antarctic regime in arguing for its retention. Although the various claims of these Treaty advocates are not easily categorized, they generally relate to the openness of the Antarctic Treaty System, the successful suppression of territorial claims, or the overall practical effectiveness of the Antarctic Treaty System. Upon examination, however, none of these arguments is convincing.

A. The Antarctic Treaty System Is a "Closed Shop"

Several commentators have argued that the "openness" of membership in the Treaty System reflects a concern with the interests of the international community.[220] This openness is supposedly demonstrated by the "well known fact that participation is open

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tion reflects a lack of interest in the subject, which in turn may suggest at least passive acquiescence in the status quo. If the Treaty did in fact provide for open membership, then arguably this could be the case. The two-tiered membership structure, and the substantial requirements for obtaining consultative status, however, are significant considerations which counsel against membership, reasons which suggest more than a mere lack of interest. *See supra* notes 72-79 and accompanying text. Mere lack of participation in the Treaty System does not, then, evidence acquiescence in the status quo, or recognition of the Treaty System as customary international law.

219 By exercising exclusive control over the allocation of mineral resources, the consultative parties' undertaking assumes the fundamental characteristic of property ownership. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 (1982) (Marshall, J.) ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' ") (quoting United States v. General Motors Corp., 323 U.S. 373, 378 (1945)).

220 *See* Australia, View of States, U.N. Doc. A/39/583 (Part II) Oct. 29, 1984, at 85 (The Treaty "is open to accession by any Member State of the United Nations, or any country which may be invited to accede with the consent of the Consultative Parties—it is thus as universal as the interest of States in Antarctica."); Sollie, *supra* note 45, at 23 ("the Antarctic Treaty System is in fact an open system"); Trolle-Anderson, *supra* note 71, at 63-64; Vicuna, *supra* note 212, at 65, 68-70 ("Neither the Antarctic Treaty nor any of the regimes associated with it have established a closed system of participation." *Id.* at 69); Wolfrum, *supra* note 207, at 162 ("The co-administration [of Antarctica] rests

to all the members of the United Nations."[221] That accession is open to all United Nations member states[222] is misleading, however, since access to *meaningful* participation is far more limited. In fact, since the consultative parties dominate the policymaking institutions of both the Treaty and the Convention, the international community does not have an opportunity to advance its interests within the Treaty System.

Within the two-tiered membership structure of the Antarctic Treaty, decisionmaking authority is exercised exclusively by the consultative parties.[223] Although the Treaty provides that any contracting party may apply for consultative status if it conducts substantial scientific research in Antarctica,[224] this requirement represents a major obstacle for less-developed countries that have few resources to devote to this type of project. Critics have charged that less-developed countries are effectively excluded from consultative status, and consequently are excluded from meaningful participation under the current regime.[225]

The closed shop character of the Treaty is perpetuated by the Convention, which concentrates decisionmaking authority in the Resources Commission.[226] To join the Resources Commission, a party to the Convention must satisfy two requirements. First, the applicant must be "actively engaged in substantial scientific, technical and environmental research."[227] This requirement, again, presents a significant economic barrier for less developed states.[228]

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with the Consultative Parties and is in no way restricted to a small group, but open to all those States who have shown a substantial interest in Antarctic matters.").

221 Vicuna, *supra* note 212, at 69.

222 Treaty, *supra* note 2, art. XIII, para. 1.

223 *See supra* text accompanying notes 72-79.

224 Treaty, *supra* note 2, art. IX, para. 2.

225 One commentator has stated tbat consultative status is a "role to be purchased by what amounts to a demonstration of technical competence and financial capacity beyond the reach of the poorer countries." Pinto, *supra* note 217, at 168.

The interpretation of this provision is left to the consultative parties themselves. Furthermore, an application for consultative status must be unanimously approved by the current consultative parties. *See supra* note 74.

226 *See supra* text accompanying notes 94-99.

227 Convention, *supra* note 1, art. 18, para. 2(b).

228 It may seem that the threshold requirement of scientific and technical research has greater justification as a condition for membership on the Resources Commission than as a condition for attaining consultative status under the Treaty. *See supra* note 74 and accompanying text. A state unable to support extensive research in Antarctica presumably would not be in a position to undertake mineral resource exploitation either. Further analysis suggests, however, that interests other than resource exploitation may be implicated in a mineral resource regime. Excluded states may, for example, have a strong interest in preventing any mineral resource activities from taking place for environmental reasons, or an interest in supporting the world market for minerals. Furthermore, less developed states may be concerned that rapid exploitation will result in depletion of Antarctica's mineral wealth before they gain the technical sophistication

Second, the Resources Commission must approve the membership.[229] The membership decisions of the Resources Commission are not reviewable. Given that the consultative parties will make up the initial Resources Commission, they could conceivably use this arrangement to perpetuate their dominance indefinitely.

B. Suppression of Territorial Claims

Treaty proponents have called Article IV an "ingenious formula" that has made peaceful cooperation possible under the Treaty System.[230] By emphasizing the magnitude of this accomplishment, these commentators implicitly recognize the determination with which claimant states adhere to their respective claims. However, Article IV does not affect the validity of territorial claims; it merely places a moratorium on their assertion vis-á-vis other claimants.[231] The seven territorial claims which arose prior to the Treaty retain their original force,[232] and should the Treaty System

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which will allow them to participate. Thus, for a variety of reasons, states lacking the ability to satisfy the threshold requirement may have vital interests which will be left unprotected under the Convention.

229 Convention, *supra* note 1, art. 18, para. 4.

The choice of language in this membership provision is siguificant. A party wishing to obtain representation on the Commission must submit a "notification and accompanying information," in effect an application. *Id.* art. 18, para. 3. Upon submission, the Commission will take this notification under consideration. A nonconsultative party "submitting a notification shall be deemed to have satisfied the requirements for Commission membership if no member of the Commission objects at the meeting at which such notification is considered." *Id.* art. 18, para. 4. By creating this presumption of validity, the drafters have given the decision an objective cast. Had the burden of satisfying the Commission been placed squarely upon the applicant, the procedure would seem more arbitrary, and membership more exclusive. A similar statutory device was employed in the Treaty, with respect to the requirements for attaining consultative status. For a discussion of membership criteria under the Treaty, see F. AUBURN, *supra* note 15, at 147-50.

