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## The Polar Regions and the Law of the Sea

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## *The Polar Regions and the Law of the Sea*

THE POLAR REGIONS PROVIDE a unique setting for the development of international law, in particular, the law of the sea. "The North Pole rests on 4300 meters of water covered by moving ice about 3 meters thick, whereas the South Pole rests on nearly 3300 meters of land covered by a solid ice cap which may be 1500 meters thick."<sup>1</sup> The ice is in constant flux while forming its own unique ocean environment. The physical environments of the Arctic and Antarctic present their own special legal problems which call for prompt, novel solutions. There are no international institutions and few laws to govern these vast and once remote areas. These regions, that once seemed so inaccessible, are now gradually being opened by our emerging polar technology so that more ambitious research projects, mineral exploitation,<sup>2</sup> and even tourism<sup>3</sup> have become possible.

What is involved is a new territory rapidly becoming accessible to any nation or private enterprise with the requisite resources. The question is whether our present institutions will suffice in this new environment, or whether new methods will have to be devised to ensure that the coexistence of many nations in these areas is to be orderly and peaceful.<sup>4</sup> Perhaps as new principles are developed to deal with the polar regions, they can be applied equally to other aspects of the law of the sea. Today, scientific research is the primary activity in the polar regions. This research provides an important reference point from which to explore the organizations and regulations that will be necessary for the safe and equitable exploitation of the regions.

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<sup>1</sup> D. PHARAND, *THE LAW OF THE SEA OF THE ARCTIC, WITH SPECIAL REFERENCE TO CANADA* 151 (1973). Pharand also suggests that the Arctic and Antarctic have different physical characteristics. He says, "Not only are the Arctic and Antarctic located at opposite ends of one planet, but they are essentially opposite in their very nature; whereas the Antarctic is a continent surrounded by a vast maritime belt, the Arctic is an ocean surrounded by a vast and nearly continuous continental belt."

<sup>2</sup> K. Bertrand, *Optional Considerations: the Historical Background*, in *SCIENCE, TECHNOLOGY AND SOVEREIGNTY IN THE POLAR REGIONS* 18 (G. Schatz ed. 1974). Bertrand points out that the discovery of resources in combination with an energy crisis shows that a harsh environment did not deter the drilling for oil on the North Slope of Alaska for very long.

<sup>3</sup> *Id.* Tourist operations are operated from the United States and Argentina to Antarctica.

<sup>4</sup> P. Jessup, *Sovereignty in Antarctica*, 41 *AM. J. INT'L L.* 117-119 (1947).

A resurgence of interest in these areas raises old questions as to what law is to govern the "last found regions of the world on a firm and lasting basis of international comity."<sup>5</sup> How are the two legal concepts of freedom of the seas and territorial sovereignty to be applied to these regions that are neither sea nor land in the ordinary sense?

It has been suggested that the principles of the law of the sea are not applicable to the ice of the polar regions, and that territorial acquisition of ice is possible in the same way as acquisition of land. Others say that the states adjacent to the Arctic ought to exercise at least some form of national jurisdiction and control over this territory.<sup>6</sup>

Territorial sovereignty denotes the bundle of legal rights which a state exercises over land. Three criteria are necessary in international law for an effective claim to territory. They are discovery, effective occupation and public notice.<sup>7</sup> The occupation required must not be merely symbolic or fictitious but must be "effective."<sup>8</sup> "Effective" occupation requires, "something in the nature of a permanent settlement, a colonization."<sup>9</sup>

Permanent habitation in these frozen environments would be very difficult at this time. Even if the principle of occupation could be applied to the ice-covered land of Antarctica, how could it be similarly applied to the frozen seas of these regions which are not stationary?<sup>10</sup>

These assertions of territorial sovereignty tend to ignore the fact that the water masses and pack ice of the polar regions are not stagnant cohesive bodies of ice, but flowing masses that tend to fuse and split endlessly. Pharand describes this phenomenon as follows:

The water masses under the ice cover are basically the same as in any other ocean. True, there is an undersea mountain extending from the Siberian Islands to Ellesmere Island, and the sea floor reveals a physiographic complex of basins and ridges, but there is nonetheless a displacement of water masses as in other oceans. . . . The pack ice consists of ice floes

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<sup>5</sup> E. H. Wall, *The Polar Regions in International Law*, 1 INT'L L. Q. 54 (1947).

