



SCHOOL OF LAW
CASE WESTERN RESERVE
UNIVERSITY

Case Western Reserve Journal of
International Law

Volume 17 | Issue 2

1985

The Antarctic Treaty Regime: A Workable Compromise or a Purgatory of Ambiguity

Gillian Triggs

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

Gillian Triggs, *The Antarctic Treaty Regime: A Workable Compromise or a Purgatory of Ambiguity*, 17 Case W. Res. J. Int'l L. 195 (1985)
Available at: <https://scholarlycommons.law.case.edu/jil/vol17/iss2/2>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

The Antarctic Treaty Regime: A Workable Compromise or a "Purgatory of Ambiguity"?¹

by Gillian Triggs *

I. INTRODUCTION

During the October 1959 conference in Washington to negotiate the Antarctic Treaty, the Argentine Ambassador observed that it "has not been convened to institute regimes or to create structures. It is not its mission to change or alter anything."² It is unlikely that the Ambassador envisaged, or would have accepted, the interwoven framework which has since been constructed upon the Antarctic Treaty, and which has facilitated a wide range of legislation for the Antarctic area. Certainly the Antarctic Treaty does not establish an international organization with legal personality. Moreover, it sets up no standing secretariat or central arrangement for the circulation of information or proposals. Rather, recommendations of the Parties become effective only once they are adopted unanimously rather than upon the more usual basis of a two-thirds majority and the Treaty permits only certain Parties to participate in the policy making process. The Contracting Parties simply bind themselves to meet at "suitable intervals and places, for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and the formulating and considering and recommending to their Governments measures in support of the principles and objectives of the Treaty."³

In practice, those Contracting Parties named in the Preamble to the Treaty and certain acceding and appropriately qualified states, described as Consultative Parties, meet every two years in a conference hosted and organized by one of the Parties.⁴ The biannual conference is supported by a range of subsidiary meetings including preparatory meetings, special

* Senior Lecturer in Law, University of Melbourne; Ph.D., University of Melbourne (1983); LL.M., Southern Methodist University (1972); LL.B., University of Melbourne (1968).

¹ Note, *Natural Resource Jurisdiction on the Antarctic Continental Margin*, 11 VA. J. INT'L L. 374, 379 (1971).

² Hayton, *The Antarctic Settlement of 1959*, 54 AM. J. INT'L L. 349, 355 (1960).

³ The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

⁴ The fifteen Consultative Parties are the twelve states named in the Preamble: Argentina, Australia, Belgium, Chile, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom, and the United States; and three acceding states which have since become qualified: Brazil, Poland, and the Federal Republic of Germany. Contracting Parties which have not yet achieved Consultative Party Status are: Bulgaria, China, Denmark, German Democratic Republic, Italy, Netherlands, Papua New Guinea, Peru, Romania, Spain, Uruguay and Czechoslovakia. *Id.*

consultative meetings and meetings of experts. This semipermanent conference of fifteen states has been moderately successful in giving effect to the principles and objectives of the Treaty.

The biannual conference has expanded the scope of the Treaty by negotiating other conventions which are linked to the Antarctic Treaty and by agreeing upon recommendations which become binding upon Consultative Parties. In 1964, the Agreed Measures for the Conservation of Antarctic Fauna and Flora were negotiated.⁵ These Measures establish a permit system for killing and capturing native animals, and provide for the protection of species and areas of outstanding scientific interest. Moreover, numerous recommendations dealing with tourism,⁶ environmental conservation,⁷ oil contamination⁸ and mineral exploration have been effected.⁹ Apparently on the basis that the Antarctic Treaty does not apply to the high seas in Antarctic waters and to ensure separate regulation, the Convention for the Conservation of Antarctic Seals was negotiated in 1972 by the original twelve Contracting Parties to the Antarctic Treaty.¹⁰ The separate negotiation of this Convention provided a precedent for the negotiation by the Consultative Parties in 1980 of the Convention on the Conservation of Antarctic Marine Living Re-

⁵ Antarctica: Measures in Furtherance of Principles and Objectives of the Antarctic Treaty, adopted June 2-13, 1964, Agreed Measures for the Conservation of Antarctic Fauna and Flora, 17 U.S.T. 991, 996, T.I.A.S. No. 6058 [hereinafter cited as Agreed Measures].

⁶ Antarctica: Measures in Furtherance of Principles and Objectives of the Antarctic Treaty, adopted 1979, Recommendation X-8, reprinted in 2 G. TRIGGS, AUSTRALIA'S SOVEREIGNTY IN ANTARCTICA: THE VALIDITY OF AUSTRALIA'S CLAIM AT INTERNATIONAL LAW 140 (Melbourne University Programme in Antarctic Studies No. 61, 1983); Antarctica: Measures in Furtherance of Principles and Objectives of the Antarctic Treaty, adopted June 20, Recommendation VIII-9 to VIII-11, T.I.A.S. No. 10486; Antarctica: Measures in Furtherance of Principles and Objectives of the Antarctic Treaty, adopted Nov. 10, 1972, Recommendation VII-4, 28 U.S.T. 1138, 1142-43, T.I.A.S. No. 8500; Antarctica: Measures in Furtherance of Principles and Objectives of the Antarctic Treaty, adopted Oct. 30, 1970, Recommendation VI-7, 25 U.S.T. 266, 273-74, T.I.A.S. No. 7796.

⁷ Antarctica: Measures in Furtherance of Principles and Objectives of the Antarctic Treaty, adopted 1979, Recommendation X-7, reprinted in 2 G. TRIGGS, *supra* note 6, at 139; Antarctica: Measures in Furtherance of Principles and Objectives of the Antarctic Treaty, adopted 1977, Recommendation IX-5, reprinted in 2 G. TRIGGS, *supra* note 6, at 131; Antarctica: Measures in Furtherance of Principles and Objectives of the Antarctic Treaty, adopted 1975, Recommendation VIII-13, reprinted in 2 G. TRIGGS, *supra* note 6, at 126.

⁸ Antarctica: Measures in Furtherance of Principles and Objectives of the Antarctic Treaty, adopted 1979, Recommendation X-7, reprinted in 2 G. TRIGGS, *supra* note 6, at 139.

⁹ Antarctica: Measures in Furtherance of Principles and Objectives of the Antarctic Treaty, adopted 1979, Recommendation X-1, reprinted in 2 G. TRIGGS, *supra* note 6, at 133; Antarctica: Measures in Furtherance of Principles and Objectives of the Antarctic Treaty, adopted 1977, Recommendation IX-1, reprinted in 2 G. TRIGGS, *supra* note 6, at 128.

¹⁰ Antarctic Treaty Signatories: Convention for the Conservation of Antarctic Seals, June 1, 1972, 29 U.S.T. 441, T.I.A.S. No. 8826 [hereinafter cited as Convention on Seals].

sources.¹¹ The Consultative Parties are presently negotiating through a separate Convention a minerals regime for Antarctica.¹²

Each of these recommendations and conventions is linked to the Antarctic Treaty, forming a regime with jurisdiction over areas and issues not contemplated by those negotiating the Treaty itself.

The regime remains, nonetheless, a weak and shadowy structure given to hortatory recommendations rather than clear enforcement mechanisms. It is justifiably criticized as less effective than it should be and, more significantly, perhaps incapable of protecting the interests of the international community in Antarctica. Taubenfeld, for example, warns that "a weakly organised program of self-policed, voluntary, 'a political' co-operation in the field of science may in the long run be insufficient to the task of providing a secure, peaceful, non-contentious, orderly development of the last continent."¹³

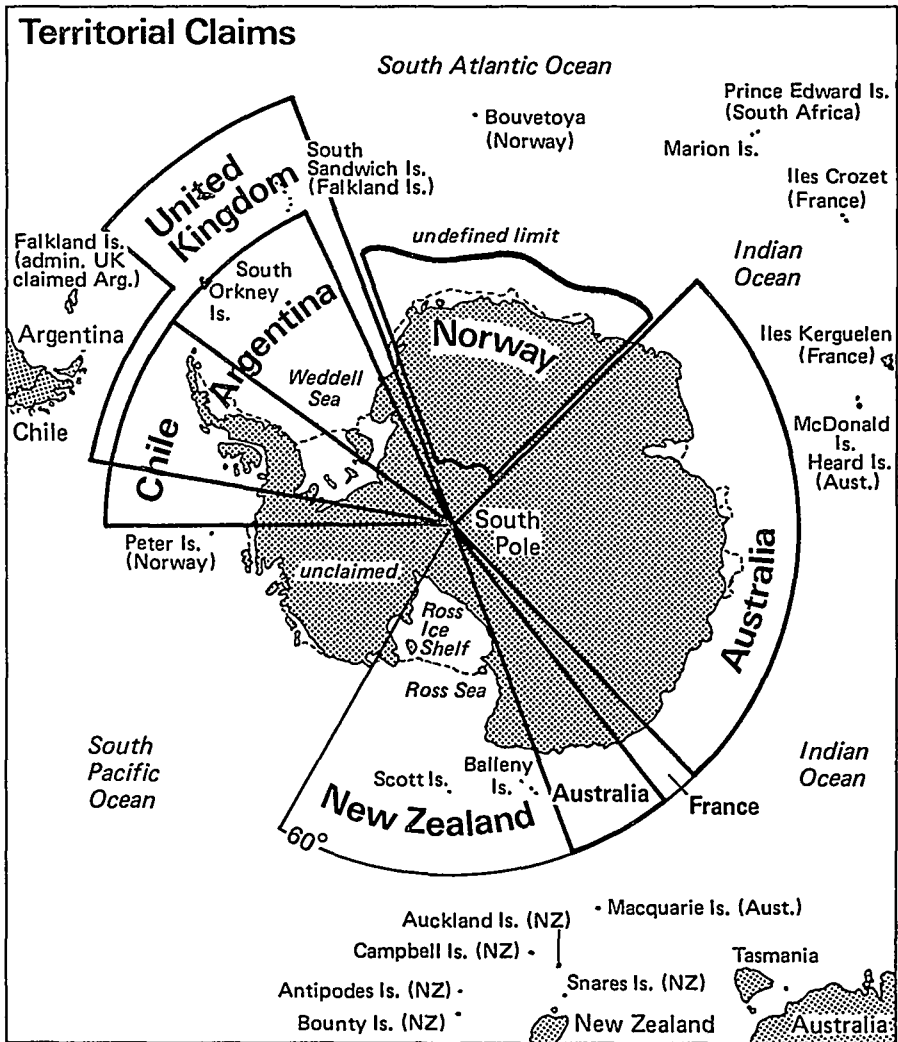
Why then did the original Contracting Parties reject the U.S. suggestion of a United Nations trusteeship or of a condominium in Antarctica and, instead, make a conscious decision to avoid a formal international organization with a permanent secretariat and full legal personality? The answer lies in the pervasive and apparently intractable problem of the differing juridical positions of states on claims to territorial sovereignty in Antarctica. Indeed, the ambiguous and repetitive provisions of the Antarctic Treaty, the recommendations made under it, and the allied conventions are incomprehensible in the absence of an understanding of the conflict between claimant and non-claimant states on the fundamental issue of Antarctic sovereignty, and of the perceived need to reach a compromise between individual claims to sovereignty and general interests of the international community in scientific cooperation and peaceful regulation of the environment.¹⁴

¹¹ Convention on the Conservation of Antarctic Marine Living Resources, *reprinted in* 19 I.L.M. 841 (1980) [hereinafter cited as CCAMLR].