230 "Through the effectiveness of this article, Antarctica has remained the zone of peace which the signatories of the Treaty had hoped for." Trolle-Anderson, *supra* note 71, at 60; *see also* Australia, View of States, *supra* note 220, at 85 (Article IV has "averted international strife and conflict over Antarctica, inter alia, by putting aside the question of claims to sovereignty in Antarctica, thereby removing the potential for dispute."); R. Tucker Scully, *Institutionalisation of the Antarctic Treaty Regime*, in ANTARCTIC CHALLENGE II, *supra* note 4, at 284 (Scully commends the "elaboration of imaginative juridical accommodation which is reflected in Article IV"); Gillian D. Triggs, *The Antarctic Treaty Regime: A Workable Compromise or a "Purgatory of Ambiguity?"*, 17 CASE W. RES. J. INT'L L. 195, 201 (1985).

231 Auburn states that Article IV "was not an agreement on territorial status, but rather a decision not to press claims." F. AUBURN, *supra* note 15, at 118; *see* W. BUSH, *supra* note 51, at 57-58.

232 The langnage of the Treaty clearly supports this view. Article IV states that "[n]othing contained in the present Treaty shall be interpreted as . . . a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica." Treaty, *supra* note 2, art. IV, para. 1.

lapse, the territorial claims would reemerge intact.[233] Article IV thus does not represent a solution to the problem of conflicting claims, rather, it is a tenuous compromise without which the current regime could not exist.[234]

The moratorium on claims established by Article IV has been effective for the limited purposes of the Treaty.[235] Mineral resource activities as contemplated by the Convention, however, are not reconcilable with the status of the claimant and nonclaimant parties under Article IV. As discussed previously, Article IV of the Treaty System did not resolve the underlying differences between the positions of the claimant and nonclaimant parties. The seven claimant states assert that their territorial claims are valid; the nonclaimant states refuse to recognize any such claims. Article IV simply institutionalized these fundamental differences. Given the ownership rights which territorial sovereignty implies,[236] extraction of mineral resources without authorization by a sovereign (claimant) state constitutes an infringement of sovereignty. Faced with the ambiguity of Article IV, and at the same time desiring to authorize mineral resource activities, the drafters of the Convention chose to recognize the validity of territorial claims by conceding privileged status to claimant states through mandatory representation on the Regulatory Committees.[237] While the conflict-producing potential of this arrangement will not be revealed until the Convention is implemented, Treaty advocates cannot assert that the Convention has resolved the issue of individual claims.

C. Limited Success of the Antarctic Treaty System

Commentators who support the current legal regime for Antarctica frequently justify the regime by emphasizing the successful attainment of its objectives.[238] The consultative parties themselves

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233 Bruno Simma suggests that the consultative parties viewed Article IV as an interim provision. The consultative parties explicitly "wanted to retain the option of asserting their interests 'by all means' should the Treaty operation and cooperation break up." Simma, *supra* note 185, at 204.

234 Trolle-Anderson, *supra* note 71, at 59-60.

235 None of the activities contemplated under the Treaty would constitute a significant infringement of the claimant state's territorial sovereignty. *See supra* notes 119-20 and accompanying text. Article VIII deals with the allocation of personal jurisdiction, but it is expressly limited to "acts and omissions" of observers and scientific personnel which occur in the course of their Treaty functions. Treaty, *supra* note 2, art. VIII, para. 1.

236 *See supra* note 132.

237 *See supra* text accompanying notes 100-08.

238 For example, Wolfrum claims that "[t]he intense cooperation in the fields of scientific research, demilitarization, protection of the environment, meteorology and communication under the auspices of the Antarctic system is indicative not only of the existence of a juridical regime but of its ability and proficiency." Wolfrum, *supra* note

have often emphasized the Treaty System's effectiveness. Recommendation IX-1 on Antarctic mineral resources, approved by the consultative parties, proclaimed that "the framework established by the Antarctic Treaty has proved effective in promoting international harmony . . . in ensuring the protection of the Antarctic environment, and in promoting freedom of scientific research in Antarctica . . . ."[239] In practice, however, the Antarctic Treaty system has not been as successful as its proponents claim. An examination of the Treaty System's operation reveals that these claims of success are overstated. This is particularly true in the areas of environmental protection and international cooperation, with respect to both the degree and scope of claimed success.

1. *Environmental Protection*

The consultative parties' frequent pronouncements on the subject of environmental protection have not translated into positive action. The consultative parties have, for example, declared that it is "the special responsibilit[y] of the Consultative Parties to ensure that any activities in Antarctica . . . should not become the cause of . . . danger to the unique Antarctic environment."[240] Despite such expressions of concern, there has been little or no effective enforcement of environmental protection measures.[241]

A recent example of this lack of protection involved the construction of an airstrip at Pointe Geologie in the French sector.[242] The airstrip was to be built at a location specifically identified as a

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207, at 162; *see also* Bergin, *supra* note 32, at 38 ("For nearly three decades, the Treaty has been a means by which many beneficial ends have been achieved, including protection of an intricate Antarctic ecosystem and mitigation of volatile international disagreement over sovereignty claims."); Trolle-Anderson, *supra* note 71, at 57 ("Antarctica of today is a continent of peace and cooperation.").

Furthermore, it is often suggested that the past accomplishments of the Treaty System provide a sound basis for its future expansion. *See* Note, *supra* note 159, at 554 ("The Antarctic Treaty and its conventions have been successful in achieving their objectives, and, thus, the world community should continue to utilize them.").

239 *Recommendation IX-1: Antarctic Mineral Resources, reprinted in* W. BUSH, *supra* note 51, at 343, 344.

240 *Id.* at 344. In developing a mineral resources regime, the consultative parties formally endorsed the principle that "protection of the unique Antarctic environment and of its dependent ecosystems should be a basic consideration." *Id.* at 345. The Convention itself echoes these concerns. The Convention provides that "the protection of the Antarctic environment and dependent and associated ecosystems must be a basic consideration in decisions taken on possible Antarctic mineral resource activities." Convention, *supra* note 1, at preamble.