<sup>6</sup> L. ROLLAND, MAISON DE JEU ÉTABLIE SUR LES GLACES AU DELÀ DE LA LIMITE DES EAUX TERRITORIALES 342, cited in D. PHARAND, *supra* note 1, at 146.

<sup>7</sup> Island of Palmas Case (United States v. the Netherlands), Hague Reports 2d, (Scott) 83 (Perm. Ct. Arb. 1928).

<sup>8</sup> E. H. Wall, *supra* note 5, at 55.

<sup>9</sup> Lakhtine, *Rights over the Arctic*, 24 AM. J. INT'L L. 703, 704 (1930).

<sup>10</sup> E. H. Wall, *supra* note 5, at 55.

averaging about three meters thick and covering approximately 90% of the Arctic Ocean; the floes or fragments of ice are generally in close contact. However, the ice within the pack is not compact, uniform, permanent or immobile. The ice floes are neither firmly packed nor joined together but are separated by a number of leads or polynyas, which resemble lakes of open water . . . these water openings account for roughly 10% of the surface and are so numerous in the summer that the Arctic Ocean really becomes marine in character . . . the ice floes are not only in constant motion locally but also move around all over the Arctic Ocean, a considerable proportion being carried outside completely.<sup>11</sup>

The controversy concerning whether ice is considered the high seas or land reaches a climax in Antarctica where ice occurs in three different forms: pack ice, ice shelves, and ice sheets.<sup>12</sup> Bernhardt suggests that the ice that resembles land be governed by the traditional legal principles governing land areas, and that the remaining ice be governed by the principles of the law of the sea.<sup>13</sup> There would be enormous difficulties in drawing the dividing line between land and sea ice and this process would greatly inhibit the formation of uniform principles to govern effectively the Antarctic region.

If a polar regime of governing principles for the ice environment is to be formed, efficiency demands that all types of Antarctic ice be included in one system. The approach is preferable to a division of the continent into different sectors based upon the nature of the land or sea which comprise the individual sectors. To follow a divided approach would pave the way for disagreement and disharmony among the nations interested in the Antarctic.

The question of national sovereignty and the applicability of international conventions is unclear in the polar regions. As far

<sup>11</sup> D. PHARAND, *supra* note 1, at 151-56.

<sup>12</sup> J. Bernhardt, *Sovereignty in Antarctica*, 5 CAL. W. INT'L L. J. 330 (1975). Bernhardt describes the differences and states:

Pack ice is generally categorized as sea ice, and is formed by the freezing of sea water . . . Shelf ice, initially generically the same as pack ice, forms on the surface of the sea, but normally in bays or other sheltered areas. Such deposits may build up a shelf which remains attached to the land for many years. Such shelf ice can reach thicknesses of 500-1000 feet, as in the Ross Sea, and on its most seaward extremities is subject to calving; that is, the breaking away of large pieces into the sea. Ice sheets, on the other hand, are generally considered land ice, and are formed on land by the freezing of fresh water or the compacting of snow . . . .

<sup>13</sup> *Id.* at 348.

as the Arctic is concerned, Pharand feels that the attitude of the adjacent Arctic states is important to any discussion of the sovereignty issue.<sup>14</sup>

The practice of states has always played a significant role in the evolution of international law. Often the influence of the state supporting a particular theory will determine how quickly or effectively a principle of international law will evolve. As Pharand says:

To use the imagery of Charles de Visscher in his discussion of the importance of power in the formation of international law, 'some states are heavier than others and will thus mark the path of their practice in a more definite and permanent way.'<sup>15</sup> So that, if the state practice of both the United States and the Soviet Union were to indicate that they do not consider the freedom of the seas applicable to the Arctic Ocean, their practice might constitute an effective limitation on that fundamental principle of international law. This does not mean that the attitude of the other Arctic states is not important, but it is necessarily less so; their attitude could increase or decrease the importance of a practice followed by either of the two great powers or by both, but would hardly change the actual course of such a practice.<sup>16</sup>

One must examine the attitudes of the adjacent Arctic states to assess whether the principle of freedom of the seas applies.