¹² *The Antarctic Minerals Regime: The Beeby Draft*, *reprinted in* GREENPEACE INTERNATIONAL, THE FUTURE OF THE ANTARCTIC, BACKGROUND FOR A U.N. DEBATE 5 (Appendix 8, 1983) [hereinafter cited as Beeby Draft I].

¹³ Taubenfeld, *A Treaty for Antarctica*, 531 INT'L CONCILIATION 246, 295 (1961).

¹⁴ The claimant states are: United Kingdom (1908), New Zealand (1923), France (1924), Australia (1933), Norway (1937), Chile (1940) and Argentina (1942). The legal bases of these claims to sovereignty rest predominantly upon the doctrine of effective occupation. For a discussion of this and other legal bases to title see F. AUBURN, ANTARCTIC LAW AND POLITICS (1982). For a list of the 20 non-claimant states which are also party to the treaty see *supra* note 4.



This paper examines the organizational structure of the Antarctic Treaty regime and the provisions which link the Treaty and related conventions. It will also consider the drafting technique of "contrived ambiguity" or "bi-focalism" which has been employed to useful effect in achieving a compromise of differing juridical positions on sovereignty. Such a compromise has been possible primarily because the Parties share common interests and values in Antarctica and because they have, more recently, understood that if they fail to effectively regulate resource exploitation and to respond to environmental concerns, the international community will be quick to argue that a more representative organization should assume control over Antarctica as the common heritage of mankind. For this reason, consideration will be given to the political, if not legal, import of the principle of a common heritage for the future of Antarctic management.

II. PROVISIONS LINKING THE ANTARCTIC LEGAL REGIME

A. *Article IV*

Critical to the success of the Antarctic legal regime is Article IV of the Antarctic Treaty which is intended to preserve the conflicting interests of claimant states, potential claimants, and non-claimants. It also provides the mechanism by which subsequent Antarctic conventions are joined to the Treaty. Article IV provides:

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 sovereignty 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 sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.¹⁵

Article IV is subject to criticism because it states what it does not mean and does not state what it was intended to mean.¹⁶ Such a provi-

¹⁵ The Antarctic Treaty, *supra* note 3, at art. IV.

¹⁶ *The Antarctic Treaty: Hearings Before the Senate Comm. on Foreign Relations*, 86th Cong., 2d. Sess. 13 (1960) (statement of Senator Gruening).

sion is ample grist for the lawyer's mill, as is evidenced by the prolific scholarship devoted to analysis of its effect.¹⁷ However, as Marcoux concedes, the "purgatory of ambiguity" created by the provision had the practical effect of facilitating an important international agreement with apparently no detriment to or increase in sovereignty claims.¹⁸

While the Article is verbose and obscure, it leaves each state to interpret its content consistently with its particular juridical interests. It is open to the following interpretations. The words "any basis of claim" in clause 1(b) may protect the prior interests of non-claimant states, such as the United States and the Soviet Union which have not previously sought to assert a claim but which might seek to do so in the future.¹⁹ The words "or those of its nationals" will cover claims made on behalf of, but not ratified by, the state concerned.²⁰ In this way, potential claimants may protect their "rights" to make a claim in the future.

Non-claimants may also be protected by Article IV, paragraph 1(c), which provides that a Contracting Party does not prejudice its position "as regards its recognition or non-recognition" of other states' rights or claims.²¹ This provision also protects claimants who have already recognized the Antarctic sovereignty of other states. Claimants are further protected by Article IV, paragraph 1(a), which provides that the Treaty is not a renunciation of "previously asserted rights of or claims to territorial sovereignty."²² Similarly, Article IV, paragraph 1(b) provides that "any basis of claim" which a state may have is not to be reduced or diminished by the Treaty.²³

Although states may thus argue that their activities as Treaty parties do not prejudice their legal positions, the Article cannot prevent an objective determination of, for example, the validity of an Antarctic sovereignty claim.²⁴ Also, as third states are not bound by the Treaty, they may form their own views as to the legal strength of such claims untram-

¹⁷ J. KISH, *THE LAW OF INTERNATIONAL SPACES* 77-78 (1973); F. AUBURN, *supra* note 14, at 104-10; Bernhardt, *Sovereignty in Antarctica*, 5 CAL. W. INT'L L.J. 297, 310-16 (1974).

¹⁸ *Supra* note 1.

¹⁹ Both the United States and the Soviet Union have reserved their rights to make claims in the future. 2 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 1234, 1244, 1254-55 (1963).

²⁰ 1 G. HACKWORTH, *Polar and Subpolar Regions*, in *DIGEST OF INTERNATIONAL LAW* 449, 454 (1940) (claims for the United States in Marie Byrd Land made by Admiral Bird).

²¹ The United States and Soviet Union refuse to recognize the sovereignty of any state in Antarctica. Argentina recognizes no claim other than its own. The United Kingdom, New Zealand, Australia and Norway reciprocally recognize each others' claims. For a discussion of the issue of recognition in Antarctica see 1 G. TRIGGS, *ANTARCTIC SOVEREIGNTY IN ANTARCTICA: THE VALIDITY OF AUSTRALIA'S CLAIM AT INTERNATIONAL LAW* 558 (Melbourne University Programme in Antarctic Studies No. 61, 1983).

²² The Antarctic Treaty, *supra* note 3, at art. IV, para. 1(a).

²³ *Id.* at art. IV, para. 1(b).

²⁴ It must be concluded, however, that no tribunal is likely to have cognizance of the question.

meled by Article IV.²⁵

While Article IV, paragraph (1) attempts to preserve the status quo of claims made on the Antarctic, Article IV, paragraph (2) deals with activities during the life of the Treaty. Such activities are not to constitute a basis for asserting, supporting or denying a claim to create a right.²⁶ Further, no new claim or enlargement of an existing claim may be made.²⁷ While it seems the Contracting Parties intended that the legal position of each should return to the status quo ante on termination of the Treaty, an objective examination of Article IV paragraph (2) suggests that this is unlikely to be the result. Return is unlikely partly because the Parties cannot be prevented from continuing to use their bases once the Treaty ends, both to invoke their very existence in support of their sovereignty claims and to constitute a foundation for further occupation and research. Moreover, return to status quo ante is unlikely because the Treaty is not binding on third states. Thus, Contracting Parties may employ their activities during the life of the Treaty in support of their claims against third states. It is unlikely that the Treaty creates an objective regime,²⁸ and it is not yet possible to conclude that Article IV describes a rule of customary international law which creates rights and obligations for third states.²⁹

Although Article IV appears to mean all things to all states, it did enable the Contracting Parties to ratify the Antarctic Treaty and thus to establish the Antarctic regime. The Conventions on Seals³⁰ and Marine Living Resources³¹ and the proposed Convention on Minerals³² each makes Article IV of the Antarctic Treaty binding on Contracting Parties and thereby forms a link between the Treaty and the Conventions. For example, Article I paragraph (1) of the Convention for the Conservation of Antarctic Seals applies to the seas south of the 60° South Latitude "in respect of which the Contracting Parties affirm the provisions of Article

²⁵ Vienna Convention of the Law of Treaties, opened for signature May 23, 1969, art. 34, reprinted in 8 I.L.M. 679, 694-95 (1969); Note, *Wadlock's Report on the Question*, 2 Y.B. INT'L. COMM'N 27 (1964).

²⁶ The Antarctic Treaty, *supra* note 3, at art. IV, para 2.

²⁷ *Id.*

²⁸ Vienna Convention on the Law of Treaties, *supra* note 25, at art. 36. The Antarctic Treaty indicates that the Parties are sensible to the wider interests of the international community but there appears to be no independent or intrinsic evidence of an intent to elevate these interests into an enforceable right. See The Antarctic Treaty, *supra* note 3, at preamble, arts. I, II, V.

²⁹ While some argue that the Treaty and activities under it have created "common rights" in Antarctica, it remains unlikely that any such rights extend to Article IV. Note, *Thaw in International Law, Rights in Antarctica under the Law of Common Spaces*, 87 YALE L.J. 804, 807 (1978).

³⁰ See *supra* note 10.

³¹ See *supra* note 11.

³² See *supra* note 12.

IV of the Antarctic Treaty.”³³ Similarly, the Convention on the Conservation of Antarctic Marine Living Resources provides that Contracting Parties, regardless of whether they are Parties to the Antarctic Treaty, are bound by Article IV of the Antarctic Treaty in the Treaty area and in their relations with each other.³⁴

The Marine Living Resources Convention is particularly notable for its attempt to resolve the sovereignty issue. The sovereignty question arises in relation to Antarctic marine living resources because claimant and non-claimant states differ as to the existence of maritime jurisdictions in Antarctica. The logical consequence of a claim to territorial sovereignty in Antarctica, as elsewhere, is a claim to appurtenant maritime zones. Thus Australia, for example, asserts a right to exclusive coastal state jurisdiction over a 200 mile zone around its claimed Antarctic territory and over the continental shelf.³⁵ Article IV, paragraph (2) of the Marine Living Resources Convention repeats Article IV, paragraph (1) of the Antarctic Treaty and adds that nothing in the Convention and no acts or activities taking place while it is in force shall:

- (b) be interpreted as a renunciation or diminution by any Contracting Party of, or as prejudicing, any right or claim or basis of claim to exercise coastal state jurisdiction under international law within the area; or
- (c) be interpreted as prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any such right, claim or basis of claim.³⁶

These provisions are further examples of ambiguity which permit interpretation by claimant and non-claimant states in the manner most suited to protect their respective juridical positions or, as described during the negotiations, which permit a “bi-focal” interpretation.³⁷

Article IV, paragraphs 2(b) and (c) may be interpreted in the following ways. Claimants may point to Article IV, paragraph 2(b), which denies any implications adverse to a claim to exercise coastal state jurisdiction. Non-claimant states may argue that Article IV, paragraphs 2(b) and (c) apply only to waters around islands north of 60° South Latitude, where sovereignty or coastal state jurisdiction is not disputed. Such islands include the Kerguelen and Crozet Islands. Conversely, these non-claimant states are likely to point to Article VI of the Antarctic

³³ Convention on Seals, *supra* note 10, at art. I, para. (1).