241 James N. Barnes, *Legal Aspects of Environmental Protection in Antarctica*, in THE ANTARCTIC LEGAL REGIME, *supra* note 3, at 241.

242 For a more thorough account of this episode, see Christopher C. Joyner, *Protection of the Antarctic Environment: Rethinking the Problems and Prospects*, 19 CORNELL INT'L L.J. 259, 268-70 (1986).

priority site for the study of Antarctic wildlife. Construction was undertaken without securing the environmental impact reports and construction permits as required under French law. The resulting disruption to the habitat of several rare Antarctic bird species violated not only French law, but also the Agreed Measures for the Conservation of Flora and Fauna,[243] and the Treaty itself.[244] Despite the objections of several scientific and environmental organizations,[245] none of the consultative parties publicly took notice of the situation. The Antarctic and Southern Ocean Coalition, an environmental organization, concluded that the "handling of this case raises a question of credibility for the Antarctic Treaty System. If member governments fail to take any collective action—even to investigate allegations of a breach—the public can have little confidence in the commitments of governments pursuant to the Antarctic Treaty and related instruments."[246]

In addition to their failure to take positive action, the consultative parties have frequently frustrated independent international efforts to protect the Antarctic environment.[247] For example, in 1975 the United Nations Environmental Program proposed to extend the Treaty's environmental protection provisions with respect to mineral resource exploitation. Program administrators representing

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243 One part of the Treaty System, the Agreed Measures, provides that "[e]ach participating Government shall prohibit within the Treaty Area the killing, wounding, capturing or molesting of any native mammal or native bird, or any attempt at any such act, except in accordance with a permit." Agreed Measures for the Conservation of Antarctic Fauna and Flora, June 2-13, 1964, 17 U.S.T. 996, 998, T.I.A.S. No. 6058, *modified in* 24 U.S.T. 1802, T.I.A.S. No. 7692 (1973).

244 The Treaty imposes an enforcement obligation upon member states. Article X states that "[e]ach of the Contracting Parties undertakes to exert appropriate efforts . . . to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty." Treaty, *supra* note 2, art. X.

245 Including the French National Academy of Sciences, the Federation Francaise des Societes de Protection de la Nature, and Greenpeace International. Joyner, *supra* note 242, at 269.

246 Antarctic and Southern Ocean Coalition, *Background Paper on the French Airfield at Pointe Geologie, Antarctica* 8 (Mar. 1, 1985) (mimeographed), *cited in* Joyner, *supra* note 242, at 270.

A more recent example of the Treaty System's inadequate environmental protection measures involved the grounding of the Argentine supply ship, *Bahia Paraiso*, in the Bismarck Strait in January 1989. The resulting oil spill created an oil slick 8-12 kilometers long, and caused significant damage to the local ecosystem. In particular, the oil spill destroyed a three-year research project on the effects of ultraviolet radiation on the food chain which was being carried out at the United States Palmer Station. The international response was almost nonexistent. In a House of Commons debate considering the accident, the British Under-Secretary of State for Foreign and Commonwealth Affairs stated: "There are no specific treaty obligations which require the United Kingdom [a consultative party] to clean up oil spills in Antarctica and there are no resources deployed in Antarctica for that purpose." *See* Redgwell, *supra* note 5, at 475 n.9 (quoting 149 PARL. DEB., H.C. (5th ser.) 143 (W.A.) (14 Mar. 1989)).

247 *See* F. AUBURN, *supra* note 15, at 120-25.

states which were consultative parties to the Treaty blocked the proposal.[248] Similarly, the Scientific Committee on Antarctic Research (SCAR)[249] proposed in 1973 and 1985 that mandatory environmental impact assessments be required for any major construction project in Antarctica.[250] The consultative parties rejected these proposals and instead adopted their own nonbinding, noncompulsory recommendation covering the same subject matter.[251]

2. *Cooperation Among Treaty Parties*

Treaty System proponents also praise the high degree of cooperation among member states that has prevailed under the current regime.[252] Central to this element of cooperation is the requirement that the consultative parties make every important decision by consensus.[253] The significance of this cooperation must, however, be critically examined in light of the fact that the consultative parties are a self-selecting group. If participation were indeed open, as is often claimed,[254] unanimity would in many instances be unattainable given the polarization of national interests along multiple axes within the international community.[255] This suggests that consen-

248 *Id.* at 235.

249 The Scientific Committee on Antarctic Research, or SCAR, is an arm of the International Council of Scientific Unions charged with coordinating scientific activity throughout the Antarctic region. *See* Sollie, *supra* note 45, at 22 n.15.

250 The proposed mandatory environmental impact assessments would have required circulation among participating governments and approval of their adequacy. Barnes, *supra* note 241, at 243.

251 At the Eight Consultative Meeting in Oslo, Norway, representatives of the consultative parties adopted a code of conduct outlining "recommended procedures," and suggested that their governments "[t]o the greatest extent feasible . . . observe the code of conduct." *Recommendation VIII-II: Man's Impact on the Antarctic Environment, reprinted in* W. BUSH, *supra* note 51, at 324-26. In contrast to the mandatory assessments required by the SCAR proposal, these recommended procedures were nonbinding.

252 *See* Trolle-Anderson, *supra* note 71, at 57 (Under the Treaty System "[e]ighteen countries with diverse political and economic systems successfully cooperate in managing all matters concerning the southern continent."); Vicuna, *supra* note 212, at 66 ("The Antarctic Treaty system is essentially a pragmatic formulation deprived of ideological connotations of any sort which enables it to sustain a continued process of compromise and adaptation.").

253 During the negotiation of the Treaty itself, full consensus was required. Sollie, *supra* note 45, at 31. Article IX of the Treaty provides that all "measures in furtherance of the principles and objectives of the Treaty" must be adopted by consensus. Treaty, *supra* note 2, art. IX, para. 1. Furthermore, applications for admission to the consultative group must have the unanimous approval of the current consultative parties. *See supra* note 74. In consultative meetings, all recommendations of the consultative parties must be adopted by consensus. *Rules of Procedure of Antarctic Treaty Consultative Meetings*, July 10, 1961, para. 23, *reprinted in* W. BUSH, *supra* note 51, at 117. Finally, any amendment or modification to the Treaty must have the unanimous approval of the consultative parties. Treaty, *supra* note 2, art. XII, para. 1(a).