Even though it was a United States naval officer who first hoisted the flag at the North Pole, the United States has made no claim to the Arctic for itself nor has it recognized the claim of any other nation.<sup>17</sup>

As for the Soviet Union's position, Pharand points out that:

Although the Soviet jurists such as Sigrist, Lakhtine, and Koroven have interpreted the sector theory to include ice formations within the [Soviet Union's] sector, the government of the U.S.S.R. does not appear to have subscribed to such an extensive interpretation. True, most of its research has been done on the Soviet side of the Pole but, since it is impossible to control ice stations, they sometimes take unexpected courses; consequently a number of Soviet ice stations have drifted well outside the Soviet sector. However, much more significant is

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<sup>14</sup> D. PHARAND, *supra* note 1, at 145.

<sup>15</sup> C. DE VISSCHER, *THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC* 177-98 (1955), as cited in D. PHARAND, *supra* note 1, at 168-69.

<sup>16</sup> D. PHARAND, *supra* note 1, at 168-69.

<sup>17</sup> *Id.* at 169. See also, F. M. Auburn, *International Law and Sea-Ice Jurisdiction in the Arctic Ocean*, 22 INT'L & COMP. L. Q. 552-557 (1973).

the fact that the U.S.S.R. has established a number of stations well within the American sector north of Alaska.<sup>18</sup>

Pharand's statement intimates that the Soviet Union does not recognize the claims of other countries to the Arctic nor does it necessarily advance any claim of its own. Pharand suggests that the Soviets' lack of assertion of jurisdiction was illustrated by the incident of August, 1967 when U.S. icebreakers were in the seas north of the Soviet coast. The Soviet Union did not really object to their presence until they tried to use the Vilkitsky Strait, which it considers as lying within its territorial waters.<sup>19</sup>

The official attitude of Canada is also unclear. Numerous statements have been made by her ministers in the House of Commons to the effect that they support the idea of a Canadian sector which extends across the Arctic Ocean to the North Pole.<sup>20</sup> Yet, upon examination of these statements it seems that these ministers never meant to claim jurisdiction over the water and ice of the Arctic.<sup>21</sup> But, as Pharand points out:

In these circumstances, it is somewhat surprising that the official maps prepared and issued by the Government continues to show the 'boundary' of Canada as extending to the North Pole. . . .<sup>22</sup> whatever might be the intent behind Canada's continuing practice to show a polar sector on its maps, it would seem reasonably clear that it is not in support of a claim of sovereignty and, indeed, the sector theory per se can find no basis in international law.<sup>23</sup>

Even though Canada's position is ambiguous, both major powers, along with Norway and Denmark, refuse to claim sovereignty or recognize the claims of others. Therefore, the principle of freedom of the seas seemingly does apply to the Arctic.<sup>24</sup>

<sup>18</sup> *Id.* at 190-91. See also R. Reid, *The Canadian Claim to Sovereignty Over the Waters of the Arctic*, 12 CAN. YEARBOOK OF INT'L L. 114 (1974). Reid defines the sector theory as ". . . each country with a continental coastline automatically falls heir to all the territory lying between its coastline and the North Pole."

<sup>19</sup> D. PHARAND, *supra* note 1, at 191. For an account of this incident, see D. Pharand, *Soviet Union Warns United States Against Use of Northeast Passage*, 62 AM. J. INT'L L. 927-35 (1968).

<sup>20</sup> See Plischke, *Trans-Polar Aviation and Jurisdiction over Arctic Airspace*, 37 AM. POL. SCI. REV. 999-1013 (1943).

<sup>21</sup> D. PHARAND, *supra* note 1, at 171.

<sup>22</sup> Political Map of Canada, 2 CAN. YEARBOOK OF INT'L L. (1967), as cited in D. PHARAND, *supra* note 1, at 172.

<sup>23</sup> D. PHARAND, *supra* note 1, at 172-73.