³⁴ CCAMLR, *supra* note 11, at art. IV.

³⁵ *Antarctica — A Continent of International Harmony*, 10 AUSTL. FOREIGN AFF. REC. 1 (1980).

³⁶ CCAMLR, *supra* note 11, at art. IV, para. (2).

³⁷ Tinker, *Antarctica: Towards a New Internationalism*, 13 NEW SCIENTIST 799 (1979); Barnes, *The Emerging Antarctic Living Resources Convention*, 73 AM. SOC. INT'L L. PROC. 264, 280 (1979).

Treaty, which maintains the freedom of the high seas south of 60° South Latitude, in support of their argument that the Convention applies to all waters off the Antarctic mainland. Claimant states, however, may take the view that Article IV of the Convention applies to waters both north and south of the 60° South Latitude and, hence, to disputed territorial claims on the Antarctic continent and surrounding waters. If this is a permissible interpretation, then Article IV will prevent the Convention from implying a diminution of sovereignty in maritime zones.

The contrived result achieved by such a dual interpretation is of dubious legal value. The success of this "bi-focal" approach assumes that the Parties will continue to demonstrate goodwill and depends upon acceptance of the Convention by third states in the absence of clearly understood and agreed standards of conduct. Were Australia or any other claimant state to give effect to their views of Article IV of the Convention by, for example, exercising the customary jurisdiction of a coastal state in relation to waters adjacent to its sectoral claim in Antarctica, it is likely that the Convention would break down.³⁸ Further, the technique of contrived ambiguity cannot preclude an objective assessment of its legal effect and validity by, for example, an international arbitrator, who may deny one or both interpretations employed to the advantage of the Parties.

The current negotiations for a minerals regime in Antarctica pose a far greater threat to sovereignty claims than do the existing recommendations and conventions, which are concerned primarily with the Antarctic environment and its living resources.³⁹ This greater threat exists because acts such as issuing mining licenses and collecting royalties and other revenues from the exploitation of minerals within its territory are demonstrably an exercise of that State's sovereignty.⁴⁰ To give up these sovereign rights to a regional organization—possibly organized under the auspices of the Antarctic Treaty—or to an international organization, would be to relinquish a significant attribute of sovereignty. Were a claimant state to give up its control over mineral exploration and exploitation within its territory, it would lose its exclusive right to mining revenues and might jeopardize its claim to Antarctic sovereignty.

In order to foreclose any such prejudice, the Draft Articles, known as Beeby I,⁴¹ prepared by the Chairman of the Informal Meeting of the

³⁸ See list of states, *supra* note 4.

³⁹ Article IX of the Antarctic Treaty provides for measures in relation to preservation and conservation of living resources but makes no mention of non-living resources. See The Antarctic Treaty, *supra* note 3, at art. IX.

⁴⁰ The view of the Australian Government is that "the right to exploit resources is traditionally an integral part of the concept of natural sovereignty," *Antarctica in the 1980's*, 52 AUSTL. FOREIGN AFF. REC. 4, 12 (1981).

⁴¹ Beeby Draft I, *supra* note 12.

Antarctic Treaty Consultative Parties for consideration at the meeting in Bonn on July 11-22, 1983, include a provision to preserve Article IV of the Antarctic Treaty.⁴² Draft Article VII repeats the provisions of Article IV paragraph (1) of the Treaty and specifically provides that a minerals regime, and acts and activities taking place while this regime is in force, shall not affect Article IV paragraph (2) of the Antarctic Treaty.⁴³ It is doubtful that any such provision could protect the claimant states against a conclusion that their sovereignty in Antarctica, if it exists, has been diminished, were they to ratify a minerals regime which gives access to third states to resources within their claimed territory and which fails to give claimants a role in granting licenses and a preferred share in royalties.⁴⁴ Further, it is significant that the Consultative Parties have been unable to devise or agree upon alternative techniques to preserve the juridical positions of the Parties. Draft Article VII indicates that it is impossible to do so and that a minerals regime is simply incompatible with national claims of sovereignty.⁴⁵

III. OTHER LINKING PROVISIONS BETWEEN THE ANTARCTIC TREATY AND SUBSEQUENT CONVENTIONS

The Conventions on Seals⁴⁶ and Marine Living Resources⁴⁷ and the proposed minerals regime are also linked to the Antarctic Treaty by other provisions. These provisions demonstrate the significant extent to which regulation of the Antarctic environment and its resources has been confined to the Consultative Parties to the Antarctic Treaty, thus lending credence to allegations of an "Antarctic Club."⁴⁸ The Convention for the Conservation of Antarctic Seals "recalls" the Agreed Measures⁴⁹ adopted under the Antarctic Treaty and "notes" that the Scientific Committee on Antarctic Research of the International Council of Scientific Unions (SCAR) is "willing to carry out the tasks requested of it" in the Convention.⁵⁰ SCAR is the primary international organization with which the Antarctic Treaty Parties cooperate and work.⁵¹ Article X of

⁴² Negotiations continued in Japan in June of 1984, on the basis of a revised document, Beeby II, which is not a public document but which builds upon Beeby I.

⁴³ Beeby Draft I, *supra* note 12, at art. VII.

⁴⁴ It is, however, arguable that the Draft gives claimant states the dominant role in drafting, or nominating the state to draft, the "Management Scheme" which in Draft Article XXX determines the licensing arrangements and the payment of taxes and royalties.

⁴⁵ Beeby Draft I, *supra* note 12, at art. VII.

⁴⁶ See *supra* note 10.

⁴⁷ See *supra* note 11.

⁴⁸ F. AUBURN, *supra* note 14, at 147; Note, *supra* note 29, at 806; Skegestad, *The Frozen Frontier: Models for International Co-operation*, 10 COOPERATION AND CONFLICT 168, 179 (1975).

⁴⁹ See Agreed Measures, *supra* note 5.

⁵⁰ Convention on Seals, *supra* note 10, at preamble.

⁵¹ F. AUBURN, *supra* note 14, at 171-83.

the Convention provides that it is open for signature only by those states participating in the conference which negotiated the Convention: that is, the Consultative Parties to the Antarctic Treaty. Accession is open only to states invited to accede with the consent of the Contracting Parties to that Convention.⁵²

The Convention on the Conservation of Antarctic Marine Living Resources calls for international cooperation with due regard to the provisions of the Antarctic Treaty and recognizes "the prime responsibilities of the Antarctic Treaty Consultative Parties for the protection and preservation of the Antarctic environment and, in particular, their responsibilities under Article IX, paragraph 1(f) of the Antarctic Treaty in respect of the preservation and conservation of living resources in Antarctica."⁵³ The Convention also "bears in mind" the importance of Recommendation IX-2, which led to the establishment of the present regime.⁵⁴ It then provides that Contracting Parties will not engage in activities in the Antarctic Treaty area contrary to the principles and purposes of that Treaty. In their relations with each other, they are bound by the obligations contained in Articles I and V of the Antarctic Treaty which concern peaceful uses and disposal of radioactive wastes.⁵⁵ Further, Article IV of the Convention provides that all Contracting Parties are bound in their relations with others by Article VI of the Antarctic Treaty, which saves high seas rights.⁵⁶ Article V provides that those Contracting Parties which are not Parties to the Antarctic Treaty acknowledge the special obligations and responsibilities of the Antarctic Treaty Consultative Parties for the protection and preservation of the environment of the Antarctic Treaty area. Moreover, Article V specifies that they will observe the Agreed Measures and other measures recommended by the Antarctic Treaty Consultative Parties in relation to protection of the Antarctic environment.⁵⁷ For practical purposes, such contracting parties will be acceding states.

The Antarctic Marine Living Resources Convention is linked to both the International Convention for the Regulation of Whaling⁵⁸ and the Convention for the Conservation of Antarctic Seals by Article VI, which provides that nothing in the Marine Living Resources Convention is to derogate from Contracting Parties' rights and obligations under ear-

⁵² Convention on Seals, *supra* note 10, at art. 12.

⁵³ CCAMLR, *supra* note 11, at preamble.

⁵⁴ *Id.*

⁵⁵ *Id.* at art. III.

⁵⁶ *Id.* at art. IV.

⁵⁷ *Id.* at art. V.

⁵⁸ International Convention for the Regulation of Whaling, June 8, 1937, 52 Stat. 1460, T.I.A.S. No. 4406, 190 U.N.T.S. 79.

lier Conventions.⁵⁹ Again, the Marine Living Resources Convention is open for signature only to those states which participated in the negotiations for that Conference—the Consultative Parties to the Antarctic Treaty and the Federal Republic of Germany.⁶⁰

The Draft Articles on a minerals regime propose an Article VII, under which Parties to the regime, whether or not they are Parties to the Antarctic Treaty, agree not to engage in any activities in the Antarctic Treaty area contrary to the principles and purposes of that Treaty.⁶¹ Moreover, in their relations with each other, they are bound by the principles and objectives contained in Articles I, IV, V and VI of that Treaty.⁶² Furthermore, Parties to the minerals regime must acknowledge the special obligations and responsibilities of the Antarctic Treaty Consultative Parties for the protection and preservation of the environment of the Antarctic Treaty area.⁶³ They must observe the Agreed Measures and other recommendations of the Antarctic Treaty Consultative Parties in relation to the environment and also any measures relating to the conservation of Antarctic marine living resources which are adopted by the Commission which has been established under the Convention on the Conservation of Antarctic Marine Living Resources.⁶⁴ The proposed Articles also establish various links with other international organizations including the United Nations, its relevant specialized agencies, and SCAR.⁶⁵ No provision is yet available that describes the Parties to the regime nor the rights of accession; however, by necessary implication it is clear that Parties will include states which are not party to the Antarctic Treaty.

A practical result of the provisions linking the Antarctic Treaty with the Conventions on Sealing and Marine Living Resources is to expand the scope of control by the Consultative Parties to the Antarctic Treaty, both geographically and jurisdictionally, over living resources of the high seas within the Antarctic convergence. This result has been achieved without expanding significantly the number of states which are Parties to these Conventions beyond the Consultative Parties to the Antarctic Treaty itself.⁶⁶

Criticism that the Antarctic regime that has been constructed is an "inner circle" may be met by the fact that it is possible to accede to the Antarctic Treaty and its allied Conventions. However, accession alone

⁵⁹ CCAMLR, *supra* note 11, at art. VI.

⁶⁰ *Id.* at art. XXIX.

