The Future of the Antarctic Treaty System: An Examination and Evaluation of the "Common Heritage" and "World Park" Proposals for an Alternative Antarctic Regime

Michael T. Kyriak *

I: INTRODUCTION

The Antarctic Treaty System, while often recognised as a model of international cooperation, has recently come under increasing pressure to relinquish its authority over the Antarctic continent. While manifested in many different forms, such pressure commonly presumes some inadequacy on the part of the Treaty System, questioning its legal basis and challenging its integrity.

The central issue raised by these challenges is the concept of sovereignty. While a number of states claim to be sovereign over territory in Antarctica, the international consensus necessary to validate such claims is lacking. Furthermore, the challenges that are raised against the Treaty System reject the solution to disputed sovereignty claims which is provided by Article IV of the Treaty.

This article will first examine the concept of sovereignty in international law, and consider the traditional method of territorial acquisition most suitable to Antarctica – that of discovery and occupation. The criteria regarded as necessary to the assertion of a sovereignty claim *erga omnes* will be explained. As this is an area of dispute, the writer will review briefly the likely consequences of international arbitration, concluding that a legal challenge is not only likely to be ineffectual (as the claimant states are unlikely to accept the jurisdiction of the court), but may actually escalate conflict between rival states.

The Treaty System was an instrument designed in part to avoid such international conflict. While the Treaty purports to have provided a solution to this

* BA, Doctoral Candidate (Political Studies)

problem, this is not in fact the case. Treaty States continue to be concerned with the question of territorial sovereignty, and consciously order their actions to support their claims.

Two of the most significant challenges to the Treaty System are the "Common Heritage" and "World Park" proposals. The first of these challenges has been raised within the United Nations General Assembly by Malaysia and the "Group of 77".[1] As Antarctica is considered by this group to be the "Common Heritage" of humankind, no sovereignty claims are recognised.[2] The second challenge is the call for Antarctica to be considered a "World Heritage" or "World Park". While attracting support from the international environmental lobby and apparently even from within the Treaty System,[3] this concept is still relatively undefined. As a purely theoretical construct, the proposal is highly commendable. As a "real world"[4] challenge to the existing system it lacks both precedent and an institutional framework.

The World Park proposal actively avoids independent institutionalisation, aiming instead to enshrine defining principles within an established system. Such informality avoids many of the problems that face the World Heritage proposal. Consequently this proposal is weakened significantly by its incorporation within an organisation that was designed for a different purpose. To achieve their goal of permanent protection for the Antarctic ecological system, the proponents of a World Park must promote an institutional arrangement that focuses primarily upon ecological considerations.

The Antarctic case study is indicative of a wider international development: the evolution (or revolution) of traditional legal concepts in response to the developing awareness of problems, such as the question of international environmental protection, that are not addressed by the present system.

---

1 An organised group of developing, non-aligned nations within the United Nations.

2 It is claimed that control, and most importantly, ownership of the Antarctic resources properly resides in the international community.

3 Australia and France, in rejecting the Minerals Convention, both proposed similar World Park schemes.

4 That is, "practical rather than theoretical". The desirability of preservation of the current system indicates a recognition of the potential problems that would be caused by the replacement of the Antarctic Treaty, a document strongly supported by the governments that presently control the international political system. This decision is based largely on a recognition of *"realpolitik"* limitations. However the basic underlying assumption is that the Treaty System is an organisation capable of governing the Antarctic continent as competently as any existing institutional arrangement. The Antarctic Treaty System is, in many respects, a model international organisation. It is obviously not perfect, and in some aspects appears inadequate and ineffectual. However, subject as it is to the real world considerations of managing the activities of a number of different states with different ideals and desires, it is very successful, especially when compared to some other international organisations.

II: THE TREATY SYSTEM

The achievements of the Antarctic Treaty System are remarkable. The Treaty System has unified not only the superpowers, but also claimant, non-claimant, and potential claimant states,[5] thereby avoiding Cold War tensions and potential conflict over sovereignty of the Antarctic territories. The Treaty System has been instrumental in maintaining peace in Antarctica; in keeping the continent almost completely disarmed; in providing for the free exchange of scientific information; in regulating human activity in the continent; and in protecting the environment through the negotiation of several conventions and of an environmental protocol.[6]

The success of the Antarctic Treaty in circumventing the hazardous question of sovereignty, and in providing for the protection of the Antarctic environment, has rested largely on its decision-making process. All decisions are made by consensus. While the adopted definition of consensus is a negative one,[7] the result has been the formulation of institutional arrangements and agreements that have accommodated the fundamental needs or concerns of the Treaty States. Such accommodation of interests during the process of formative negotiations has avoided consequential dispute.

It is not surprising, however, that the Antarctic Treaty System has attracted international attention. In 1959, when the Treaty was created, there was no real conception of the economic or strategic value of Antarctica.[8] The vast majority of states had little or no interest in this southern continent, and, even if they had such an interest, most lacked the ability to pursue it. The original signatories assumed control over the Antarctic continent in a geopolitical environment that was vastly different from the situation that exists today.