<sup>24</sup> Neither Norway nor Denmark seems to subscribe to the idea of a national

The question of sovereignty in Antarctica is governed by the Antarctic Treaty signed in 1959, and effective in 1961. The Treaty did not clarify the sovereignty issues; it only maintained the status quo as to national claims for 30 years.<sup>25</sup>

The sovereignty issues and claims in the polar regions are at best unclear, and it is this uncertainty which will cause future problems in fixing national rights and responsibilities in these regions. Scientific research and expeditions are possible areas where ownership and control issues may arise. At present, scientific research is an important activity and a likely starting point for discussion of the issues that will be involved in the development of these regions. Any principles or institutions that are established to guarantee peaceful cooperation in scientific research can be expanded to the other activities that are becoming technologically possible. It is stated that:

The old concept of freedom of the seas was fine as long as the ocean was considered nearly worthless, except for cheap transportation or national defense. Management of the oceans for the exploitation of the natural resources that it contains, or that could be produced demands a clarification of ownership.<sup>26</sup>

The Antarctic Treaty has established some guidelines for scientific research,<sup>27</sup> but it leaves many questions unresolved. Under the Antarctic Treaty a contracting party is presumed to have jurisdiction over its nationals in the Antarctic, but the authors of the treaty did not deal with the possibility of non-nationals in the Antarctic or the rights of entrepreneurs or multinational enterprises.<sup>28</sup> As Kenneth Bertrand points out, "One of the concerns relating to potential legal difficulties in the Antarctic

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sector of the Arctic, nor do they recognize the claims of others. Neither country has had the opportunity to make its official position known, but history indicates that they regard the Arctic Ocean as open to all nations. This is so even though it was a Norwegian explorer, Nansen, who first crossed the Arctic Ocean in 1893-1896. See PHARAND, *supra* note 1, at 175-76.

<sup>25</sup> G. Schatz, SCIENCE, TECHNOLOGY AND SOVEREIGNTY IN THE POLAR REGIONS 1-2 (G. Schatz ed. 1974). As Schatz states:

The Antarctic Treaty, signed in 1959, was intended to defer action by any contracting party to enlarge any "claim to territorial sovereignty" or to prejudice the claims of another, and this moratorium was intended to remain in effect for the thirty-year duration of the treaty.

See also R. Reid, *supra* note 18, at 111-36.

<sup>26</sup> P. Frye, A. Maxwell, K. Emery, and B. Ketchum, *Ocean Science and Marine Resources*, in *USES OF THE SEA* 67 (E. Gullion ed. 1968).

<sup>27</sup> See The Antarctic Treaty, Dec. 1, 1959 [1961] 1 U.S.T. 794, T.I.A.S. No. 4780, U.N.T.S. 71, (entered into force for the U.S. June 23, 1961), arts. I, II, and III.

<sup>28</sup> G. Schatz, *supra* note 25, at 3.

today involves the multinational character of the personnel engaged in scientific or other activities."<sup>29</sup>

It is not uncommon for expeditions to include persons of at least three different nationalities. This situation is likely to continue with the advent of international cooperative efforts in the polar regions. As Skolnikoff suggests:

Increasingly, new technologies are emerging that require the participation or cooperation of many countries if the benefits of technology are to be realized, or that have effects beyond national borders, or that are relevant primarily to areas outside national jurisdictions, or that require investment beyond the means of most or all nation-states acting individually.<sup>30</sup>

The potential for conflict among these multinational expeditions is even greater when one considers the effect that extremes of the polar regions can have on an expedition's personnel, causing friction, disputes and even crime.<sup>31</sup>

The situation is further complicated by the reality that private individuals or groups, possessing the necessary financial resources, can now reach "these remote areas with or without the permission or assistance of their national governments."<sup>32</sup> It will be more difficult to control the activities of private expeditions than those of a national group.

The informal and undefined dispute settlement framework of the Antarctic Treaty is inadequate to settle even these personnel and multinational problems. When one is continents away from the nearest court, the standard dispute settlement methods are not always feasible. For example, Marshall Myers notes that the often inclement weather of the Antarctic creates practical problems with regard to removing parties in need of disciplinary action. He suggests that the lack of expeditious prosecution, the remoteness of witnesses from the courts, and the problems

<sup>29</sup> K. Bertrand, *supra* note 2, at 15-16.

<sup>30</sup> E. Skolnikoff, *National and International Organization for the Seas*, in *USES OF THE SEA* 99 (E. Gullion ed. 1968).

<sup>31</sup> K. Bertrand, *supra* note 2, at 15-16. Bertrand discusses this problem and states:

The harsh environment of the polar regions places men, particularly those from lower latitudes, under physiological and psychological stress. This stress can lead to antisocial conduct or worse. Survival in polar regions requires cooperative and concerted effort, a fact which the natives of the Arctic have come to terms in their cultural mores. Personal failure to perform up to the accepted standards through inability or negligence can have serious consequences for both the individual and the group.