⁶¹ Beeby Draft I, *supra* note 12, at art. VII.

⁶² *Id.* at art. VIII, para. 1.

⁶³ *Id.* at art. VIII, para. 2.

⁶⁴ *Id.* at art. VIII, para. 3.

⁶⁵ *Id.* at arts. XVI, para. 3, XXXVI.

⁶⁶ See list of states, *supra* note 4.

does not entitle the Party to participate in consultative meetings under the Antarctic Treaty. This Treaty provides that an acceding state may participate in these meetings only "during such time as that Contracting Party demonstrates its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the dispatch of a scientific expedition."⁶⁷ Such a readily ascertainable and objective test has not, however, led to a substantial increase in the number of Consultative Parties. While twelve states have taken advantage of the relative ease of access to become Parties to the Treaty, only three states, Poland, the Federal Republic of Germany, and Brazil have achieved this status and have become entitled to participate in policy making under the Treaty, most notably because states have failed to apply. However, other contributing factors may include the fear that a state's contribution would not be substantial, either because the state has taken part in only joint expeditions or because its involvement has been concerned only with resource exploitation.⁶⁸

A further reason may lie in the practice that a Contracting Party seeking Consultative Party status must provide information in support of its application. The existing Consultative Parties have adopted the rule that they should acknowledge unanimously that the appropriate requirements have been met.⁶⁹

As noted earlier, accession to the Convention on Seals is subject to the consent of the Contracting Parties to that Convention.⁷⁰ The Convention on the Conservation of Antarctic Marine Living Resources is open to accession by "any State interested in research or harvesting activities in relation to the marine living resources to which this Convention applies."⁷¹ This reference to "interested" states is so vague that it is almost meaningless. Professor Auburn suggests that "altruistic concern" alone may suffice.⁷² This Convention includes accession by regional economic integration organizations which include among their members a state member of the Commission established by the Convention.⁷³ Members of the Commission include Contracting Parties participating in the negotiations for that Convention—again the Consultative Parties to the Antarctic Treaty and the Federal Republic of Germany.⁷⁴ Thus, a pre-

⁶⁷ The Antarctic Treaty, *supra* note 3, at art. IX para. 2.

⁶⁸ In 1975 the German Democratic Republic had 11 scientists taking part in a Soviet program. Although the Netherlands conducted a joint expedition with Belgium in 1964-67, it may be doubted whether the Netherlands would have gained Consultative Party status had they applied for it. F. AUBURN, *supra* note 14, at 152.

⁶⁹ F. AUBURN, *supra* note 14, at 148-51.

⁷⁰ Convention on Seals, *supra* note 10, at art. 1.

⁷¹ CCAMLR, *supra* note 11, at art. XXIX.

⁷² F. AUBURN, *supra* note 14, at 237.

⁷³ CCAMLR, *supra* note 11, at art. XXIX, para. 2.

⁷⁴ *Id.* at art. VII.

ferred position has been retained for the Consultative Parties to the Antarctic Treaty.

The preferred position is not explained solely on the grounds of the differing juridical positions of states on the question of Antarctic sovereignty. It also reflects the not completely unreasonable belief that it is only through a regional organization made up of states which are genuinely and actively concerned with the Antarctic environment that Parties will be able effectively to ensure protection and rational use of the area, not only in their own interests, but also in the interests of the international community.

IV. THE DOUBLE VETO

The sovereignty issue is, however, responsible for other features of the Antarctic regime. The Antarctic Treaty provides that the Consultative Parties may consult at meetings and formulate, consider and recommend measures to their Governments.⁷⁵ In practice, such recommendations must be approved by all representatives present.⁷⁶ Thus, Parties have each retained a veto over the means by which the objects and principles of the Antarctic Treaty are to be implemented. In this way, claimant states have ensured that no recommendations affecting their territory can be made without their consent, thereby preserving exclusive sovereign rights in their respective Antarctic sectors. Not only must recommendations receive the consent of each representative at a consultative meeting, but they do not become "effective" under Article X paragraph (4) until they have been approved by all Consultative Parties.⁷⁷ This is an additional and significant safeguard of the interests of claimant states, as it eliminates the uncertainties of the more common two-thirds majority voting rule applicable in most international organizations.

Despite an operating rule that Consultative Parties should signify their approval of recommendations reasonably in advance of the next meeting, Parties have been slow to give their consent.⁷⁸ The constraint of unanimity and the delay in obtaining subsequent approval explain the

⁷⁵ The Antarctic Treaty, *supra* note 3, at art. IX, para. 1.

⁷⁶ "The Recommendations formulated by the Meeting shall be approved by all the Representatives present" Rules of Procedure for the Antarctic Treaty Consultative Meetings, para. 1, adopted July 10, 1961, reprinted in DEPARTMENT OF STATE, HANDBOOK OF MEASURES IN FURTHERANCE OF THE PRINCIPLES AND OBJECTIVES OF THE ANTARCTIC TREATY (2d ed. 1979); Colson, *The Antarctic Treaty System: The Mineral Issue*, 12 LAW & POL'Y INT'L BUS. 841, 875 (1980).

⁷⁷ The Antarctic Treaty, *supra* note 3, at art. X, para. 4.

⁷⁸ See Colson, *supra* note 76, at 876. Note that at the start of the 10th Consultative Meeting none of the 9th Consultative Meeting Recommendations were in effect. Report of the 10th Consultative Meeting, Washington, D.C., Sept. 17 to Oct. 5, 1979; see also F. AUBURN, *supra* note 14, at 161.

expanded role of the final report. Issued after each consultative meeting, the final report records decisions of the conference and may be approved by a mere majority of the representatives present.⁷⁹

Further, there may be no modification or amendment of the Treaty in the absence of the unanimous agreement of all Consultative Parties.⁸⁰ Any such modification or amendment does not, in any event, come into force until it has been ratified by all Consultative Parties. This constitutes a device similar to the "double veto" and, hence, another control over any changes to the Treaty. Similarly, although the Agreed Measures may be amended at any time, they may be so amended only with the unanimous agreement of the Consultative Parties to the Antarctic Treaty.⁸¹

While the Convention for the Conservation of Antarctic Seals provides that an amendment to that Convention may become effective on the basis of an approval by two-thirds of the Contracting Parties, it will not be effective against Contracting Parties who have objected to the proposed amendment.⁸² Under Article VI of the Sealing Convention, the Consultative Parties to the Antarctic Treaty also have an effective veto over the establishment of a system of control over, and inspection of, measures to implement the Convention.⁸³ While such a system requires the consent of only two-thirds of the Contracting Parties, this must include the concurring votes of each state which was signatory to the Convention. Again, such states are Consultative Parties to the Antarctic Treaty.

The Convention on the Conservation of Antarctic Marine Living Resources establishes a Commission to give effect to the objectives and principles set out in the Convention and to adopt conservation measures and regulations.⁸⁴ All the decisions of the Commission on matters of substance are to be by consensus.⁸⁵ All other decisions are by a simple majority of the members of the Commission present and voting.⁸⁶ There appears to be no difference between the requirement of unanimity in the Antarctic Treaty and the requirement of "consensus" in the present Convention except that there would be no formal vote. In the event that a decision upon a matter other than a matter of substance is unacceptable to a member of the Commission, that member may notify the Commis-

⁷⁹ The Antarctic Treaty, *supra* note 3, at art. IX.

⁸⁰ *Id.* at art. XII.

⁸¹ *Id.* at art. XIV.

⁸² Convention on Seals, *supra* note 10, at art. 9.

⁸³ *Id.* at art. 6.

⁸⁴ CCAMLR, *supra* note 11, at art. VII.

⁸⁵ *Id.* at art. XII.

⁸⁶ *Id.*

sion to this effect and the measure will not be binding upon it.⁸⁷ In this way, Commission members, who are also Consultative Parties to the Antarctic Treaty and who maintain a sovereignty claim in Antarctica, may avoid compliance with any measure which compromises its claim.

The Beeby I Draft Articles for a minerals regime merely require that decisions of the Commission set up under this regime be made in relation to matters of substance by a majority of two-thirds of the members present and voting.⁸⁸ This is a radical departure from the usual decision making procedures under the Antarctic regime. Were a claimant state to agree to this provision, in the absence of any further provision providing that such states are not bound by decisions contrary to their wishes, an implication of diminished sovereignty would be inevitable because exclusive control over nonrenewable resources is so closely linked to the traditional attributes of a territorial sovereign.

V. THE TWO-TIERED SYSTEM OF PARTICIPATION AND THE BINDING EFFECT OF RECOMMENDATIONS

The Antarctic Treaty refers only to Contracting Parties. However, Article IX provides that only "representatives of the Contracting Parties named in the Preamble" (that is, the original twelve negotiating states) are entitled to take part in the periodic meetings under the Treaty.⁸⁹ States which accede to the Treaty may not participate in such meetings unless they subsequently become entitled to do so.⁹⁰ The result is that all Contracting Parties do not have the same opportunity to take part in discussing policy or in drafting recommendations.

Most importantly, the question arises whether all Contracting Parties are legally bound by recommendations which emanate from consultative meetings, regardless of whether they have taken part in these meetings. While there may have been some doubt about this question, the Consultative Parties provided an implicit answer in Recommendation III-VII which provides that "the Representatives recommend to their governments that any new Contracting Party entitled to participate in [Consultative Meetings] should be urged to accept these recommendations and to inform other Contracting Parties of its intention to apply and be bound by them."⁹¹ The Consultative Parties have subsequently repeated this view.⁹² The result is that Consultative Parties which have approved recommendations will clearly be bound by them. However, a

⁸⁷ *Id.* at art. IX 6(c).

⁸⁸ Beeby Draft I, *supra* note 12, at art. XV.

⁸⁹ The Antarctic Treaty, *supra* note 3, at art. IX.

⁹⁰ *Id.* at art. IX.

⁹¹ *Report of the Third Antarctic Treaty Consultative Meeting, Brussels, 1964*, 12 POLAR RECORD 453, 456-57 (1965).

⁹² See The Antarctic Treaty, *supra* note 3, at art. X.

new Contracting Party is not automatically bound by recommendations unless and until it specifically accepts them. Poland, for example, approved all past recommendations on gaining Consultative Party status, including those which were not yet effective.⁹³ The Federal Republic of Germany, however, preferred to confine its approval to those recommendations which had already become effective.⁹⁴ *A fortiori* third states will not be bound.