Despite their expressed desire to act in the interests of all humankind, the needs and concerns that were accommodated by the Treaty System were those of the participating states. More precisely, they were the needs and concerns of the Consultative Parties, as it was with this select group, or "Antarctic Club"[9] that decision-making power lay. With the signing of the Antarctic Treaty, the original

---

5 Those states that reserved the right to make a claim in the future while not recognising the existing claims.

6 This protocol has yet to be ratified at the time of writing.

7 The position of consensus is achieved when no state feels so strongly opposed to any one issue that it is unacceptable. The term consensus connotes a lack of disagreement rather than unanimous agreement.

8 Dr Gould stated to the United States Senate Committee on Foreign Relations in 1960: "My profession is geology and I would not give a nickel for all the mineral resources I know in Antarctica." Cited in Triggs, *International Law and Australian Sovereignty in Antarctica* (1986) 207.

9 Simma, "The Antarctic Treaty as Providing for an 'Objective Regime,'" (1986) 19 Cornell ILJ 189, 209.

signatories assumed exclusive control of the Antarctic continent. Within the Treaty System itself this control was vested only in the consultative members. Although membership to the Treaty was extended to any member of the United Nations, access to Consultative Party status was reserved to states who could demonstrate their "interest in Antarctica by conducting substantial scientific research activity there".[10] The Consultative Parties themselves decided what was to constitute such an "interest". As a result, admission to this self-selecting group of nations was from inception extremely restricted.

It has been argued that the exclusivity of this group of concerned states was, and is, essential to the process of consensus decision-making.[11] Without regard to the validity or otherwise of this argument, it is significant that the Treaty System has come under increasing international pressure directed against the exclusivity of the "Antarctic Club" and the basis of its authority is increasingly questioned.

Sovereignty

Each of these challenges to the Antarctic Treaty System presupposes a different basic premise concerning the question of sovereignty. As these premises cannot usefully be examined *in vacuo*, it is necessary to examine the concept of sovereignty within international legal theory in order to comprehend not only the challenges to the present system but also their wider consequences. Furthermore a brief evaluation of the attitudes of the claimant states is necessary as each of the alternative solutions envisages the abandonment of these existing claims in favour of a proposed new order.

International Law and the Concept of Sovereignty

The concept of sovereignty in international law is well defined. Huber J in the *Island of Palmas* case stated that:[12]

> Sovereignty ... in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.

It is this exclusive right to state control over territory in Antarctica that is disputed. How does a state establish exclusive control over territory? There are five accepted methods of territorial acquisition:[13]

---

[10] Antarctic Treaty Article IX (2).

[11] "The key to the success of the Antarctic System has been limiting the participation in regulatory decisions to States that conduct activities there, thus avoiding a dilution of influence by either the territorial claimants or the non-claimants principally involved in Antarctica. Once the decision-making group becomes too large, unanimity is hard to achieve, while certain qualified majorities could be achieved even without the participation of states with significant types of interest": Oxman, "Evaluating the Antarctic Minerals Convention: The Decision-Making System" [1989] U Miami L Rev 17.

[12] *Island of Palmas (Netherlands v United States)* [1928] 2 RIAA 829.

[13] Myhre, *Antarctic Treaty System: Politics, Law and Diplomacy* (1986) 8.

(i) subjugation, i.e., a State may take territory from another by force;
(ii) accretion, which means that the forces of nature work so as to change the geography of an area;
(iii) cession, whereby the title is transferred by the provision of a treaty;
(iv) prescription, which is the transfer of title over time from one state to another; and
(v) the occupation of hitherto unoccupied land.

Only the last of these is relevant to Antarctica. This is the acquisition of title by the discovery and adequate occupation of previously unoccupied territory.

Occupation means "the actual, and not the nominal taking of possession .... [T]he occupying State reduces to its possession the territory in question and takes steps to exercise exclusive authority there".[14] Use of the method of discovery and occupation has given rise to two major points of conflict. Firstly, who originally discovered Antarctica? This is not a question which can be easily resolved, given the existence of many claims of discovery arising from different nations and employing a number of different methods of effecting discovery. Adding to these difficulties, the evolution of customary law has not established a set of objective criteria applicable to the question of what actually effects the discovery of territory. This question is complicated by the existence of a number of different methods of discovery, each based upon the particular circumstances of the given case.

This problem is followed by another, more substantial, dispute: the question of what actually constitutes effective occupation. Case law indicates that it is likely to be the state that can exhibit the "best" effective occupation that will be awarded title.[15]

So what is effective occupation and how is it established? How can it be asserted against other claimants?

Effective Occupation

Two criteria have evolved concerning the requirements for the establishment of effective occupation. First is the concept of *animus occupandi*. This is the expression by a particular state of the intention to act as a sovereign. There are three features defining this concept:[16]

> First, activities upon which a claim to sovereignty rests must be undertaken by the claimant State or on its behalf .... Secondly, if State activities in the disputed territory occur with the consent of another State, they cannot be used as evidence of sovereignty, unless the requirements for prescriptive acquisition also exist .... Thirdly, State activities relied on to support a claim of sovereignty must be generally referable to the hypothesis that sovereignty exists.

---

[14] King Victor Emmanuel III of Italy in the *Clipperton Island* dispute, cited in Triggs, supra at note 8, at 5.

[15] See *Clipperton Island (Mexico v France)* [1931] 2 RIAA 1105; *Island of Palmas (Netherlands v Sweden)* [1909] 2 RIAA 829; *Legal Status of Eastern Greenland (Denmark v Norway)* [1933] PCIJ Series A/B, No 53, at 22.