<sup>32</sup> *Id.* at 18.

in gathering evidence could "affect a nation's willingness to seek justice."<sup>33</sup>

It will become evident that the Antarctic Treaty is inadequate to handle future problems in this region. The treaty should, however, be recognized as an important first step in international cooperation in the polar region. It is indeed sobering to note that the Arctic does not even have a basic agreement to cover present or future controversies. Both regions will suffer tremendous growing pains unless institutions are developed to deal with these potential conflicts.

It is clear that a Polar Regime with governing laws should be formulated before an international crisis erupts.<sup>34</sup> There are those who would resist any organizational efforts under the banner of "freedom of the seas" or "freedom of science." Under this type of *laissez-faire* approach, international conflicts — with all the consequences — will arise, and no individual or nation will benefit. As Eugene Skolnikoff suggests, "When it becomes technologically possible for one or a few nations to alter the entire earth's environment, perhaps irreversibly, or to destroy resources known to be needed by others, freedom of unilateral action may simply become unacceptable."<sup>35</sup> When technology becomes available to many, limitation upon unilateral action becomes necessary. The machinery necessary for these efforts can take many forms:

. . . ranging from simple bilateral agreements to the creation of supranational institutions to which jealously guarded national prerogatives are delegated. If, however, there is a lesson to be learned from this concept of a trend toward global technologies it is that as new machinery is designed, or existing machinery extended, for example, to perform functions related to the oceans, nations must keep the larger picture in mind and recognize that they must build an international regime able to cope with more than just a series of isolated requirements.<sup>36</sup>

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<sup>33</sup> M. Myers, *Operational Considerations: New Legal Issues*, in SCIENCE, TECHNOLOGY AND SOVEREIGNTY IN THE POLAR REGIONS 28 (G. Schatz ed. 1974).

<sup>34</sup> C. Ray, *Ecology, Law and the Marine Revolution*, in PACEM IN MARIBUS 23-24 (E. Borgese ed. 1971). As Carlton Ray stated:

Much as we might wish it so, the sea is not a placebo for our destruction of the land . . . Nevertheless, one must agree with Belman (1968): "If law awaits developments, it loses the ability to shape them" . . . It is true that we do not as yet have all the knowledge we might desire, but it is also true that we know enough now to be able intelligently to monitor our actions.

<sup>35</sup> E. Skolnikoff, *supra* note 30, at 99.

<sup>36</sup> *Id.*

The very nature of the ocean requires international cooperation if significant gains are to be made. Not only must research cross international boundaries as in studies of currents and ice floes, but significant research projects may require the expertise of scientists of many nations with joint funding. The ocean itself moves endlessly and the bodies of water are so interconnected that:

. . . an observed volume of water may at some previous time have been almost anywhere else in the ocean. The processes that determine the dissolved substances in sea water are seldom restricted to a local area. The structure of the sea floor reflects forces that are reshaping the entire planet. Marine organisms are so interlinked that an element absorbed in the food web at one location may reappear months later and thousands of miles away.<sup>37</sup>

Louis Henkin suggests that scientific research will benefit by some regulation that will protect at least the equipment from other ocean uses and establish uniformity in procedure.<sup>38</sup>

It is evident that there is a need for some form of regulatory and enforcement agency in the polar regions and that early action must be taken before vested interests solidify. As the question of sovereignty in the polar regions is unclear, it is most important that an international regime be established now while these regions are still considered by many to be merely cold, remote areas. Once nations have realized the potential of these areas and have laid claim to them, it will be too late for a revision of our policies. It will then be much more difficult to convince nations to give up their sovereign claims and national rights in exchange for an international regime. Because there are no entrenched ideas of sovereignty regarding the polar regions, there is more hope for international understanding and cooperation in this area of the law of the sea than in any other.

Following is a brief discussion of some of the existing laws and institutions for the development of scientific research and

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<sup>37</sup> W. Wooster, *Oceanography and International Ocean Affairs*, in *PACEM IN MARIBUS* 61 (E. Borgese ed. 1971).