It remains possible that recommendations may become declaratory of a customary rule applicable in Antarctica which is binding on all states within the international community.⁹⁵ Further, certain provisions in the Antarctic Treaty are reflected in the recommendations and, hence, are binding on all Contracting Parties. For example, Article X obliges each of the Contracting Parties "to exert appropriate efforts, consistent with the character of the United Nations, to the end that no-one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty."⁹⁶ This exhortation may include recommendations to the extent that they further the principles and objectives of the Treaty. It is entirely possible, however, that Contracting Parties might object to recommendations concerning resource exploitation on the ground that they radically broaden the existing scope of the Treaty. This objection is especially pertinent in relation to minerals exploitation, which is not mentioned at all in the Antarctic Treaty.⁹⁷

The Convention for the Conservation of Antarctic Seals does not establish such a two-tiered system of participation. Article VI provides that a system of control and inspection may be established with a mere two-thirds majority of Contracting Parties.⁹⁸ Presumably, if such a system was established, it would be binding on all Contracting Parties regardless of a dissenting vote. Any such dissenting state would not be bound, however, by amendments to the Annex, which may also be made by a two-thirds majority.⁹⁹

The Convention for the Conservation of Antarctic Marine Living Resources follows the Antarctic Treaty model in relation to participation. It establishes a commission which includes the negotiating parties,

⁹³ Note of the Polish Ministry of Foreign Affairs to Parties to the Antarctic Treaty, March 2, 1977. F. AUBURN, *supra* note 14, at 169.

⁹⁴ Third Special Antarctic Treaty Consultative Meeting: Final Report (The meeting was held on Mar. 3, 1981. This report is available at the offices of the Case Western Reserve Journal of International Law).

⁹⁵ It is probable that the practice of the states confirms customary rules in relation to peaceful uses, free scientific access, non-military use, and environmental protection.

⁹⁶ The Antarctic Treaty, *supra* note 3, at art. X.

⁹⁷ Of the relevant Recommendations, the "Moratorium" Rec. IX-I, *supra* note 9, is the most significant.

⁹⁸ Convention on Seals, *supra* note 10, at art. 6.

⁹⁹ *Id.* at art. 9.

those acceding states which are engaged in research or harvesting activities in Antarctica, and certain regional economic organizations.¹⁰⁰ Measures adopted by consensus by this Commission are binding on all members unless they notify the Commission to the contrary.¹⁰¹ Contracting Parties which are not members of the Commission are not bound in any event. Again, since the negotiating parties are predominantly the Consultative Parties under the Antarctic Treaty and these Parties under Article VII appear to have a veto over whether a request by a Contracting Party to become a member of the Commission should be granted, the Consultative Parties have maintained a preferred position over other Contracting Parties.

VI. ORGANIZATIONAL STRUCTURE UNDER THE ANTARCTIC REGIME

The point has been made that the Antarctic Treaty does not establish an international organization in the usual sense. The Convention for the Conservation of Antarctic Seals simply lists in an Annex the precise measures which the Parties adopt.¹⁰² These may be amended at any time by a meeting of Contracting Parties.¹⁰³ Again, no secretariat or formal structure exists. In sharp contrast, the Convention on the Conservation of Antarctic Marine Living Resources constructs a relatively sophisticated organization. It establishes a Commission to give effect to the objectives and principles of the Convention and to adopt conservation measures. Article VIII provides that it shall:

[H]ave legal personality and shall enjoy in the territory of each of the States' Parties such legal capacity as may be necessary to perform its function and achieve the purposes of this Convention. The privileges and immunities to be enjoyed by the Commission and its staff in the territory of a State Party shall be determined by agreement between the Commission and the State Party concerned.¹⁰⁴

The headquarters of the Commission are in Tasmania. It is to hold annual meetings, elect a Chairman and Vice-Chairman, adopt rules of procedure and, if necessary, it may establish subsidiary bodies. The Convention sets up a Scientific Committee, which is a consultative body to the Commission, as well as a Secretariat, which is directed and supervised by an Executive Secretary who serves both the Commission and the Scientific Committee.¹⁰⁵

¹⁰⁰ CCAMLR, *supra* note 11, at art. VII.

¹⁰¹ *Id.* at art. IX, para. (6)(b).

¹⁰² Convention on Seals, *supra* note 10, at art. 3, para. 1.

¹⁰³ *Id.* at art. 3, para. 3.

¹⁰⁴ CCAMLR, *supra* note 11, at art. VIII.

¹⁰⁵ *Id.* at arts. XIII, XIV, XX, XVI, XVII.

The activities of the Commission are linked with those under the Antarctic Treaty in order to ensure that the rights and obligations of a Contracting Party under regulations or measures of the Commission are not inconsistent with recommendations under the Antarctic Treaty. Article IX paragraph (5) requires that the Commission "take full account of any relevant measures or regulations established or recommended by the Consultative Meetings pursuant to Article IX of the Antarctic Treaty or by existing fisheries commissions responsible for species which may enter the area to which this Convention applies."¹⁰⁶ The words "take full account of" do not appear to accord a necessarily binding effect to recommendations upon the Commission. However, since the Parties to the Convention and the Antarctic Treaty overlap to such a substantial extent, it is obvious that a clash of obligations should be avoided.

The Beeby I draft for a minerals regime also proposes a more formal structure than that provided by the Antarctic Treaty. Draft Article X establishes a Commission with legal personality and necessary legal capacities, privileges, and immunities.¹⁰⁷ It is to carry out the objective and principles of the proposed regime and to exercise various specified functions including the authorization of exploration and development permits.¹⁰⁸ A Scientific, Technical and Environmental Advisory Committee and a secretariat are also proposed.¹⁰⁹

The draft would also create a Regulatory Committee that appears to be powerful. This body is to consider each exploration application in order to draw up a management scheme covering both exploration and exploitation.¹¹⁰ The structure of this Committee has been described as "diplomatic virtuosity and genius . . . that is designed to provide a political solution, not environmental control."¹¹¹ It consists of: (a) the sponsoring state and two parties designated by it; (b) the claimant state in whose claimant territory the application has been made and three parties designated by it; and (c) the Soviet Union and the United States. The combination of the two super powers and the sponsoring state and those nominated by it (the "miners") may not exceed four states.¹¹² Likewise, the total of the claimant state and the parties nominated by it (the "owners") may not exceed four states. Since voting is by a simple majority, neither the claimant state nor the superpowers can ever be outvoted on this committee. Thus, if mining is to take place, it must be with the

¹⁰⁶ The Antarctic Treaty, *supra* note 3, at art. IX, para. 5.

¹⁰⁷ Beeby Draft I, *supra* note 12, at art. X.

¹⁰⁸ *Id.* at art. XIII, para. 1.

¹⁰⁹ *Id.* at arts. XVI, XVII.

¹¹⁰ *Id.* at art. XXIX.

¹¹¹ *Antarctic Minerals Regime: Beeby's Slick Solution*, 23 ECO No. 1, at 1 (July 11-22, 1983).

¹¹² *Id.* at art. XX.

consent of a claimant state. In this way, a semblance of sovereignty can be maintained.

The draft minerals regime and the existing structure established by the Marine Living Resources Convention are linked in various ways with the Antarctic Treaty because the same Parties are predominantly Contracting Parties to each agreement. It is apparent that contrary to original intentions a formal and cohesive legal regime is evolving for Antarctic management. However, this regime remains hampered by the veto power of the Consultative Parties to the Treaty over the negotiation of recommendations and the access of acceding states to a policy making role. Further, these Consultative Parties may avoid Measures or Recommendations which are unacceptable to them.

The Antarctic Treaty leaves open the question of enforcement jurisdiction over nationals and foreigners,¹¹³ primarily because the exercise of jurisdiction is a function of territorial sovereignty, hence, the issue of jurisdiction raises the issue of the validity of claims to sovereignty in Antarctica. The system of inspection under the Treaty has the disadvantage of being subject to prior notification.¹¹⁴ It has been employed infrequently and no violations have been reported as a result of the few inspections made. Whether the system of inspection and observation which may be set up under the Marine Living Resources Convention¹¹⁵ proves to be effective remains to be seen.

The Antarctic Treaty provides no mechanism for compulsory dispute settlement, a fact which is hardly surprising in light of the conflicting views on Antarctic claims to sovereignty. However, the Marine Living Resources Convention does bind the Parties to arbitral, judicial, or "other peaceful means" of resolution.¹¹⁶ Reference to the International Court remains a matter of choice.

These and other criticisms of the Antarctic regime may appear churlish and unimportant in light of the significant success of the Antarctic Treaty in achieving its aims of preserving Antarctica for scientific research and prohibiting its military use. Also, it is perhaps naive to expect that Antarctica can be managed and protected by an effective and strong international organization when national claims to territorial sovereignty compete with other states' demands for access to resources and with diametrically opposed assertions of common property rights in these resources. Indeed, past experience with international organizations suggests that even where the interests and objectives of state parties are substantially in accord it remains difficult to achieve consensus or coop-

¹¹³ The Antarctic Treaty, *supra* note 3, at arts. IX, VIII.

¹¹⁴ *Id.* at art. VII.

¹¹⁵ CCAMLR, *supra* note 11, at art. XXIV.

¹¹⁶ *Id.* at art. XXV, para. 1.

erative regulation.¹¹⁷ Charney describes the failure of the international community to recognize the advantages of cooperation and effective international regulation as the "lesson of the 1970's," and suggests that "a strictly nation-state territorial regime for Antarctica might, under certain circumstances, be the most manageable and most protective of the Antarctic environment."¹¹⁸

While, as Charney conceded, he may be "jaded" by the Law of the Sea Conferences, his stimulating suggestion undoubtedly warrants further research into the legal structures of resource and environmental management regimes. Certainly, it has been the position of claimant states, such as Australia, that while their continued assertions of sovereignty may lack international political appeal, their motives are not totally selfish. Rather, it is argued that a regional organization of directly interested states is better able to achieve its objectives of conservation and regulation than a wider organization more susceptible to political manipulation and hence to deflection from its purposes.¹¹⁹ Such beliefs may be justified, or they may reflect no more than ingrained prejudices. For this reason, detailed research is necessary to assess what international mechanisms are appropriate for the joint management of an environment and its resources.

Few organizational precedents exist where states, with conflicting sovereignty claims, jointly manage resources. The Treaty Concerning Spitzbergen of 1920¹²⁰ and the Joint Shrimp Fishing Agreement of 1975 between the United States and Brazil¹²¹ are of only limited value. While numerous international organizations are concerned with the joint management and exploitation of resources, they are not entrained by conflicts over the property or sovereign rights to the resource itself. Nevertheless, such organizations have a certain analogical relevance for Antarctica, particularly those concerned with fisheries such as the North East Atlantic Fisheries Commission of 1963 with its now defunct Joint Enforcement Scheme of 1972.¹²² These fisheries regimes are designed to achieve three main objectives: to establish fisheries zones, to fix quotas for a total allowable catch and to establish measures for the conservation

¹¹⁷ See, e.g., the European Economic Community and the Council of Europe, D. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* (3d. ed. 1975).