[16] Triggs, supra at note 8, at 16; see Brownlie, *Principles of Public International Law* (3rd ed 1979) 143-144.

It is the second criterion above that addresses the question of effective occupation. To fulfil this requirement a state must demonstrate "the continuous and peaceful display of State authority".[17] This reflects the concern of international courts and tribunals to grant title to territory as the formal recognition of an existing but hitherto unconfirmed sovereignty. Such title is said to develop from prior inchoate title. An inchoate title is formed at the time of discovery of territory, and it merely denotes the beginning of the establishment of an actual or complete title. This occurs when there is the "actual exercise and display of authority"[18] by the state claiming sovereignty.

That the manifestations of sovereignty must be "continuous and peaceful" displays the concern of arbitrators to avoid decisions that may cause international conflict. This concern is understandable, but unfortunately leads to situations where sovereignty is awarded to the claimant who establishes the "superior" title, rather than a decision declaring that neither claimant state has fulfilled the requirements of sovereignty. This in turn has led to difficulties in establishing objectively what constitutes an effective and exclusive display of authority.

So how does a state establish a superior claim? While there is no definitive set of criteria against which to measure the strength of any particular claim, case law provides a guide as to what these requirements are likely to be.[19] The most important of these is the extension and enforcement of a state's legislative and criminal jurisdiction over the claimed territory. The establishment of bases and the creation of an administrative and communications infrastructure are also indicative of the intent to execute sovereign authority.

These requirements are considered to be flexible; their relative importance is determined by the specific conditions of each territory. The common law recognises that the degree of effective control that must be exhibited will be diminished in sparsely populated or uninhabited territories.[20] In the Antarctic situation, it is likely that the intention and will to act as sovereign will be afforded more importance than the physical exercise of authority because of the inhospitable nature of the environment.

Arbitration

Working within existing international law, a court or tribunal is likely to deal

---

[17] Supra at note 12.

[18] *Legal Status of Eastern Greenland (Denmark v Norway)* (1933) PCIJ Series A/B No 53, 22, at 45; cited in *Western Sahara* (Adv Op) [1975] ICJ Reps 42.

[19] As the cases have considered a wide range of different territorial situations, there is a range of different requirements for the development of a superior claim. As the Antarctic has a particularly harsh climate and is unpopulated, cases concerning territory with similarly harsh environments are the best determinants of the likely requirements. To this end see especially *Legal Status of Eastern Greenland,* supra at note 18, especially at 27, 50-51.

[20] "The intermittence and discontinuity compatible with the maintenance of the right [to territorial sovereignty] necessarily differ according as [sic] inhabited or uninhabited regions are involved": supra at note 12, at 840, per Huber J.

with a claim to territorial sovereignty in Antarctica in two ways. The first is to decide between competing claims over a disputed territory. In this case the court will have to decide which of the contrasting claims is valid. The situation may be complicated by the involvement of states which have an interest in the disputed area, but which have not yet lodged a claim.[21] In such a case the matter will probably result in the awarding of title to the claimant with the superior claim. This would follow from the authority's desire to avoid the conflict that would be likely to arise if a disputed territory were declared *terra nullius*.[22] The validity of any such decision is likely to be disputed as the preference for one state's actions over another's will be an arbitrary decision without an accepted legal basis.[23]

The second situation would arise upon a request for an international court or tribunal to review the question of sovereignty in Antarctica. As this decision would take place in the absence of overt dispute, the solution is more likely to be internationally acceptable. However, the potential for conflict arises here also. Antarctic Treaty members are likely to reject any international decision that prejudices their claims to sovereignty in Antarctica. They are also likely to reject the authority of any instrument of international arbitration if they expect a negative outcome from such proceedings.

Thus it is likely that any proposed solution of the question of sovereignty in Antarctica will result in the reanimation of the international disputes. This is important when considering the challenges to the Treaty System. It is a universally accepted principle that the Antarctic continent should remain peaceful and demilitarised. The Treaty parties have so far maintained this state. Remarkably, the Treaty System was able not only to keep the Cold War out of Antarctica, but even during a directly related dispute such as the Falklands/Malvinas conflict, both Britain and Argentina continued their active and supportive participation within the Treaty System. To challenge the Treaty System is to challenge a system that has been successful in maintaining peace. By what methods have the Treaty parties achieved this success? Should they be challenged?

The Antarctic Treaty's Solution

The evaluation of the Treaty's solution to these questions must be considered in relation to the changing world order.[24] The underlying question is whether the Treaty can prevent disputes among Treaty States, as well as avoiding the conflict that may arise from third parties. Can a system governed by this conception of national sovereignty effectively protect the Antarctic environment?

---

21 The United States and the former Soviet Union are obvious examples.

22 The declaration of an area as *terra nullius* would leave that area open to any nation to appropriate it.

23 This is due to the lack of established criteria, in international law, on this point. While the court would have to apply some test, the lack of an accepted test is problematic as it is then likely to be disputed by the losing party.

24 That is, the geopolitical environment today, as compared to 1959-1960 when the Treaty was negotiated.

Article IV was the device with which the Treaty signatories hoped to avoid conflict on this issue. Article IV states:

> 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.

To a significant extent Article IV has succeeded in its intended aim. Peace has been preserved in Antarctica. While certain Treaty States have conflicting territorial claims, these conflicts have remained theoretical.