<sup>38</sup> L. Henkin, *Changing Law for Changing Sea*, in *USES OF THE SEA* 77 (E. Gullion ed. 1968). He states:

On the high seas research is free but it suffers some of the inadequacies of laissez-faire. It suffers as well from undue concern for national security . . . . There are no arrangements for general cooperation, for protecting buoys and scientific equipment. Lack of uniformity in research practices and in markings create dangers for both research and navigation.

law of the sea and an explanation of the applicability of those principles to the unique conditions of the polar regions.

It has been suggested that there are several possible approaches to a development of a law of the sea.<sup>39</sup> One is a "wait and see" approach which leaves exploitation to chance. Support for this theory comes from the proponents of the case law method and those who note our lack of knowledge and experience in the sea. They would wait until this knowledge is developed further. As mentioned earlier, this type of approach in the polar regions would lead to the entrenchment of national interests and retardation of international cooperation.

The "flag" approach is supported mainly by military and mineral interests of powerful nations. Under this approach the sea would belong to no one initially, but later would be subject to claims, along with some concessions either to an international registry or toward cooperation in pollution and security. This seems to many to be a form of neo-colonialism with emphasis on competition rather than cooperation and ecology. It is this very approach that is sought to be avoided by the formation of a Polar Regime based on the concept of the sea as the common heritage of all mankind.

The final alternative suggested is an "international" one calling for international efforts and regulation in lieu of national ones. Small and developing nations may view this approach as the only legitimate one, or at least the one most likely to protect their interests. Something in line with this approach would seem to have the best chance of acceptance by the international community.<sup>40</sup>

It is to avoid competition among nations for the resources of the polar regions that an international governing regime must be established. Several agencies of the United Nations are involved in various types of ocean research,<sup>41</sup> but none focus on the specific problems of the polar regions. Instead, these agencies

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<sup>39</sup> C. Ray, *supra* note 34, at 20.

<sup>40</sup> *Id.* at 17. Ray's article goes on to state:

Ultimately man's activities within and beneath the sea must be legally regulated. Griffin (1967) states: "To a large extent, a period of legal conjecture is ending." The problem is ". . . to evolve policies and a legal regime which will maximize all beneficial uses of ocean space . . . . Under no circumstances, we believe, must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations."

<sup>41</sup> See E. Skolnikoff, *supra* note 30, at 101-02 for further discussion of the various U.N. agencies involved in ocean research.

are oriented towards a specific field, as, for example, health or agriculture. This approach is viewed as too fractionalized to be either effective or efficient in the vast areas of the polar regions. Another deficiency is that none of the agencies have any effective machinery with regulatory or enforcement power.<sup>42</sup>

Elizabeth Borgese in her introduction to the book, *Pacem in Maribus*, discusses the two different schools of thought as to the type of organization that should be embodied in an ocean regime. One school opts for the traditional "inter-national" organization that deals exclusively with nation-states rather than enterprises or other nongovernmental or non-sovereign entities. This proposition of a "two-tier" system would be added to the concept. The basic concept is that an international organization would first grant licenses to nations to engage in ocean projects. These nations would, in turn, grant franchises to individual enterprises. It has been argued that the "two-tier" system would be simpler, require less machinery, and would more clearly fasten responsibilities and liabilities where they belong; namely, on the states.<sup>43</sup>

The other approach would require the international organization to issue ocean licenses directly to the independent enterprise. As Borgese says, "Considering the rapid advance of technological integration, the growing interdependence of the world market, and the evolution of the huge multi-national corporations, one may indeed come to the conclusion that the trend, during the next twenty years, is such that resource exploitation by nation-States will become totally unrealistic."<sup>44</sup> It is felt that international law will be strengthened by the direct relationship between the international regime and the enterprises. This approach also seeks to circumvent many of the problems of sovereignty that are generally placed in the path of international cooperation. It will be important to keep these two schools of thought in mind when establishing the organizational structure of the Polar Regime. Special consideration should be given as to which type of organization would best suit the polar conditions.

President Nixon, on May 23, 1970, submitted a proposal on the law of the sea that would have had all states renounce any claims to a territorial sea beyond the 200-meter isobath, recogniz-

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<sup>42</sup> C. Ray, *supra* note 34, at 17.

<sup>43</sup> E. Borgese, *Introduction*, in *PACEM IN MARIBUS* xxiv (E. Borgese ed. 1971).