¹¹⁸ J. CHARNEY, *THE NEW NATIONALISM AND THE USE OF COMMON SPACES* 3 (1982).

¹¹⁹ See, e.g., *Antarctica — A Continent of International Harmony*, *supra* note 35, at 11-12.

¹²⁰ Treaty Concerning the Archipelago of Spitzbergen, Feb 9, 1920, 44 Stat. 1892, T.S. No. 686; 2 L.N.T.S. 8; Skegestad, *The Frozen Frontier: Models for International Corporation*, 10 *COOPERATION AND CONFLICT* 167 (1975).

¹²¹ Agreement Between the United States of America and Brazil Concerning Shrimp, Mar. 14, 1975, United States-Brazil, 27 U.S.T. 1377, T.I.A.S. No. 8253; Burton, *New Stresses on the Antarctic Treaty: Toward International Legal Institutions Governing Antarctic Resources*, 65 *VA. L. REV.* 421 (1979).

¹²² J. FAWCETT & A. PARRY, *LAW AND INTERNATIONAL RESOURCE CONFLICTS* 106 (1981).

and renewal of fish stocks.¹²³ Administrative practices under such regimes provided useful guidance for the establishment of regulations under the Convention on the Conservation of Antarctic Marine Living Resources of 1980.¹²⁴

A study of international and regional institutions to regulate resources should not, however, ignore the ways in which international law and national law are interrelated. Fawcett observes, for example, that liability for oil discharge from surface vessels on seabed operations derives from "a complex of rules, including customary rules of international law, the provisions of the various international Conventions, and the law governing civil liability for damage in the national systems."¹²⁵ Indeed, the 1982 Convention on the Law of the Sea¹²⁶ has been a grandiose attempt to unify traditional rules and to develop the law from various international and domestic sources into a single coherent and accessible "legislative" form. The provisions of this Convention establishing the organizational structure and voting rules of the Council and Assembly and the regulations concerning deep-sea bed mining, fishing and the marine environment are, when they come into force, likely to provide an indication of international standards and of management policies of significant bearing upon the future management of Antarctica.

VII. ANTARCTICA AS THE COMMON HERITAGE OF MANKIND

The limitations placed upon the Antarctic Treaty regime by its constituents, invariably reflecting conflicts of sovereignty, assume particular potency in the context of the present political environment in which, as part of a commitment to a New International Economic Order, some states and writers argue that Antarctica is, or ought to become, subject to the principle of the common heritage of mankind.¹²⁷

Many proposals have been made to submit Antarctica to interna-

¹²³ *Id.* at 105.

¹²⁴ *Supra* note 11.

¹²⁵ J. FAWCETT & A. PARRY, *supra* note 122, at 117.

¹²⁶ United Nations Convention on the Law of the Sea, Oct. 7, 1982, U.N. Doc. A/Conf. 62/122, reprinted in 21 I.L.M. 1261 (1982).

¹²⁷ Report of the Secretary General to the 39th Session of the General Assembly, U.N. Doc. A/39/583, at 63-66 (1984) (this report includes the views of the 53 states which responded to the Secretary General's request for submissions). In May of 1976 Guinea argued that a new Antarctic Treaty was necessary to allow developed and developing states to share equally in the proposed Southern Fisheries Programme. B. MITCHELL, *RESOURCES IN ANTARCTICA: POTENTIAL FOR CONFLICT* 91, 100 (1977). The Chinese also have suggested that the future Seabed Authority should manage offshore oil resources. See *China's Interest in Joint Research*, 9 ANTARCTIC 62 (1980). See generally J. KISH, *THE LAW OF INTERNATIONAL SPACES* (1973); P. JESSUP & H. TAUBENFELD, *CONTROLS FOR OUTER SPACE AND THE ANTARCTIC ANALOGY* (1959); Bernhardt, *Sovereignty in Antarctica*, 5 CAL. W. INT'L L.J. 297, 349 (1975); Pinto, *The International Community and Antarctica*, 33 U. MIAMI L. REV. 475, 478-79 (1978); Note, *supra* note 29, at 821.

tional regulation and various attempts have been made to have the matter discussed by the United Nations and its specialized agencies. Such proposals were made by the United States in 1948,¹²⁸ New Zealand in 1956,¹²⁹ and the United Kingdom in 1958.¹³⁰ The question was thought to be too controversial for consideration during the Law of the Sea negotiations and thus was not discussed.¹³¹ Middle Eastern States have since proposed that the International Sea Bed Authority, once it is established, should be empowered to extend its control to Antarctica, particularly in order to manage the more readily exploitable off shore oil and gas resources.¹³² At a seminar organized by Earthscan, an agency funded by the United Nations, Sri Lanka warned that Third World countries would not be satisfied if exclusive control by the Antarctic Treaty powers were to continue. Sri Lanka said that Antarctic resources should be "made subject to a regime of rational management and utilization to secure optimum benefits for mankind as a whole and, in particular, for the developing countries, in accordance with appropriate global international arrangements, and within the framework of the new international order."¹³³

In 1982, Dr. Mahathir, the Prime Minister of Malaysia, in a speech to the General Assembly, recommended that Antarctica be placed under the control of the United Nations or alternatively, that the Consultative Parties to the Antarctic Treaty should act as trustees for mankind as a whole.¹³⁴ At the New Delhi meeting of non-aligned nations in March 1983, a resolution overwhelmingly called for the United Nations to undertake studies and debate on Antarctica.¹³⁵ The Secretary General is expected to complete an interim report in October 1984.

The proposal that Antarctica should be regarded as part of the common heritage of mankind rests upon several grounds. First, writers have argued that traditional theories of territorial acquisition are redolent of a past colonial era inappropriate to modern times, and, therefore, should not be applied to Antarctica.¹³⁶ Second, it is argued that the Antarctic

¹²⁸ 19 DEP'T ST. BULL. 283, 301 (1948); Hayton, *The Antarctic Settlement of 1959*, 54 AM. J. INT'L L. 349 (1960).

¹²⁹ Hanessian, *The Antarctic Treaty 1959*, 9 INT'L & COMP. L.Q. 436, 450 (1960).

¹³⁰ *Id.* at 452-55.

¹³¹ F. AUBURN, *supra* note 14, at 126.

¹³² Mitchell, *Antarctica: A Special Case*, 73 NEW SCIENTIST 64, 66 (1977).

¹³³ J. FAWCETT & A. PARRY, *supra* note 122, at 20-21.

¹³⁴ Report of the Secretary General to the 39th Session of the General Assembly, U.N. Doc. A/39/583, at 65 (1984); Rich, *A Minerals Regime for Antarctica*, 31 INT'L & COMP. L.Q. 709, 713 (1982).

¹³⁵ *Antarctic Minerals Regime: Beeby's Slick Solution*, 23 ECO No. 1, at 1, 2 (July 11-22, 1983).

¹³⁶ Note, *supra* note 29, at 808, 814. It is argued that the theories of international law are "arcane and cannot be taken seriously today."

Treaty and subsequent practices of the Parties confirm the existence of common rights of access and exploitation throughout the Antarctic.¹³⁷ Thirdly, it is argued that the common heritage concept, developed in relation to outerspace and the resources of the deep seabed, has crystallized into a principle of customary international law which applies to all "new" spaces or territories, including Antarctica.¹³⁸

In support of the first argument, the traditional principles of international law are doubtless of dubious or limited authority in the context of Antarctic sovereignty. But to assert that such law is the product of a bygone colonial era begs the question whether customary international law has changed. As to the second argument, it is clear that the treaty practices of States may create binding rights and obligations for third States.¹³⁹ An examination of the Antarctic Treaty suggests that it may have had a law-creating role in establishing customarily accepted practices of free scientific use and non-militarization. However, activities under the Antarctic Treaty system do not support the more extreme view that existing claims to territorial sovereignty in Antarctica are no longer valid under international law.

Of greater import is the third argument that the common heritage principle, as developed in regard to outerspace and resources of the deep seabed, is applicable to the area.

The concept of a common heritage for mankind is notoriously slippery and ill-defined. The term *res communis* to which the common heritage principle is likened involves the notion of communal ownership and control of property which is, therefore, not subject to individual ownership or the sovereignty or sovereign rights of particular states.¹⁴⁰ While the notion of a common heritage is, at most, a principle rather than a set of rules, and thus does not entail specific and detailed legal requirements and consequences, it nevertheless does have certain identifiable objec-

¹³⁷ *Id.* at 837.

¹³⁸ Ostreng & Skegestad, *The Challenge of the New Territories—An Introduction*, 9 COOPERATION AND CONFLICT 53 (1974):

[N]ew Territories [are] areas which (a) have not previously been subject to the internationally recognized sovereignty of any state or placed under the authority of any international organization, and which (b) are becoming the object of activities which create the need for the regulating and control of what occurs in the area.

Id. at 54. See also Commission to study the Organization of Peace, Strengthening the United Nations 207 (1957) where it was argued that, had a well-developed international community existed 300 years ago, discovered lands would have been made part of that community rather than unilaterally administered.

¹³⁹ Vienna Convention on the Law of Treaties, *supra* note 25, at art. 38.

¹⁴⁰ D. O'CONNELL, INTERNATIONAL LAW 406 (2d. ed. 1970); I. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 181 (3d. ed. 1979).

tives.¹⁴¹ First, it rejects the notion of domination of territory or of natural resources either by a particular state as sovereign, or by legal persons as "owners" of property. Thus it is analogous to the notion of *res communis*. Second, it seeks to safeguard a common heritage for future use, and thus emphasizes conservation of resources in the sense of sustainable use, exploitation and environmental protection. Third, it aims to conserve the earth's resources. Fourth, an equitable allocation of the resources and benefits is sought, with particular attention to the needs of the developing states. Finally, it contemplates a legal regime to formulate precise rules to give effect to these general objectives.