The unfortunate result of suspending the question of sovereignty in Antarctica is that this question has remained a potential area of conflict. Treaty members, while apparently pursuing the goals of environmental protection and co-operative scientific research, have often been attempting to safeguard or promote any potential claim that they may have. Concern not to affect their claimed authority has, for example, prevented effective environmental controls and has precluded the establishment of any effective regime designed to implement these goals. Although the Treaty suspends territorial claims based upon any expressions of sovereignty after the creation of the Treaty, even a cursory examination of the distribution of bases reveals a political rather than a purely scientific distribution.[25]

If the Antarctic Treaty is an effective solution to the question of conflicting claims, why have Treaty States continued to act to preserve or strengthen their claims in the manner described above? The reason is that Article IV, while successful so far, provides at best a tenuous solution to this question. Although arguably binding against Treaty States while the Treaty is in existence, Article IV provides no protection to claimants after termination, nor does it prevent third parties from making conflicting claims.

The first consideration is the threat posed to claimant states by other Treaty signatories. This is not a major threat. Article IV prevents the signatories from "asserting, supporting or denying a claim to territorial sovereignty .... while the present Treaty is in force".[26] Developments subsequent to the Treaty cannot be employed by signatories against each other in an attempt to establish effective

---

[25] The situation of the Amundsen-Scott base at the South Pole is a classic example of this distribution, as is the encompassing distribution of Soviet bases.

[26] Antarctic Treaty, Article IV.

occupation of a territory. However as noted above, Article IV does not in fact resolve the question of sovereignty. The *status quo* that it strives to preserve is the state of unresolved conflict. Were the Treaty to be terminated and the claimant states returned to the *status quo ante*, they would resume this conflict.

The question of territorial sovereignty would be resolved by Article IV only if:

(i) Treaty signatories alone were able to make a claim to territorial sovereignty in Antarctica; and
(ii) if the Treaty bound signatories permanently.

Unfortunately neither of the above conditions are realised under the present system. The vast majority of states who have not acceded to the Antarctic Treaty do not recognise the legitimacy of the existing claims. Furthermore, the protection afforded to the claimant states exists only while the Treaty is in force. Several Treaty States have reserved their right to make a claim to Antarctic territory while refusing to recognise the claims of other states.[27]

An examination of these possible counterclaims is warranted. I shall consider first the question of states that are not signatories to the Treaty. The fact that they have not acceded to the Treaty suggests that these potential claimants are not bound in any way by the provisions of Article IV. This is not necessarily the case, however, as provision exists in international law for the binding of third parties to the terms of a Treaty.

The applicable rule of international law is *pacta tertiis nec nocent nec prosunt:* "treaties neither impose burdens nor confer benefits upon third States".[28] This principle is formally recognized in Article 34 of the Vienna Convention on the Law of Treaties, which states that "[a] treaty does not create either obligations or rights for a third State without its consent".[29] The exception to this rule is that a treaty may become legally binding if either:

(i) that treaty creates an objective regime; or
(ii) the treaty or provisions therein are accepted as customary law.

There is a degree of dispute concerning the incorporation of a treaty into the principles of customary international law, as there is concerning the creation of an objective regime.[30] One requirement is essential to both these alternatives: for a treaty to be binding on third party states it must be accepted by them. That is to say, they must assume the obligations or rights conferred on them. This is not the case

---

27 Supra at note 21.
28 Triggs, supra at note 8, at 140-141.
29 Quoted ibid, 141.
30 For a fuller discussion on this point see ibid, 140-150.

with regard to the Antarctic Treaty.[31]

Assuming that third parties are not bound by the Treaty, it follows that these states may support any claim that they make with evidence of *animus occupandi* without regard to Article IV. In defence of their claims, Treaty signatories may also assert evidence of *animus occupandi* post-1961 to establish a superior claim. Article IV prevents the assertion of evidence of occupation only against those who are similarly bound, and does not afford protection against third party claimants. Therefore, it is important that the Treaty States continue to assert their sovereignty. This includes the rejection of agreements that appear to derogate from this sovereignty.

Will Article IV continue to bind signatories after the Treaty has been terminated? It has been argued that the wording of Article IV indicates that the Article was "drafted with an eye to the eventual termination of the treaty",[32] and that it was intended to be effectual only so long as the Treaty was in force. However, it must be noted that:[33]

> It is an accepted rule of treaty law that the termination of a treaty, for whatever cause and in whatever way, can only affect its continuing obligations and cannot *per se* affect or prejudice any right already definitively and finally acquired under it, or undo or reverse anything affected by any clause of an executed character in the treaty.

Article 33(d) of the Harvard Research Draft Convention affirms this rule of law:[34]

> The termination of a treaty puts an end to all executory obligations stipulated in the treaty; it does not affect the validity of rights acquired in consequence of the performance of obligations stipulated in the treaty.

The obligation created by Article IV is a duty upon Treaty signatories not to substantiate any claim of territorial sovereignty with evidence of *animus occupandi* during the period governed by the Antarctic Treaty. It will continue after the termination of the Treaty, because it is an obligation already assumed. However, with regard to the acts or activities that are prohibited from use as the basis of a claim to title, Article IV binds the signatories only "while the Treaty is in force".[35] Acts or activities after the termination of the Treaty may be used validly as the basis of a claim. The reason for this is that the obligation created by Article IV exists only as long as the Treaty itself. The duty not to assert, as evidence of *animus occupandi*, acts or activities while the Treaty is in force remains effective, but there is no continuing obligation. For example, the fact that a base was built and operated under the Treaty regime will not prevent the state operating that base

---

31 "The Antarctic Treaty does not ... create an objective regime and, while in some respects the Treaty appears to describe customary law, any conclusion to this effect is prohibited by Article IV(1), in so far as such laws may prejudice prior claims or bases of claims." Triggs, supra at note 8, at 150.