254 *See supra* notes 217-18 and accompanying text.

255 For example, polarization inheres in the dichotomy between industrialized and

sus under the Treaty System is possible only because of the uniform alignment of interests among the consultative parties. Furthermore, in order to preserve this form of cooperation the consultative parties must exclude from participation those states that have legitimate but divergent interests. Cooperation under the Treaty System would surely be a virtue if based upon compromise and conciliation. However, when it is the product of self-interested exclusionary behavior, its benefits come at too great a cost.[256]

IV
RECOMMENDATION

A. Historical Perspective

The Antarctic Treaty system rests upon a series of outmoded legal principles regarding the acquisition and exercise of territorial sovereignty. Under the current regime the consultative parties, particularly the twelve original parties to the Treaty, enjoy a privileged status that can be attributed solely to the fact that they were first to invent a legal regime for Antarctica.[257]

This first-come-first-served rationale was appropriate in the Age of Discovery when the priority was to establish a system of organized appropriation, rather than to allocate limited quantities of scarce resources.[258] The apportionment of lands inhabited by "uncivilized" populations during the period of European colonialism seems unjust in retrospect, but it was recognized as valid by the European nations involved.[259] However, it is inappropriate from both

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less-developed nations, between East and West, between mineral importers and mineral exporters, between aligned and nonaligned states.

256 Finn Sollie has characterized this situation as "a dilemma of critical size in an organization of special-interest-states with a desire to preserve the identity as well as the existence of their organization against pressures from common-interest-states with a desire to enforce the principle of universal participation." Sollie, *supra* note 45, at 21.

257 The Treaty provides that any state may, subsequent to obtaining nonconsultative status, apply for admission to the consultative group. Several states have, in fact, gained consultative status through this process. However, only the twelve original parties hold permanent consultative status, which cannot be lost through lack of activity. Temporary consultative parties, in contrast, lose their status once their substantial presence in Antarctica lapses. *See supra* note 73.

The first-come-first-served mentality is also inherent in the territorial claims which Article IV of the Treaty implicitly recognizes. *See supra* notes 230-34 and accompanying text. The Convention explicitly recognizes these claims. *See supra* text accompanying notes 236-37.

258 During the period of European expansion, when the extent of undiscovered lands was unknown, "the issues raised related solely to the relationship between the discoverer and the discovered." Grieg, *supra* note 114, at 140.

259 *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 584 (1823) (Marshall, C.J.) ("[A]ll the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians.").

a legal and political point of view to employ doctrines based upon discovery and possession to justify the administration of territory and resources during the post-World War II era. This is an era of scarce vital resources, requiring a high degree of international cooperation and interdependence.[260] International law must, and inevitably will, adjust to accommodate these new economic and political priorities and the Antarctic legal regime must adapt accordingly.[261]

Outmoded principles of territorial acquisition cannot justify the power that the consultative parties hold. The authority of the parties must be granted through the international community's de facto recognition of their special position. Yet the recognition granted to the consultative parties for the limited undertakings of the Treaty cannot apply to the parties' attempt to exercise exclusive jurisdiction over mineral resources.[262] The element of consensus that is indispensable to the formation of international law[263] does not exist with respect to the current regime.[264]

B. An Alternative Legal Regime for Antarctica

Treaty advocates often assert that despite the defects of the current legal regime, there is no viable alternative.[265] This view ignores the fact that from the outset of the Antarctic legal debate, commentators have proposed alternative regimes[266] including trus-

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260 The basic intuition underlying the call for increased international cooperation is by no means a novel one. Adam Smith recognized that "[w]hat improves the circumstances of the greater part can never be regarded as an inconvenience to the whole. No society can surely be flourishing and happy, of which the far greater part of the members are poor and miserable." ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan ed. 1976). It is only that the circumstances have become more compelling.

261 The need for the international legal system to adjust to shifting priorities has also been recognized in the context of ocean resources. *See* P. SREENIVASA RAO, THE PUBLIC ORDER OF OCEAN RESOURCES: A CRITIQUE OF THE CONTEMPORARY LAW OF THE SEA IX-X, 26-7 (1975).

262 *See supra* text accompanying notes 212-18.

263 *See supra* text accompanying notes 116-17.

264 Nor may the consultative parties rely upon the pre-Treaty sovereignty claims as a basis for authority, since the claims were never widely recognized as legitimate. *See supra* note 67.

265 *See* Vicuna, *supra* note 212, at 72-73. In the legal context, the argument is often a circular one. Vicuna suggests that if the consultative parties do not have the right to control ADtarctica, that right must belong to the international community; yet the "international community does not have either the record of activity or the element of sovereignty to support such a right or title." *Id.* at 73. This argument's weakness lies in its application of traditional standards of sovereignty and possession, upon whose abandonment internationalization largely rests. *See also* Trolle-Anderson, *supra* note 71, at 64 (the current Treaty System "is built on an extremely fine and delicate political and legal balance which it would be impossible to recreate in the political climate of today").

266 For a discussion of early proposals, see F. VICUNA, *supra* note 18, at 5-8; *supra* notes 29-34 and accompanying text.

teeship,[267] international ownership,[268] and the creation of a world park.[269] Most of these proposals presumed that the international community has a right to share in the benefits to be derived from Antarctica.[270] In recent years, increased recognition of the international community's interest in Antarctica has manifested itself in the development of the common heritage principle.

I. *The Common Heritage Principle*

The principle of the "common heritage of mankind" developed in the context of the rapid political and economic changes that took place in the latter part of this century.[271] With roots in the legal doctrine of *mare liberum*, or freedom of the high seas, the common heritage principle has three main tenets: first, the replacement of rights to ownership with rights to use; second, international management and control over the resource in question; and third, sharing the wealth resulting from such use.[272]

The common heritage principle has yet to gain universal acceptance as a rule of international law;[273] however, this does not

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267 An Antarctic trusteeship for the benefit of the international community was discussed in the United Nations in 1947-1948. *See* Wolfrum, *supra* note 207, at 145. In 1959, Jessup and Tauhenfeld proposed a similar arrangement. PHILIP C. JESSUP & HOWARD J. TAUBENFELD, CONTROL FOR OUTER SPACE AND THE ANTARCTIC ANALOGY 11 (1961).