The principle of a common heritage has been adopted in relation to the resources of the deep seabed and outer space. The Moon Treaty of 1979 provides that "the moon and its natural resources are the common heritage of mankind" and establishes, when it becomes feasible, mechanisms to govern the exploitation of these resources.¹⁴² Similarly, the 1982 Convention on the Law of the Sea provides that the "area and its resources are the common heritage of mankind" and that the resources are "not subject to alienation" except in accordance with the rules, regulations and procedures to be established by the International Seabed Authority.¹⁴³

The issue of whether unilateral exploitation of resources is necessarily incompatible with the wider interests of mankind has immediate relevance for the deep seabed miners who are nationals of states which are not, and do not intend to become, parties to the Convention on the Law of the Sea.¹⁴⁴ Certainly, it is arguable that state practice supports the conclusion that a common heritage principle applies as a norm of customary law to deep seabed resources. It is, however, by no means clear whether such a customary norm specifically prohibits non-treaty states from licensing their nationals to mine deep seabed resources outside the

¹⁴¹ Note an attempt to define the phrase by the Maltese Ambassador to the U.N. Conference on the Law of the Sea:

First of all there is the absence of property. The common heritage engenders the right to use certain property, but not to own it. It implies the management of property and the obligation of the international community to transmit the common heritage, including resources and values, in historical terms. Common heritage implies management. Management not in the narrow sense of management of resources, but management of all uses. Third, common heritage implies sharing of benefits.

Borgese, *Pardo, the Maltese Ambassador to the U.N.C.L.O.S.*, *PACEM IN MARIBUS* 161 (1972).

¹⁴² Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 10, 1979, art. 11(1), U.N. Doc. A/34/80, *reprinted in* 18 I.L.M. 1434 (1979).

¹⁴³ United Nations Convention on the Law of the Sea, Oct. 7, 1982, U.N. Doc. A/Conf. 62/122, *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter cited as UNCLOS Convention].

¹⁴⁴ This issue concerns the United States, United Kingdom, Federal Republic of Germany, Japan, Soviet Union, France and Italy. Note, however, that only the United States is firmly committed to unilateral mining. B. OXMAN, D. CARAN, & C. BUDERI, *LAW OF THE SEA: U.S. POLICY DILEMMA* (1983).

controls established by the authority. Does respect for the common heritage require, for example, that exploitation should take place only under the control of a regime which operates for the benefit of all, especially developing states? Can states exploit "common spaces" which are not presently under the jurisdiction of a management regime, if and when they have the capital and technology to do so?

It has been notable that the U.S. Deep Seabed Hard Minerals Resources Act of 1980 makes reference to its support for the common heritage principle "with the expectation that this principle would be legally defined under the terms of a comprehensive International Law of the Sea Treaty."¹⁴⁵ The implication is that the concept of a common heritage has legal substance only within the precise terms of the treaty which employs it and then, obviously, only in relation to those States which are party to it. This implication is supported by the earlier Moon Treaty which provides that the "Moon and its natural resources are the common heritage of mankind which find expression in the provisions of this Agreement."¹⁴⁶

Thus, the conclusion is justified that the principle of a common heritage does not invoke a legal phenomenon that is clearly understood in international law. Rather, it is a "label for the bundle of provisions in the Agreement creating a new type of territorial status."¹⁴⁷ To employ the phrase a "common heritage" in the absence of such a treaty, or readily identifiable customary rule, is to invoke a moral ideal or political aspiration which has no independent legal content. This conclusion has special relevance for Antarctica to the extent that certain aspects of the common heritage principle apply there, for not only may the unilateral exploitation of resources be permissible but claims to territorial sovereignty also may remain consistent with the principle.

It has been observed that attempts have been made to transfer the idea of a common heritage from the precedents set in the outerspace and deep seabed treaties to Antarctica for the purpose of denying the validity of sovereignty claims and asserting rights to Antarctic resources. It thus becomes useful to consider whether, and in what respects, Antarctica might be subject to the principle of a common heritage.

Certain aspects of the Antarctic Treaty regime and subsequent Consultative Party recommendations and practices might reasonably be interpreted as creating norms of international law and, hence, rights and obligations for non-party states in Antarctica. In particular, these in-

¹⁴⁵ Deep Seabed Hard Minerals Resources Act, 30 U.S.C. § 140(a)(3) (1982).

¹⁴⁶ Agreement Governing the Activities of States on the Moon and other Celestial Bodies, *supra* note 142, at art. 11(1).

¹⁴⁷ Cheng, *The Moon Treaty: Agreement Governing the Activities of States on the Moon and Other Celestial Bodies within the Solar System other than the Earth*, December 18, 1979, CURRENT LEGAL PROBLEMS 213, 222 (1980).

clude obligations not to use the area for military purposes, to promote environmental preservation, and to allow free scientific use. The Preamble to the Antarctic Treaty recognizes that "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."¹⁴⁸ Similarly, the Convention on the Conservation of Antarctic Marine Living Resources states that "it is in the interest of all mankind to preserve the waters surrounding the Antarctic continent"¹⁴⁹ for the same purposes. Further, a Recommendation of the Ninth Consultative Meeting accepts that in dealing with mineral resources in Antarctica the Consultative Parties should not "prejudice the interests of all mankind in Antarctica."¹⁵⁰

Some of these interests can be identified. They include Antarctica's influence on global weather patterns and its functions as a storehouse for 70% of the earth's fresh water.¹⁵¹ Its unique and largely unspoiled environment make it a most significant scientific laboratory which could be kept intact if it were declared to be a world park. Any activities, and in particular mineral exploitation, which compromised these interests would violate customary norms relating to Antarctica.

Broadly, these norms may be described as protecting the interests of mankind in the Antarctic environment and as ensuring that certain benefits of use and exploitation accrue, or are available, to all states. The Antarctic Treaty and related recommendations and conventions indicate that Antarctica is subject to the notion of a common heritage in these respects. However, such a conclusion does not describe the precise legal content which has been accorded the notion in the Convention on the Law of the Sea and the outer space treaties. Does recognition of the interests of mankind in Antarctica imply the conclusion, for example, that territorial claims consequently have no validity; that exploitation of the living and non-living resources of the continental shelf of Antarctica are now subject to regulation by the International Sea Bed Authority under the Law of the Sea Convention, or that the economic benefits of resource exploitation must be distributed to developing states on an equitable basis? The short answer to these questions is no.

As a preliminary matter, it should be remembered that the Law of the Sea Convention potentially applies to the seabed and subsoil of the Antarctic area. If Antarctic sovereignty claims are disregarded, the Law of the Sea Convention will also apply up to the ice shelves of the

¹⁴⁸ The Antarctic Treaty, *supra* note 3, at preamble.

¹⁴⁹ CCAMLR, *supra* note 11, at preamble.

¹⁵⁰ Antarctica: Measures in Furtherance of the Principles and Objectives of the Antarctic Treaty, Recommendation IX-1, *reprinted in* 2 G. TRIGGS, *supra* note 6, at 128.

¹⁵¹ ELLIOT, A FRAMEWORK FOR ASSESSING ENVIRONMENTAL IMPACTS OF ANTARCTIC MINERAL DEVELOPMENT II-1 (1977) (Ohio State University Institute of Polar Studies).

Antarctic continental mainland since the Convention applies beyond the limits of national jurisdiction.¹⁵² As a result, the Convention will apply to the marine resources of these waters and also to the mineral resources of the continental shelf and deep seabed within the antarctic area. The notion of a common heritage and its consequences as developed by the Convention will logically apply, not only to deep seabed resources, but to the more readily accessible resources of the continental shelf.

This conclusion is predicated on the assumption that sovereignty claims are invalid or are not recognized by the International Sea Bed Authority. So far, claimant states have been remarkably successful in avoiding interference by, or cooperation with, other international organizations in Antarctica; and have managed to exclude Antarctica from consideration in the Law of the Sea negotiations.¹⁵³ It is possible and even probable that, in the near future, the International Sea Bed Authority will not press its claims in Antarctica but concentrate instead upon other more readily accessible and less controversial resources.¹⁵⁴ However, to do so for any substantial period would be inimical to the interests of the organization because it may imply acquiescence in sovereignty claims. It is also likely that the political momentum to declare Antarctica to be part of the common heritage of mankind will gather speed once the Law of the Sea Convention comes into force and operation.

In determining the exact legal content of the common heritage concept as it applies in Antarctica, it is necessary to examine the extent to which the international community has asserted that Antarctica is *res communis* or has demanded a right of access to exploit its resources. The absence of protest has legal significance as evidence of State practice for the purpose of creating customary law, and for the purposes of implying acquiescence in territorial sovereignty.¹⁵⁵ International law requires that before acquiescence or estoppel apply, a state which believes that its interests and rights have been violated must communicate a protest to the governments responsible. If there are other competing interests in Antarctica based on the notion of a common heritage they have not been

¹⁵² UNCLOS Convention, *supra* note 144, at art. 1(i). The iceshelves are treated as *terra nullius* and subject to sovereignty by claimant states, however, it is entirely possible that the Authority will claim jurisdiction to the seabed under these shelves up to the Antarctic mainland, disregarding this traditional categorization. See generally Wilson, *Antarctica, the Southern Ocean, and the Law of the Sea*, 30 JAG 47 (1978); Joyner, *Antarctica and the Law of the Sea: Rethinking the Current Legal Dilemmas*, 18 SAN DIEGO L. REV. 415 (1980-81); Note, *supra* note 1, at 374. It is also possible that if claims are disregarded in Antarctica, the mainland itself will be caught by the phrase "beyond the limits of national jurisdiction".

¹⁵³ Wilson, *supra* note 152, at 61.

¹⁵⁴ This is so, if only because of the severe technical problems associated with exploitation on the Antarctic continental shelf.

¹⁵⁵ See generally MacGibbon, *Some Observations on the Part of Protest in International Law*, 30 BRIT. Y.B. INT'L L. 297 (1953).

substantiated by protest. Third world interest in Antarctica has been described as "occasional, timid and haphazard."¹⁵⁶ There has been no persistent assertion of rights to participate in Antarctic affairs, no formal protest against exclusive management by the Consultative Parties, and no apparent capacity to exercise any common rights over Antarctic resources. The convention on Antarctic Marine Living Resources, which was the first attempt by the Consultative Parties to regulate Antarctic resources, has prompted no published protest; nor has any been prompted by the Recommendation of the Eleventh Consultative Meeting which established the mechanism for negotiating a minerals regime.

In the *Anglo-Norwegian Fisheries* case, the International Court accepted the proposition that if a state's protest is to be effective, it must be accompanied by "all necessary and reasonable steps to prosecute the available means of redressing the infringement of its rights."¹⁵⁷ A perfect opportunity for protesting against the exclusive management of Antarctic resources by the Consultative Parties existed at the Conference on the Law of the Sea. No such protests were made. It is probable, however, that developing states understood that to raise the issue of Antarctic resources would be to jeopardize the Conference itself, and thus to risk the more readily attainable goal of applying the concept of a common heritage to deep seabed resources.