<sup>44</sup> *Id.*

ing the area beyond this depth as the "common heritage of mankind" under an international regime. The proposal went on to suggest that the "international area" would be divided into a "trusteeship zone" and an "international zone." The former would be under the administration and responsibility of the coastal nation, while the latter would be under international administration.<sup>45</sup>

This proposal has been criticized by those who feel that the division of the ocean into different zones would cause more problems than it solves. The legal status of the trusteeship zone is ill-defined and a new concept to other legal systems. It is also said that this proposal discriminates in favor of some coastal nations to the detriment of land-locked ones.<sup>46</sup> Though the Nixon plan was not devised with the polar regions specifically in mind, some of the ideas presented could prove useful in a polar organization. For instance, it was proposed that the regime be composed of three parts: a treaty, subsidiary regulations and machinery. The treaty would contain the basic rules and principles, somewhat like the present Antarctic Treaty. The organization would have as one of its principle tasks the changing and adopting of regulations in tune with new technology, and also provide new regulations for areas that were not originally planned. The machinery would be both regulatory and administrative and would have four functions: "regulation; supervision of the execution of regulations and, if necessary, bringing parties before an international tribunal; cooperation with existing international organizations; and assistance to developing nations, with assurance of equal access and opportunity to all."<sup>47</sup> Though the idea of dividing the ocean into zones would not apply to the polar regions, the administrative and organizational ideas presented in the Nixon proposal could be utilized in the development of a polar regime.

The Antarctic Treaty could form the basis for a polar treaty which would encompass the Arctic and its activities. The treaty and the regime should incorporate the idea that the polar regions are the common heritage of all. Ambassador Pardo, during one of the *Pacem in Maribus* preparatory conferences in Rhode Island in 1970, suggested three characteristics of the "common heritage of mankind":

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<sup>45</sup> *Id.* at xxix.

<sup>46</sup> *Id.* at xxxi.

<sup>47</sup> *Id.* at xxx.

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.<sup>48</sup>

The ideas of lack of ownership, management of all uses, and the sharing of benefits have been suggested in the present Antarctic Treaty, but need to be expanded. It is suggested that no claims to either region should ever be recognized. The management mechanism should coordinate all present activities and remain flexible to incorporate other areas that may develop. Benefits accrued through the endeavors of any one nation should be available to all nations, especially in the field of scientific research.

The Antarctic Treaty has several provisions dealing with the sharing of scientific information. Article III states, ". . . the Contracting Parties agree that, to the greatest extent feasible and practicable . . .," plans for scientific programs will be exchanged to permit maximum economy and efficiency of operations and that scientific personnel should be exchanged between expeditions and stations. It provides further that scientific observations and results shall be exchanged and made freely available. The problem with these provisions is that they are worded as suggestions and are not the mandatory conditions that are necessary in any Polar Regime seeking to avoid conflicts and provide benefits to all. All scientific research plans and final reports should be published and made available to all interested parties. Multi-national expeditions, with costs shared among the participants, should be encouraged so as to facilitate a cross-fertilization of ideas and an expansion of projects. Additionally, "there is at times the idealistic motivation that by bringing together people from different countries to work together world peace is encouraged."<sup>49</sup>

The following criteria for research stated in the recent U.N. Declaration of Principles Governing the Seabed<sup>50</sup> could be con-

<sup>48</sup> E. Borgese, *Preface to The Emerging Ocean Regime*, in *PACEM IN MARIBUS* 161-62 (E. Borgese ed. 1971).

<sup>49</sup> A. King, *International Cooperation in Science and Technology*, in *PACEM IN MARIBUS* 74 (E. Borgese ed. 1971).

<sup>50</sup> U.N. Doc A/8097, December 16, 1970.

verted for use in the polar regions if the words "coastal state" were changed to "Polar Regime." The criteria are:

- (1) The coastal state [Polar Regime] shall be given prior notification with a full description of the objectives, methods and timing of the research work intended.
  - (2) Representatives of (or observers nominated by)<sup>51</sup> the coastal state [Polar Regime] are invited to participate in, and to inspect, all research activities.<sup>52</sup>
  - (3) The investigators agree to publish all results and to send copies or records of all data, samples, etc. (where economically feasible) to the coastal state [Polar Regime].
  - (4) Submersibles, research bouys and other unmanned devices may be used for a limited period, provided that other traditional uses of the area are not unduly affected.
- The fulfillment of these conditions by the applicant would automatically result in the obligation of the coastal state [Polar Regime] to grant permission.<sup>53</sup>

There should be a presumption of acceptance of the research projects, but, as an alternative, an organization like the International Council of Scientific Unions could be used to certify bona fide research agencies or expeditions in order that the regime could then automatically grant permission to carry out research.<sup>54</sup> It should be stressed, however, that no project should be permitted by the regime that would upset the delicate eco-system of the polar regions.