32 Ibid, 138.

33 Sir Gerald Moore, quoted in Bernhardt, "Sovereignty in Antarctica" (1975) 5 Californian Western ILJ 297, 315.

34 Triggs, supra at note 8, at 139.

35 Antarctic Treaty, Article IV(2).

from legally claiming such use as an example of effective sovereignty. It must however substantiate such a claim solely upon the continuing existence of that base after the termination of the Treaty. Thus termination of the Treaty would allow states to employ activities undertaken while the Treaty was in force to support a claim to territorial sovereignty, if those activities are continued after termination.

Summary

Obviously the question of sovereignty in Antarctica is far from resolved. The assertions of various claimant states that they have indeed established their territorial claims *erga omnes* must be seen as little more than unilateral assertions. Both within and without the Treaty System there is dispute concerning the validity of such claims. The crucial point here is that challenges to the Treaty System all question the status of territorial sovereignty in Antarctica and propose their own alternative solution. Had it been possible to sustain the claim that this question had been resolved, these challenges would have effectively been undermined. The establishment of sovereignty would have precluded the institution of any alternative regime. As the matter lies, the claimant states are not able to establish their claims conclusively, and the question of territorial sovereignty remains unresolved. Other solutions may be advanced without having to breach the question of recognised sovereignty in Antarctica.

The inability of Article IV to resolve the question of sovereignty has another, potentially more significant, consequence. The effectiveness of the Antarctic Treaty System can be questioned in light of its inability to solve the problem of disputed sovereignty. Although indeed a novel solution, the effect of Article IV has been to limit the effectiveness of the Treaty System as an international organisation able to protect the fragile Antarctic environment. While it is true that the Treaty system has seen the creation of various environmental conventions and now even of environmental protocol, the effectiveness of these agreements must be questioned, given the practices of the Treaty States.

A recent example of serious environmental damage is the construction of the D'Urmont D'Urville airstrip in the French sector. While information provided by non-governmental organisations has revealed the extent of the damage caused by this construction, no Treaty State has made any formal complaint. Furthermore, none of the Treaty System's efforts to protect the environment has created a body capable of effective enforcement,[36] nor has any significant funding been provided for such enforcement.

The weakness of these environmental measures results largely from the unresolved nature of the question of sovereignty. As a result of the concern to avoid

[36] The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) has a functioning Secretariat but the absence of significant powers of inspection and enforcement renders this body relatively ineffective.

actions or institutions that may derogate from the effectiveness of claimant states' assertions of territorial sovereignty, the environmental protection that the Treaty has created is largely illusory.[37] The practice of states has been to avoid conflict within the Treaty system rather than to insist upon a strict enforcement of environmental control.

III: THE CHALLENGES

The "Common Heritage" Challenge[38]

Historically, interest in the Antarctic continent was limited. Its distant location and severe climate resulted in a voluntary exclusion of all but the most intrepid explorers. The passing of time and the development of technology has made Antarctica not only more accessible, but also more attractive with the possibility that large mineral deposits may be found there.

While the Antarctic Treaty System was established to govern this continent and keep it free from conflict, a number of distinct challenges to that System have evolved. The most developed and coherent of these was first seriously advanced by Malaysia and the Group of 77 in 1983, within the forum of the United Nations. While the question of Antarctica was deliberately overlooked at the negotiation of the Convention on the Law of the Sea,[39] its completion meant that Malaysia and the other nations of the Group of 77 were free to advance objections without fear of damaging that Convention. They were further armed with the international recognition of the Common Heritage principle.

There were two fundamental objections to the Treaty System. The first was a criticism of the apparently closed or exclusive nature of the Antarctic Treaty. Although any member of the United Nations could accede to the Treaty, only states exhibiting a significant interest in Antarctica could become consultative members. Moreover, the Consultative Party states decided exactly who could become members of this exclusive group. Only Consultative Parties were privy to the Treaty's decision-making process. Their decisions were reached without for-

---

[37] On this point numerous examples can be raised in support. One such example is the adverse impact that fishing has had in Antarctic waters – despite the existence of the CCAMLR.

[38] The use of this term by Malaysia and other Third World countries does not necessarily represent their understanding (or acceptance) of the philosophical underpinnings of this concept. The term is politically expedient as it has received recognition in the recent Convention on the Law of the Sea, and provides a justification for the inclusion of underdeveloped countries in the exploitative processes of both living and non-living resource development. In the context of this article the term is used to label the Malaysian-led challenge upon the Antarctic Treaty System. Although it is beyond the scope of this article to explore the philosophical definition of this concept, it must be noted that in this article this term is only intended to have a very limited meaning. The philosophical concept of a 'common heritage' is much wider.