268 For a discussion of early commentators favoring international ownership of Antarctica, see F. VICUNA, *supra* note 18, at 6.

269 The transformation of Antarctica into a world park has been favored primarily by environmentalists. *See* JAMES N. BARNES, LET'S SAVE ANTARCTICA 30 (1982); *see also* John Warren Kindt, *Ice-Covered Areas and the Law of the Sea: Issues Involving Resource Exploitation and the Antarctic Environment*, XIV BROOKLYN J. INT'L L. 27 (1988).

270 F. VICUNA, *supra* note 18, at 6.

271 Other products of this rapidly developing political and economic climate, emphasizing international cooperation, are the New International Economic Order and the "law of social interdependence." On the former, see POLITICAL AND INSTITUTIONAL ISSUES OF THE NEW INTERNATIONAL ECONOMIC ORDER (Ervin Laszlo & Joel Kurtzman eds. 1981); THE NEW INTERNATIONAL ECONOMIC ORDER (Karl P. Sauvant & Hajo Hasenpflug eds. 1977); THE NEW INTERNATIONAL ECONOMIC ORDER: A THIRD WORLD PERSPECTIVE (Pradip K. Ghosh ed. 1984). On the latter, see Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 149 (Alvarez opinion) ("It is evident that for the traditional individualistic regime on which social life has hitherto been founded, there is being substituted more and more a new regime, a regime of interdependence, and that, consequently, the law of social interdependence is taking the place of the old individualistic law."); Pinto, *supra* note 217, at 166.

272 Note, *supra* note 159, at 536.

273 *See* Remarks by Christopher C. Joyner, *Who Has the Right of Exploitation, and the Right to Prevent Exploitation, of the Minerals in Antarctica?*, 79 AM. SOC'Y INT'L L. PROC. 58, 62-67 (1985) (panel discussion) ("As an international law principle, [the common heritage of mankind] falls short." *Id.* at 67); Scharnhorst Müller, *The Impact of UNCLOS III on the Antarctic Regime*, in ANTARCTIC CHALLENGE, *supra* note 4, at 171 (Of statements advocating the common heritage principle, Muller says that "it would seem to go too far considering these opinions as a testimony of a well established principle of interuational law."); Gillian D. Triggs, *The Antarctic Treaty System: Some Jurisdictional Problems*, in THE ANTARCTIC TREATY REGIME, *supra* note 4, at 88, 98-104.

mean that it is irrelevant to the current legal debate over Antarctica.[274] The development of international law is a gradual process.[275] International law often lags behind changes in the underlying political and economic order it reflects.[276] Trends in the development of the law must therefore be interpreted to determine which principles should guide the creation of prospective legal regimes.

The common heritage principle gained momentum during the 1970s.[277] It is now widely recoguized as a valid conceptual ideal.[278] The current debate over the common heritage principle concerns

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274 One Antarctic commentator has recognized that "if legal systems are to survive, they must be dynamic and flexible. Most especially, international law must address new international ideologies and recent concerns for Antarctica." Triggs, *supra* note 273, at 104.

275 The *lex lata* must be objectively verifiable by reference to actual state practice and judicial pronouncements. However, the "task of verifying the *lex lata* does not preclude the witnessing of the gradual emergence of a rule of law in its formative stage." Cheng, *supra* note 196, at 514.

276 *See* Bradley Larschan & Bonnie C. Brennan, *The Common Heritage of Mankind Principle in International Law*, 21 COLUM. J. TRANSNAT'L L. 305 (1983). As these authors observed:

> The development of international law is a slow process. The time which elapses from the juncture when an issue demanding a legal solution is perceived until that point when concerned parties agree to be bound by a specific legal document or doctrine may be measured in years, decades or even centuries.

Id. at 305.

277 The impetus was provided by the 1973 Nonaligned Summit in Algiers. At that meeting, the demands of the Nonaligned movement and the "Group of 77" less-developed countries were presented in a comprehensive package which advocated a "new international economic order." The New International Economic Order proposes a restructuring of the dominant economic order established by the developed market economies during the post-World War II period. Emphasis is placed on development of third world economies. THE NEW INTERNATIONAL ECONOMIC ORDER, *supra* note 271, at 3-15.

278 The Convention itself explicitly acknowledges the basic obligations inherent in the common heritage principle. Paragraph 13 of the preamble states that "the effective regulation of Antarctic mineral resource activities is in the interest of the international community as a whole." Convention, *supra* note 1, at preamble. The Convention further declares that "participation in Antarctic mineral resource activities should be open to all States which have an interest in such activities and subscribe to a regime governing them and that the special situation of developing country Parties to the regime should be taken into account." *Id.*

Commentators, including Treaty advocates, have generally reached the same conclusion. *See* Francioni, *supra* note 24, at 171 (The common heritage principle "has become the *leitmotif* in the progressive development of international law governing the use of areas beyond national jurisdiction."); Joyner, *supra* note 273, at 67 ("In substantial part the treaty system is operating to promote basic [common heritage of mankind] objectives in Antarctica."); Wolfrum, *supra* note 207, at 147 ("Due to the interdependency which governs the relations between states, the principle of solidarity among nations has evolved as a leading principle of international law."). *But see* Müller, *supra* note 273, at 171 ("As to the common heritage concept it must be pointed out that the United Nations have not declared it to be a universal principle applicable to all spaces beyond generally recognized national sovereignty.").

the extent to which it has attained the status of a formalized rule of law[279] (*lex lata*), as opposed to a merely desirable rule of law (*lex ferenda*).[280] Although the common heritage principle is not conclusively identified as *lex lata*, its widespread recognition as *lex ferenda* suggests its status as an emerging principle of customary international law.[281] In order to crystallize into a binding rule of customary law, it must be affirmed by state practice and *opinio juris*.[282] Past attempts to substantiate the common heritage principle have not been completely successful. One must examine the reasons underlying this failure in order to assess the implications for the principle's potential validity.