How is the failure to protest to be assessed under international law? De Soto warns against interpreting it as amounting to acquiescence.¹⁵⁸ Rich argues that this silence may constitute a "form of estoppel."¹⁵⁹ It has been noted that abstention from protest will only carry adverse consequences where total state interests have been affected. Until very recently, developing states, which now comprise the majority of the international community, have had no reason to take any interest in Antarctica other than to voice what is possibly a general concern that the Antarctic environment should be protected. Until the last twenty years, such states have had no legal grounds on which to protest, as they could only oppose existing claims if they had a superior title which, of course, they had not. Only with the development of the notion of a common heritage has it become possible for a developing state to put forth the argument that, as it is part of the common heritage of mankind, Antarctica is now, or should become, *res communis*.

Therefore, because the possibility of protest on the grounds that the Treaty Parties are acting against the common heritage of mankind has only existed for approximately 20 years and because the true implications

¹⁵⁶ Rich, *supra* note 134, at 713.

¹⁵⁷ Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Judgment of Dec. 18, 1951).

¹⁵⁸ See Rich, *supra* note 134.

¹⁵⁹ *Id.* at 715.

of that notion in relation to Antarctica are imprecise, it cannot be said that states who have failed to protest on this ground have stood on their rights and are therefore estopped. However, should the international community continue to abstain from protest, it becomes increasingly reasonable to argue that a failure to object raises an estoppel. If so, the absence of any competent objectors, outside the Consultative Parties, would have the effect of affirming existing sovereign claims, at least against non-Parties. This may facilitate the management of Antarctic resources, either unilaterally by the claimant states or under the Antarctic Treaty system.

Even if Antarctica is considered part of the common heritage of mankind this conclusion would not necessarily mean that sovereignty claims are invalid or that exploitation of Antarctic resources—either by the unilateral action of claimant states, or under the Treaty regime—is now prohibited. While the notion of a common heritage has been invoked in relation to outer space resources, customary law has not prohibited unilateral exploitation by states with the necessary capital and technology. In relation to deep seabed resources, it is possible that a moratorium on unilateral exploitation now applies at customary international law, pending the establishment of an international regime.¹⁶⁰ But the status of deep seabed resources as *res communis* and the prohibition against their unilateral exploitation arise, not from the mere invocation of the notion of a common heritage, but from the fact that both propositions now amount, or will soon amount, to precepts of customary international law. They are particular propositions, applicable specifically to deep seabed resources, which have been refined during the nine years of negotiating the Convention on the Law of the Sea and accepted by most developed and developing states, including some states with the requisite technology and capital to exploit deep seabed resources and with a particular interest in so doing.

Furthermore, any analogy between the deep seabed and Antarctica is tenuous. Whether the inaccessible resources of the deep seabed were historically viewed as *res nullius* or *res communis* is immaterial. Since they have been recognized as part of the common heritage of mankind, it is likely that they should now be viewed as *res communis*. This status was achieved before any state sought to establish effective occupation of, or territorial claims in relation to, portions of the deep seabed. Precisely the same is true of the resources of outer space. Indeed, even those states which have legislated unilaterally in relation to deep seabed resources deny that they intend to assert sovereignty over such resources. It is not

¹⁶⁰ Legal scholars differ markedly on this question. See a presentation of negotiating positions of the United States and the Group of 77 extracted in Oxman, *The Third U.N. Conference on the Law of the Sea: Seventh Session 1978*, 73 AM. J. INT'L L. 1, 35 n.119 (1979).

a radical step to argue that deep seabed and outerspace resources should be managed by, and exploited through, an international authority in the interests of the whole international community.

In marked contrast, Antarctica, prior to the intrusion of the notion of a common heritage of mankind, has been viewed as *terra nullius* by the international community and treated as such by states asserting territorial claims. Thus, eighty-five per cent of Antarctica has been the subject of serious territorial claims since 1942.¹⁶¹ The prevailing situation between states at the time when the notion of a common heritage illumed international consciousness is thus significantly different from that of the deep seabed and outerspace. It is unlikely that an international tribunal would refuse to acknowledge a consolidated title to territory in Antarctica simply because the international community has expressed a demand that the resources are to be used in the interests of mankind. This is particularly so in light of the persistent assertions and activities of claimant states with strong, though not exclusive, interests in the territory and its resources.

In conclusion, the legal consequences of invoking the notion of a common heritage in relation to the deep seabed and outerspace do not presently apply in Antarctic. Although the notion of a common heritage has been invoked by some States in advocating a new regime for Antarctica, there is nothing to indicate that practical legal consequences which might flow from such a concept have, by state practice and *opinio juris*, achieved the status of principles of customary international law. If claims to territorial sovereignty in Antarctica have already been perfected, nothing in the notion of a common heritage as a matter of law could supplant or displace those titles. Accordingly, where territorial sovereignty exists, unilateral mineral exploitation could proceed were it not for the fact that claimant states have voluntarily stayed their hands pursuant to the recommendation for a moratorium on mineral exploration and exploitation, adopted by the Consultative Parties under the Antarctic Treaty.¹⁶² If that moratorium were lifted, without any consensual regime to replace it, unilateral exploitation could proceed where sovereignty exists and there would be no obligation to share benefits with other states or to allow nationals of such states access to mineral resources.

While the conclusion is that the principle of a common heritage does not yet amount to a rule of international law which denies validity to territorial claims to Antarctica and its resources, the principle possibly has the status of *lex ferenda* rather than *lex lata*.¹⁶³ International law-

¹⁶¹ See *supra* note 14 and map.

¹⁶² The Antarctic Treaty, *supra* note 3.

¹⁶³ 1 D. O'CONNELL, INTERNATIONAL LAW 19-20 (2d. ed. 1970).

yers are frequently required to assume a false stability within a dynamic system in order to consider what the law is rather than what it may shortly become. However, it is possible, and even likely, that political factors, most especially the success of the 1982 Convention on the Law of the Sea, will induce the Parties to the Antarctic legal regime to accord the ideal of a common heritage greater legal content in the context of Antarctica and its resources. Moreover, it may only be a matter of time before the international community takes measures to establish for Antarctica a structure of resource exploitation not dissimilar from that under the Law of the Sea Convention.¹⁶⁴ This might be done by building upon those principles which presently impose obligations not to use Antarctica for military purposes, to promote preservation of the Antarctic environment and to allow free access for scientific purposes. These principles, it has already been argued, may now amount to norms of customary international law binding on all states. A unifying notion, to which each of these existing principles would be referable, would be the common heritage of mankind.

Thus, political rather than legal processes may render it difficult, if not impossible, for claimant states to maintain their claims to territorial sovereignty even where these claims may arguably be valid according to traditional principles of territorial acquisition.¹⁶⁵

VIII. CONCLUSION

The slender structure of the Antarctic Treaty has provided support for a wide range of legislation regulating the Antarctic environment, including the more substantial organizational structure of the Marine Living Resource Convention to which the Antarctic Treaty is linked. The Antarctic legal regime thereby established has been remarkably successful in avoiding the underlying issue of sovereignty in Antarctica because the Parties share a genuine scientific and exploratory interest in Antarctica and the belief that a cohesive 'regional' organization is best able to ensure rational management of the Antarctic environment. More recently, Parties have understood that some third states consider this an arrogant and self-interested attitude. The Parties have thus attempted to broaden participation in the regime and to demonstrate their ability to regulate and protect Antarctica in the interests of all states. Indicative of change are the rapid negotiations of the Marine Living Resources Con-

¹⁶⁴ Whitlam argued, "The developing countries are only biding their time to assert in the United Nations that these Antarctic resources are the Common Heritage of Mankind." Whitlam, *The Pacific Framework*, AUSTL. Q. 264 (1980).

¹⁶⁵ For a discussion of these principles see Bernhardt, *Sovereignty in Antarctica*, 5 CAL. W. INT'L L.J. 297 (1975); 1 G. TRIGGS, *supra* note 21.

vention and the establishment of its Commission as well as the inclusion of acceding States in the Twelfth Consultative Party Meeting.

The claimant states have permitted regulation of activities in Antarctica within their claimed territories at some cost to their positions on sovereignty. They have been meticulous in ensuring that any recommendation, provision in the Antarctic Treaty, or allied Conventions should not constitute a diminution of, or prejudice to, their respective claims. The resulting compromise Articles are notable for their ambiguity, permitting interpretations suited to the respective interests of the Parties. Indeed, this negotiating technique is time honoured and is of inestimable value in enabling the Parties to resolve more urgent matters. Such provisions remain subject, however, to objective legal scrutiny and do not bind third states unless they articulate customary rules. Moreover, it is doubtful whether the technique will be useful in the context of a minerals regime.

When considering the Antarctic legal regime, the aphorism appears apt that the whole is greater than the sum of its parts. In other words, although the Parties may successfully have protected their respective juridical positions on sovereignty in any particular recommendation, article, or practice, when viewed together, the claimant states may have prejudiced the validity of their claims. This is because claimant states have given precedence to regional management through the Antarctic Treaty system above the kind of domestic legislative and administrative controls which might be expected of a territorial sovereign. The failure to regulate the activities of foreigners fishing within the waters adjacent to Antarctic territory subject to a claim, in deference to the Convention on the Conservation of Antarctic Marine Living Resources, is but one example of the slow "chipping away" at the traditional attributes of sovereignty.¹⁶⁶

Because mining is so closely associated with sovereign rights, the negotiation of a minerals regime may constitute the final play in bringing down the fragile house of cards that is the Antarctic regime. This possibility, coupled with political demands for a more equitable access to and sharing of the earth's resources, present a significant challenge to the Antarctic Treaty Parties. If the Antarctic regime is to survive, it must accord more closely with the reasonable expectations of the international community. This could be accomplished by widening participation in the consultative process, by making deliberations public, and by encouraging and facilitating access by all States to Antarctic resources. In this

¹⁶⁶ See, for example, Australian legislation excepting the waters of the Australian Antarctic Territory from the proclamation of a 200 nautical mile fishing zone in 1979. Fisheries Amendment Act, 1980, No. 86. Sinclair, *200 Nautical Mile Australian Fishing Zone*, 50 AUSTL. FOREIGN AFF. REC. 541, 542-44 (1979) (statement to House of Representatives).

way, negotiations for a minerals regime might provide the opportunity for Parties to the Antarctic regime to demonstrate their willingness to implement the spirit of a common heritage. Only if the international community can be persuaded by the advantages of such a strengthened and widened Antarctic regime will it be possible to avoid an assumption of jurisdiction by the International Seabed Authority in the future. However, a cohesive system of regulation and enforcement in Antarctica seems likely only after claimant states allow the question of sovereignty to wither.

As traditional notions of sovereignty are already severely attenuated in Antarctica, its further decline to impotence might readily be achieved. But as sovereignty remains the major stumbling block to the negotiation of a minerals regime and elaborate mechanisms are devised to protect the interests of claimant states, hopes for the future of the present Antarctic Treaty regime cannot be assured.