[39] This was in order to allow the negotiations to continue without addressing a question that may be so fundamentally difficult to resolve that the negotiations as a whole might be jeopardised.

mal deliberation with other members of the Treaty or the international community at large. It was felt that this process was contrary to the trend towards the "democratisation of decision-making on the international scene".[40] It was claimed that the Antarctic should be controlled by the United Nations in the interests of the whole of humankind. The objectors to the Treaty attempted to dismiss the existing sovereignty claims. These were, it was asserted, simply "a vestige of the colonial era".[41] Malaysia maintained that Antarctic territory did "not legally belong to the discoverers, just as the colonial territories do not belong to the colonial powers" and further that Antarctica, "like the seas and the sea-bed ... belong[s] to the international community".[42] The need to share the Antarctic resources amongst all nations was emphasised.[43]

The second major objection was raised against the status of South Africa as a Consultative Party. This point was pressed by a number of states, in particular Antigua/Barbuda and Sierra Leone.[44] Although the matter was not included in the 1983 resolution, this objection was to develop into a serious threat to the Treaty System. The call for the expulsion of South Africa attacked the solidarity of the Treaty members.

These criticisms were met with strong rebuttal from the Treaty States. These states concentrated upon emphasising the benefits of the Treaty System. It was argued that the Treaty System had maintained the Antarctic continent as a peaceful and demilitarised zone since 1961. They stressed their historic involvement in the territory, and emphasised the strength of the Treaty by highlighting its ability to unite the superpowers and other claimant states, especially Argentina and Britain. It was also noted that a major part of the Treaty focused on the support of scientific research in Antarctica.

This first meeting exposed the polarisation of views that was to characterise all subsequent meetings. The critics of the Treaty System posed a range of arguments against it. The only point not emphasised at the first meeting was the question of South African involvement. It was not stressed, as the adoption of the resolution calling for a full report was considered to be the first and most important step. The Treaty States also had put forward their defences. Mr Sorzano of the United States delegation expressed these sentiments precisely when he argued against the assumption that there was any problem with the Treaty System worthy of international debate.[45]

---

40 United Nations First Committee deliberations, 1983.

41 Pakistan, cited in Hayashi "The Antarctic Question in the United Nations" (1986) 19 Cornell ILJ 275, 280.

42 Ibid.

43 Beck, "United Nations' Study On Antarctica, 1984" (1985) 22 (140) Polar Rec 499, 501.

44 Sierra Leone attempted to have the rejection of South Africa from the Antarctic Treaty included within the proposed resolution. It eventually withdrew in favour of the acceptance of the resolution calling for a general study that was expected to include an examination of the South African issue.

45 "'The Antarctic Question' implies an international problem concerning the management of the continent's affairs"; Beck, "The United Nations and Antarctica" (1984) 22 (137) Polar Rec 137, 142.

Despite their unanimous rejection of the criticisms advanced, it was apparent that the Treaty States had recognised the validity of some of these objections. Combatting claims of exclusivity, two new states were admitted to Consultative Party status. Against claims of secrecy, states that had acceded to the Treaty were allowed to attend Consultative Party meetings. Notably, however, there was no suggestion of a compromise on the issue of South African membership.

In 1985, although the First Committee considered the Antarctic question for some thirteen hours, there was practically nothing new to be said. The continuation of informal negotiations between Woolcott[46] and Zain[47] was a fruitless exercise. Any attempt to reach consensus was thwarted by the different conceptions of what such consensus actually entailed. The Consultative Parties did not accept that there was any role for the United Nations in Antarctica. They would not support any resolution that implied that there was some inadequacy or deficiency in the existing system. This was obviously less than the critics of the Treaty System could possibly accept.

The result was the adoption by vote of resolutions calling for an expanded United Nations study for information on the Minerals Convention being negotiated by the Treaty Parties and for the expulsion of South Africa from the Treaty System. While these resolutions were adopted unanimously, the Treaty parties refused to participate in this vote. Despite their strict requirements for achieving consensus, the Treaty States declared their disappointment at this lack of consensus. They declared that a return to consensus was the only way to resolve the question of Antarctica.

There has been little deviation from this position, although the matter has been raised each year. In 1986 the Treaty States refused to participate in the discussion of Antarctica. Ambassador Woolcott was the only representative of these states at the First Committee considerations of this topic. This trend was continued. By 1987 there were signs of internal stress within the Treaty States over the issue of South African participation,[48] although it was not significant enough to break the solidarity of the Treaty States. While declaring their abhorrence of apartheid, they claimed that there existed "no valid basis under international law for limiting the exercise of a party's rights under the Antarctic Treaty".[49]

As the minerals negotiations continued, so did opposition to the presumption that the Treaty States had a right to negotiate such a regime. The Third World opponents of the Antarctic Treaty drew a parallel between the exploitation of the wealth of Antarctica and the colonial era. The promotion of the Common Heritage

---

[46] Head of the Australian delegation and representative of the Consultative Parties.

[47] Head of the Malaysian delegation – the main opposition to the Treaty.

[48] Beck, "Another Sterile Annual Ritual? The United Nations and Antarctica 1987" (1988) 24 (150) Polar Rec 207, 207. Beck also notes the issues of contrasting government views and the minerals regime negotiations. See also Beck, *The International Politics of Antarctica* (1986) 270-299.

[49] Ibid, 208.

principle led to calls for the wealth of Antarctica to be equitably distributed. In 1988, *The Guardian* quoted the Prime Minister of Malaysia, Dr Mahathir, as saying, "I have heard that the South Pole is made of gold and I want my piece of it".[50] While this sentiment was not usually so clearly expressed, some control over the exploitation of Antarctic minerals was clearly desired.