2. *Past Implementation of the Common Heritage Principle*

The common heritage principle is explicitly embodied in two significant international agreements: the United Nations Convention on the Law of the Sea of 1982 (UNCLOS III),[283] and the 1979

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279 Proponents of the Treaty System often concede the validity of the common heritage principle as a moral concept, yet insist that it is not binding international law. *See* Joyner, *supra* note 273, at 66 ("As yet [the common heritage principle] is not a principle of international law. It is a philosophical notion with the potential to emerge and crystallize as a norm."); Triggs, *supra* note 273, at 99 ("the notion of a common heritage is, at most, a principle rather than a set of rules"); Note, *supra* note 159, at 539 ("Although the common heritage doctrine is arguably a developing principle of international law, it is not yet binding.").

Others consider the common heritage principle to be binding international law. *See* Jorge Castaneda, *The Resources of the Seabed*, in POLITICAL AND INSTITUTIONAL ISSUES OF THE NEW INTERNATIONAL ECONOMIC ORDER, *supra* note 271, at 34-36; Pinto, *supra* note 217, at 165-67; Wolfrum, *supra* note 207, at 147 (Wolfrum, however, denies that it is applicable to Antarctica).

280 *Lex lata* refers to the law as it is, in objectively verifiable form. *Lex ferenda* refers to the law as it should be. Consensus as to the *lex ferenda* usually precedes the formation of *lex lata*. *See* Cheng, *supra* note 197, at 514.

281 The debate over the emergence of a customary rule of law may become a circular one. For example, supporters of the current Antarctic regime may contend that no customary rule of law mandates application of the common heritage principle to Antarctica. To support this contention, they may in turn point to the absence of such application in state practice or *opinio juris*. Such practice and opinions, however, are themselves necessary to the creation of a customary rule. If this argument were accepted, the prospect of an emergent rule of law would be effectively foreclosed. In order to avoid such foreclosure, weight must be given to the *lex ferenda*—the recognition that the principle should be applied. The process of emergence is not automatic; initiative must be taken at some point.

282 *See supra* text accompanying notes 196-204.

283 UNCLOS III, *supra* note 13. UNCLOS III was the product of the Third United Nations Conference on the Law of the Sea, convened in 1973. This conference, and the two that preceded it, were primarily concerned with the conflict between freedom of the high seas and the attempt to expand exclusive national jurisdiction over ocean areas. *See* INTERNATIONAL LEGAL SYSTEM, *supra* note 119, at 157-71.

Although the consultative parties were successful in keeping the Antarctic question off the agenda at the Law of the Sea Conference, the analogy between Antarctica and the deep seabed was nevertheless widely drawn. *See* Tullio Treves, *The United Nations General*

Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the Moon Treaty).[284] Given the remote prospects for practical application of the Moon Treaty,[285] the history of UNCLOS III provides the best illustration of an attempt to implement the common heritage principle.

UNCLOS III declared the deep seabed to be "the common heritage of mankind, to be shared by all nations and not subject to traditional territorial sovereignty."[286] In furtherance of this principle, and with a view toward regulating the exploitation of the deep seabed's resources, UNCLOS III created the International Seabed Authority (the Authority).[287] The Authority has two major functions: first, to determine the terms and conditions of access to mineral resources,[288] and second, to undertake deep seabed mining on its own behalf through its operating arm, the Enterprise.[289] UNCLOS III also adopted development policies intended to facili-

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Assembly, Antarctica and the Law of the Sea Convention, in INTERNATIONAL LAW FOR ANTARCTICA 282-85 (Francesco Francioni & Tullio Scovazzi eds. 1987). The President of the Law of the Sea Conference, in his capacity as Permanent Representative of Sri Lanka, declared to the General Assembly that Antarctica is "still an area of the planet where opportunities remain for constructive and peaceful co-operation on the part of the international community for the common good of all rather than for the benefit of a few." U.N. Doc. A/30/PV/2380, at 15-16. The question of Antarctica was formally presented to the General Assembly by the Prime Minister of Malaysia, who, in heralding the "Malaysian initiative," stated that "[l]ike the seas and the seabeds, these uninhabited lands belong to the international community. The countries presently claiming them must give them up so that either the United Nations administer these lands or the present occupants act as trustees for the nations of the world." U.N. Doc. A/37/PV.10 (1982).

284 U.N. Doc. A/34/664 (1979) [hereinafter the Moon Treaty]. The Moon Treaty was adopted by the United Nations General Assembly in 1979, and became effective on July 11, 1984. The Moon Treaty prohibits the threat or use of force on the Moon, and provides for freedom of scientific activity, notice of unilateral activities, and the undertaking of an international regime providing for "equitable sharing by all States Parties in the benefits derived from [the Moon's] resources." *Id.* art. 11, para. 7(d).

285 The Moon Treaty is for obvious reasons both more general, and less easy to envision in actual operation than UNCLOS III. The Moon Treaty provides, for example, that "[i]n exploring and using the moon, States Parties shall take measures to prevent the disruption of the existing balance of its environment." Moon Treaty, *supra* note 284, art. 7, para. 1.

286 UNCLOS III, *supra* note 13, art. 136. Article 140 declares that activities in the deep seabed are to be "carried out for the benefit of mankind as a whole." *Id.* art. 140, para. 1. *Compare* Convention, *supra* note 1, at preamble, para. 13 ("the effective regulation of Antarctic mineral resource activities is in the interest of the international community as a whole"). Article 140 of UNCLOS III also provides that regulation of sea-bed activities shall take "into particular consideration the interests and needs of developing States." UNCLOS III, *supra* note 13, art. 140, para. 1. *Compare* Convention, *supra* note 1, at preamble, para. 12 ("the special situation of developing country Parties to the regime should be taken into account").

287 UNCLOS III, *supra* note 13, art. 156-85.

288 *Id.* art. 157, para. 1 ("The Authority is the organization through which States Parties shall . . . organize and control activities in the [seabed], particularly with a view to administering the resources of the [seahed].").