It is clear that some type of governing council is necessary to carry out the administrative functions of the regime. The Nixon proposal of May 1970, suggested an assembly in which all members would be represented. A smaller council which would balance the interests of the industrial powers and the developing nations could be formed. There would be a series of operating commissions dealing with different areas, some with regulatory or supervisory duties, in order that both power and responsibility are divided. The proposal would also provide for an International Maritime Court.<sup>55</sup> This approach seems to be too frag-

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<sup>51</sup> Article VII of the Antarctica Treaty of 1959 entitles the contracting parties to have observers who can inspect all areas of Antarctica including stations, ships, aircraft, equipment and personnel.

<sup>52</sup> U. Jenisch, *A Comparative Study of Current Draft Conventions and Proposals for a New Ocean Regime*, in *FROM THE LAW OF THE SEA TOWARDS AN OCEAN SPACE REGIME* 144-45 & n.15 (E. Bohme and M. Kehden eds. 1972).

<sup>53</sup> This criterion has been introduced by Article 5 para.1 of the Geneva Shelf Convention. *Id.* at 144-45 & n.16.

<sup>54</sup> *Id.*

<sup>55</sup> E. Borgese, *supra* note 43, at xxx.

mented and its decision-making process too diffused to be sufficiently effective for the polar regions, although it must be remembered that the plan was proposed for the entire ocean rather than the smaller polar regions.

Skolnikoff, in his article, *Uses of the Sea*, suggests a more effective arrangement:

Some analysts have noted a pattern in which those organizations whose procedures allow executive action through some kind of governing committee of limited membership, instead of a one-country, one-vote governing body, are apparently more effective and less bureaucratic.<sup>56</sup>

Perhaps a limited governing council should be established, with elected representatives and with the requirement that no two representatives are to be of the same country. The need for participation by the developed and developing nations in the governing process should be recognized if the council is not to be viewed with suspicion and hostility. The council would set up regulations and supervise the activities in the area. Any disputes that arise could be settled through a marine court or by arbitration. Arbitration would seem to be a fast and flexible way to handle any disputes that might arise among nations in the polar regions. Arbitration may be amenable to more nations because it gives them the freedom to choose the arbitrator whom they feel they can trust. In turn, they may feel they have more of an opportunity to be fairly heard than would be accorded in a fixed court which may be of a fixed persuasion toward certain areas or activities. Whatever the nature of the dispute settlement mechanism, the important point is that some mechanism is necessary to handle any conflicts before they have gone too far. As Jenisch states, "It is understood that this concept requires impartial institutions for the settlement of disputes within fixed time limits."<sup>57</sup>

Because there are no entrenched ideas of sovereignty in the polar regions, it may be easier to form a Polar Regime than an ocean regime. It is hoped that as soon as an ocean regime emerges, the Polar Region will become but a part of this larger scene and not remain a separate entity. It must be remembered that the ocean, only when viewed as a whole, forms a

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<sup>56</sup> E. Skolnikoff, *supra* note 30, at 102.

<sup>57</sup> Bouchez, *The Legal Regime of Scientific Research on the Seabed, Proceedings of the Symposium on the International Regime of the Seabed (Rome 1970)*, in *FROM THE LAW OF THE SEA TOWARDS AN OCEAN SPACE REGIME* 605 & n.18 (E. Bohme and M. Kehden eds. 1972).

complete working system. Skolnikoff advises, "The precedents established now, the patterns of international operation allowed to develop, the fundamental strength and viability of international organizations, are all critical elements not just to determine a regime for the oceans for the next few years, but in laying the basis for the future organization of an increasingly interdependent world."<sup>58</sup>

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<sup>58</sup> E. Skolnikoff, *supra* note 30, at 99-100.