There was also a growing concern over the possible environmental effects of the exploitation of Antarctic non-living resources. In 1988, "Antarctica's relevance to global atmospheric, climatic, oceanic, and geological processes was acknowledged".[51] This ecological recognition was largely due to the actions of environmental non-governmental organisations, such as Greenpeace and the Antarctic and Southern Oceans Coalition. This awareness was heightened by several environmental disasters.[52] Speaking on the *Bahía Paraíso* disaster,[53] Mr Gbeho of Ghana made an important point when he stated that:[54]

> [W]e cannot fail to take note of the reports that despite explicit warnings of dangerous ledges and pinnacles in the area, the vessel steamed through the channel, apparently to press national territorial claims to that part of the continent.

Observations

So what future does the question of Antarctica have in the United Nations forum? During a panel discussion in 1986 Professor Falk stated that:[55]

> [T]here seems to be very little room for political maneuvering at the present time. We hear various sides of the debate, we understand the situation is complicated and the context shifting, and yet there seems to be almost no plausible way to proceed beyond the circumstances in which we find ourselves.

Professor Falk then went on to explain why this was the case. His reasons were: "the widespread perception ... that the Antarctic regime is one of the few international arrangements that has succeeded";[56] that "this is a legal arrangement that is reinforced by an appropriate geopolitical underpinning. It is not only that it has worked, but that the two superpowers are participating with the same understanding of their interest in keeping it working";[57] that "this arrangement is supported by those that have the most proximate claims and the longest record of historical involvement in Antarctica";[58] and finally "the Pandora's box vision of what might

---

50 Beck, "Antarctica at the United Nations 1988: Seeking a Bridge of Understanding" (1989) 25 (155) Polar Rec 329, 329.

51 Ibid.

52 Especially the *Exxon Valdez* oil spill in the Arctic Ocean.

53 The sinking of an Argentine research vessel, resulting in an oil spill in Antarctic waters.

54 UN Doc A/C 1/44/42.

55 Falk, remarks on Chopra, "Antarctica in the United Nations: Rethinking the Problems and Prospects" [1986] Am Soc Int L Proc 269, 282.

56 Ibid.

57 Ibid, 283.

58 Ibid.

happen if the arrangement were altered or seriously questioned".[59] Professor Falk concluded that "the treaty system not only works, but there is no prospect, realistic or idealistic, of bringing another better system into being".[60]

Certainly there is a great deal of truth in these claims. Recent political developments have diminished or neutralised many of the objections to the Treaty System. The two most pertinent examples are the deconstruction of the South African apartheid state, and the abandonment of the Minerals Convention in favour of an environmental protocol and a ban on all mining activity in Antarctica for fifty years, coupled with a likely easing of tension over the question of sovereignty in Antarctica.

One potential source of dispute is the growing international concern and cooperation for the protection of the environment, reflected in the United Nations Conference on Environment and Development held in Rio de Janeiro in June 1992. The Treaty Parties have assumed responsibility over an area that is unique in its significance to the global environment, the ecological sensitivity of which is undisputed. The Treaty System must also be considered in this light.

The "World Park" Challenge

Consideration of the World Park option for Antarctica raises a number of problems. The first of these is that there is no established precedent for the institution of a World Park. The concept is a new one, and as such it is relatively undefined. The phrase "World Park", while most often promoted by environmental non-governmental organisations, has been employed by the whole gamut of political organisations. Unfortunately this universality of use does not indicate consensus. Any given definition of this phrase more often reflects the attitudes of the organisation employing it than an overall agreement on one theoretical concept. It is possible to provide a definition of this term, one that incorporates the general concepts usually considered to be intrinsic to a World Park. Indeed this is an essential first step in any serious promotion of this concept as a solution to the question of Antarctica. However, having surmounted this first obstacle, the proponent of an Antarctic World Park is soon confronted with another.

The Treaty States, representing over seventy per cent of the world's population, have accepted the Treaty System as a bona fide legal arrangement, and more importantly, as an international organisation legitimately empowered to determine the future of the southern continent. This future, they have determined, does not include the designation of Antarctica as a World Park. Given the existence of this organisation, and assuming that it will continue to act as it has done previously, it becomes imperative that a World Park option be acceptable to these powers. This political reality serves to limit the parameters of any proposed solution. Certain

[59] Ibid.
[60] Ibid.

factors, such as the sovereignty claims, cannot be ignored or overruled. A successful World Park proposal would have to work within these parameters. This may be incompatible with the principles of such a Park, and if so, this concept may be politically untenable.

However, before the political viability of any World Park proposal is considered, it is vital to define the concept. Without such a definition the discussion itself becomes meaningless. The concept of a World Heritage Park is a close parallel and an examination of the development of this term provides a starting point from which the World Park concept has developed.

A World Heritage Park

Since the mid-1960s the concept of a "World Heritage Park" has developed, gaining credibility through international exposure. The World Heritage Park concept was developed under the auspices of UNESCO.[61] It is an extension of the concept of national parks: areas which are recognised as having such significance and value to the nation's heritage that they ought to be protected. Consequently, to be considered a World Heritage Park such an area should fulfil the same criteria on an international scale. For an area to be judged worthy of such status it must encompass at least one of the following:[62]

> [It must] represent the major stages of the Earth's evolutionary history; represent significant ongoing geological processes, biological evolution and humans' interaction with the natural environment; contain superlative natural phenomena, formations or features or areas of exceptional natural beauty; or contain the most important and significant natural habitats where threatened species of animals or plants of outstanding universal value still survive.