289 *Id.* art. 170.

tate wealth redistribution in favor of less developed states. Accordingly, UNCLOS III contains provisions for production ceilings,[290] compulsory technology transfers,[291] and centralized price controls.[292]

Although a clear majority of negotiating states and the United Nations General Assembly approved the final text of UNCLOS III, the agreement has not been ratified by many individual states.[293] In this respect, the undertaking may be deemed a failure, particularly since none of the industrialized nations who possess the capability to undertake deep seabed mining have supported UNCLOS III.[294]

The industrialized nations had a number of specific objections to the final provisions of UNCLOS III.[295] These objections relate mostly to the implementation of policies that were perceived as unduly favoring the special interests of third world nations[296] and land-based mineral exporters.[297] Among the points of contention were the compulsory technology transfers intended to enable underdeveloped states to participate in deep seabed mining,[298] production quotas intended to support the world market for seabed minerals thereby protecting land-based producers,[299] and the implementation of centralized mechanisms for price-fixing and resource allocation, which were inconsistent with the free market

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290 *Id.* art. 151.

291 *Id.* art. 144.

292 *Id.* art. 150, para. f.

293 A total of 159 states have signed the agreement. As of December 31, 1986, however, only 32 states had ratified UNCLOS III. U.N. Office for Ocean Affairs and the Law of the Sea, Law of the Sea Bulletin, Special Issue 1, Mar. 1987, 1.

294 Among the 32 states ratifying UNCLOS III, the only European nations are Iceland and Yugoslavia. The only Asian states that have ratified are Fiji, the Philippines, Bahrain, Iraq, Indonesia, and Kuwait. The remaining ratifying states are in either the Latin American or African regional group. The United States has neither signed nor ratified the final agreement, although it did sign the final act of the Law of the Sea Conference which produced UNCLOS III. INTERNATIONAL LEGAL SYSTEM, *supra* note 119, at 158-64.

295 *See* Edward Dangler, *An Ocean Miner's View of the Draft Convention*, 3 N.Y.L. SCH. J. INT'L & COMP. L. 27 (1981); Marlene Dubow, *The Third United Nations Conference on the Law of the Sea: Questions of Equity for American Business*, 4 NW. J: INT'L L. & BUS. 172 (1982); Wayne R. Smith, *Law of the Sea Treaty: Report on the Enterprise*, 3 N.Y.L. SCH. J. INT'L & COMP. L. 51 (1981); Per Magnus Wijkman, *UNCLOS and the Redistribution of Ocean Wealth*, 16 J. WORLD TRADE L. 27 (1982).

296 *See* Smith, *supra* note 295, at 55-58 ("The industrialized countries claim that the Authority, as now designed, will be guided by the tyranny of the majority; namely, the developing countries." *Id.* at 55).

297 *See* Lawrence L. Herman, *The Niceties of Nickel—Canada and the Production Ceiling Issue at the Law of the Sea Conference*, 6 SYRACUSE J. INT'L L. & COM. 265, 272-73 (1979).

298 Such participation could only occur at the expense of the technologically developed nations. Dangler, *supra* note 295, at 35-36; Dubow, *supra* note 295, at 190-92.

299 *See* David Hegwood, *Deep Seabed Mining: Alternative Schemes for Protecting Developing Countries from Adverse Impacts*, GA. J. INT'L & COMP. L. 173, 183-85 (1982); Wijkman, *supra* note 295, at 39-42.

policies of Western nations.[300] The industrialized nations charged that these provisions would both destroy their incentive for undertaking deep seabed mining[301] and restrict access to vital resources.[302]

Some commentators have suggested that the failure of UNCLOS 111 demonstrates the inapplicability of a common heritage regime to Antarctica.[303] It is important, however, to distinguish between the essential validity of the common heritage principle and the outcome of past attempts at implementation. The publicly expressed objections of the industrialized nations to UNCLOS III rested on narrow grounds, relating to specific substantive provisions.[304] These provisions of UNCLOS III, however, are not essential to the implementation of the common heritage principle; therefore, the failure of UNCLOS III is not a condemnation of the common heritage principle itself.[305] Furthermore, one may structure a common heritage regime for Antarctica that avoids these pitfalls.

3. *A Common Heritage Regime for Antarctica*

The essential elements of the common heritage principle provide that areas deemed part of the common heritage of mankind are not subject to national jurisdiction, and that the benefits derived therefrom must inure to the interuational community.[306] As applied to Antarctica, the principle formalizes the perception that the entire international community has a legitimate interest in Antarctica. This perception is explicitly expressed by both the Treaty and the

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300 *See* Wijkman, *supra* note 295, at 38-39 ("Negotiations over the deep seabed regime arrayed developing countries in a cohesive group against most developed market economies, and each side offered proposals reflecting its dominant economic and ideological interests." *Id.* at 38.).

301 *See* Dubow, *supra* note 295, at 186-90; Mary Victoria White, *The Common Heritage of Mankind: An Assessment*, 14 CASE W. RES. J. INT'L L. 509, 533 (1982).

302 The United States based its public objections on the ground that it was denied guaranteed access to minerals essential to national security. *See* Note of January 13, 1986, from the United States Mission to the United Nations Addressed to the Scretary-General of the United Nations, in U.N. Office of the Special Representative of the Secretary-General for the Law of the Sea, Law of the Sea Bulletin No. 7, Apr. 1986, at 74.

303 *See* Müller, *supra* note 273, at 171-72; Bergin, *supra* note 32, at 39-40.

304 *See supra* text accompanying notes 295-302.

305 This does not deny that further objections may be raised on other grounds. However, to the extent that the past failure of UNCLOS III is used as evidence of the nonviability of the common heritage principle, the probative value of such failure must be limited to the specific grounds of objection.

306 *See supra* text accompanying note 272. On the application of the basic tenets of the common heritage principle to Antarctica, see Joyner, *supra* note 273, at 63-64. *See also* Edward E. Honnold, *Thaw in International Law? Rights in Antarctica under the Law of Common Spaces*, 87 YALE L.J. 804 (1978).

Convention.[307] The current legal regime for Antarctica is nevertheless fundamentally inconsistent with these principles. Territorial sovereignty[308] and exclusive jurisdiction over Antarctic mineral resources[309] cannot be reconciled with the interests of the global community.

The recognition of Antarctica as the common heritage of mankind could be accomplished either under a modified Treaty System or by the implementation of an entirely new legal regime. The essential feature of either alternative would be a system of open participation. Incorporation of this single feature would recognize the legitimate, vested interest that all nations have in Antarctica. Furthermore, if all interested parties are given a voice in determining matters of policy, the resulting legal regime can claim the tacit acceptance of the international community.[310]

The Treaty System's current regime could be remedied by eliminating the two-tiered membership structure utilized by both the Treaty[311] and the Convention.[312] All states expressing an interest in Antarctica should be invited to participate in the policymaking process.[313] Administration could be carried out by a limited body analogous to the Resources Commission established under the Convention.[314] Such a body, however, must be representative of the overall membership, and accordingly, the election procedure must allow equal voting by all member states.[315]

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307 *See supra* note 278 and accompanying text.

308 *See supra* notes 132-84 and accompanying text.

309 *See supra* notes 121-24 and accompanying text.

310 By allowing universal participation under the auspices of the United Nations, the Law of the Sea Conference gave effect to the most important element of the common heritage principle. In this respect, UNCLOS III differs fundamentally from the current Antarctic legal regime. Recognition of the common heritage principle was not a product of the Conference, but a precondition to its existence.

311 *See supra* notes 72-79 and accompanying text.

312 *See supra* notes 91-108 and accompanying text.

313 Such an arrangement promises to be unwieldy; in fact, the United Nations General Assembly is often criticized on this basis. Impracticality, however, is a relative concept. It is not thought unduly impractical for some 170 million Americans to elect a single President, or to approve an amendment to the Constitution. The extent of inconvenience must be measured in terms of the value sought to be attained.

314 *See supra* notes 94-99 and accompanying text.

315 A one-state, one-vote procedure is preferable to the current exclusionary structure of the Treaty System in that it reflects democratic principles as they currently exist in the United Nations. This political apportionment of votes, however, is fundamentally inconsistent with the common heritage principle. Given that the principle emphasizes the benefit of mankind, and not the community of political states, a decisionmaking procedure that apportioned votes according to population would be more equitable.

Such a scheme would be more consistent with the common heritage principle, yet is for now beyond the practical capacity of current international institutions. Moreover, it probably demands too much of our ability to surrender long-held political conceptions. Perhaps a compromise position could be achieved, incorporating a bicameral legislative

The economic benefits of Antarctic mineral resource activities, as part of the common heritage, must inure to the international community. A levy imposed on those undertaking development of mineral resources would accomplish this objective.[316] The amount of this levy and the distribution of its proceeds would be determined by negotiation among the participating states.[317] Although the history of UNCLOS III suggests that the process of reaching an accord on this point will be an arduous task, it also provides a cautionary illustration of the need for compromise. In this sense, UNCLOS III may have laid valuable groundwork for future attempts at international cooperation in managing the earth's scarce resources.

It is not the purpose of this Note to propose particular substantive provisions, or to develop a negotiating stance for a particular interest group. The participation of the international community should determine the exact content of an Antarctic mineral resources regime. The full implementation of an Antarctic legal regime consistent with the common heritage principle must, by definition, flow from a system of open participation.

CONCLUSION

The Convention appears at a time when the future of the entire Treaty System is being considered by the consultative parties, under the watchful eye of the international community. Although the current regime is of indefinite duration, the Treaty provides that upon

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system similar to the United States Congress, in which representation is based on both population and statehood.

316 A levy on operators does not presuppose a strictly centralized economic system such as that to which industrialized nations objected in UNCLOS III. *See supra* text accompanying note 300. Given that the common heritage principle recognizes vested legal interests in the international community amounting to ownership, a levy on operators could be analogized to the rents a property owner may charge for use of his or her property. In the context of Antarctic mineral resource activities, the capitalist analog would be a mining lease.

The United States has not objected to a limited form of revenue sharing. Dubow, *supra* note 295, at 188-90. The United States has, in fact, submitted its own proposals on this point. *See, e.g.*, Elliot L. Richardson, *Seabed Mining and Law of the Sea*, DEP'T ST. BULL., Dec. 1980, at 60, 61.

317 It may be assumed that less developed states would possess a controlling majority, if they so align themselves, and could therefore demand an unreasonable share. This would be countered, however, by the fact that only industrialized nations are likely to possess the technology to undertake mineral resource activities in Antarctica. In order for anyone to benefit, an accommodation would have to be reached. Francioni suggests that the amount of such levies "would be determined so as to guarantee an equitable and well-balanced relationship between the profits that investing companies or states reasonably expect from the Antarctic venture and the contribution to development that nonindustrial states legitimately expect from the recovery of nonrenewable resources in a common space." Francioni suggests that a fair amount would be 5-10% of profits. Francioni, *supra* note 24, at 174 n.41.

the expiration of thirty years from its effective date, any consultative party may initiate a comprehensive procedure for amendment and review of the Treaty system.[318] This option becomes available in 1991.[319] The action taken at that time is likely to be influenced by the fate of the Convention.

The Antarctic Treaty system need not be abandoned, but it should be amended to adhere to the common heritage principle whose basic tenets it purports to embody.[320] The amendments should provide for a truly open system of membership, and should allow the international community to participate meaningfully in decisions regarding Antarctica. In accordance with the common heritage principle, increased international participation should result in some form of revenue sharing.

Concepts such as the common heritage principle have, in this country, invariably been clothed in the mantle of idealism. This Note proposes that the contrary is actually the case: that the common heritage principle is a reflection of current realities. This century has witnessed a shift in priorities from appropriation to interdependence, rooted in as yet inescapable facts of geography and demographics. The legal order must adapt to these changes. If the current Antarctic Treaty regime fails to adapt in the face of international legal and political developments, "reality will surpass it, and render it ineffective."[321]

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318 Treaty, *supra* note 2, art. XII, para. 2(a). The Treaty does not simply expire pursuant to its own terms, as is sometimes suggested to be the case.

319 The Treaty became effective on June 23, 1961.

320 *See supra* note 278 and accompanying text.

321 Rüdiger Wolfrum has recognized that a future regime for Antarctica "has to respond to reality, standards as well as facts, otherwise—and this is true for every treaty in international law—reality will surpass it and render it ineffective." Wolfrum, *supra* note 207, at 147.