It is clearly arguable that the Antarctic is an area which fulfils all four of these criteria.[63]

While the Antarctic Continent may seem an ideal candidate for World Heritage Park status there are a number of fundamental political realities that, today at least, prevent any such classification. Any declaration of Antarctica as a World Heritage Park would have to come from the Treaty States. This would necessitate two concessions by these states, both of which are politically impossible. The first would be the settlement of the question of sovereignty. As previously discussed, there are three groups within the Antarctic Treaty System – those that claim territory, those that do not, and those that do not recognise existing claims while reserving the right to claim territory themselves. Declaration of an area as a World Heritage Park would require the approval of a sovereign state, and as the question of sovereignty is not likely to be resolved, no individual state will have the capacity to make such a declaration.

---

61 United Nations Educational, Scientific, and Cultural Organisation.

62 May (ed), *The Greenpeace Book of Antarctica* (1988) 158.

63 Ibid.

Furthermore, to declare Antarctica a World Heritage Park would be to imply an inadequacy on the part of the Treaty System. Treaty States are adamant about the ability of the Treaty to protect the Antarctic environment. It recognises that "in the interest of all mankind ... Antarctica shall continue forever to be used exclusively for peaceful purposes".[64] Assumptions, whether explicit or implicit, that the Treaty System is not adequate, are totally rejected by the Treaty States.[65]

The legal and political implications of an Antarctic World Heritage Park exclude the possibility of such a categorisation. For such a proposal to be feasible, these problems must be solved. Solution has, however, proved elusive. The current unwillingness of the Treaty States even to discuss these questions leaves little hope for a future agreement.[66]

A World Park

Proposals for a World Park seem to have circumvented some of the problems facing a World Heritage Park classification.[67] "The World Park regime, in keeping with the principles of the Antarctic Treaty, would not affect territorial claims."[68] Rather than proposing any predetermined institutional arrangements, this proposal merely seeks the enshrinement of a set of ecological principles within the established system.[69] Accepting the Antarctic Treaty regime, Greenpeace attempts to work within it to achieve its aim of an Antarctic World Park.[70]

Four principles define this concept:[71]

(i) the wilderness values of Antarctica should be protected;
(ii) there should be complete protection for Antarctic wildlife (though limited fishing would be permissible);
(iii) Antarctica should remain a zone of limited scientific activity, with cooperation and coordination between scientists of all nations; and
(iv) Antarctica should remain a zone of peace, free of all weapons.

---

64 Preamble to the Antarctic Treaty.

65 Michael Costello, speaking at the United Nations in 1988, as the representative of the Treaty States, said: "We cannot accept its implied premise that there is something wrong with the Antarctic treaty system and that it requires re-negotiating"; quoted in Beck, supra at note 50, at 332.

66 It is not the purpose of this article to examine the validity of arguments both in favour of and against such discussion nor to evaluate whether such discussion should take place. That there is an unwillingness to participate as expressed by the United Nations debates is sufficient.

67 While there are a number of such proposals, the Greenpeace and ASOC (Antarctic and Southern Oceans Coalition) proposal must be considered a mainstream one. References to a World Park in this article are intended to refer to the Greenpeace proposal.

68 Greenpeace, *The World Park Option for Antarctica.*

69 "Greenpeace and other members of the Antarctic and Southern Oceans Coalition (ASOC) use the term "World Park" to describe a status which would for ever protect the natural environment of Antarctica from human depredation." May, supra at note 62, at 158.

70 *The World Park Option for Antarctica,* supra at note 68.

71 May, supra at note 62, at 159.

Although there is no specific prohibition of mineral exploitation it would be argued that such exploitation would compromise all of the stated principles.[72] The pursuit of these environmental principles allows for greater political flexibility than any attempt to establish an institutional World Heritage Park scheme. As mentioned earlier the World Park proposal exists only conceptually. There has been no international agreement that has substantiated this concept. The goal of defining principles within an already established legal system seems an ideal solution to this problem.

The Treaty System is strengthened rather than weakened if it accepts these principles. The Malaysian-led United Nations challenge has recently moved towards emphasising environmental issues. Recognising the ecological importance of the Antarctic continent, not only intrinsically, but as controller of the global environment, these states claim that the Antarctic continent should be managed by the United Nations. The adoption of the World Park principles would effectively refute this challenge since these principles, if adhered to, would guarantee the integrity of the Antarctic environment.

There has been progress towards the institution of these principles within the Antarctic Treaty System. The adoption of the environmental protocol, should it proceed, will be a major step forward. However, there is a long way to go before these principles can be said to exist. It may even be that they may never be enshrined. Despite the honest intentions of the Treaty States the very System itself may prevent the institution of a World Park in Antarctica.

Reviewing the environmental protection in place, the ability of the Treaty System to protect the environment is, at best, questionable. Although the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) has a Secretariat and receives advice from a Scientific Committee, it has no powers of effective inspection and enforcement. Political factors often take precedence over scientific data. For instance, the former Soviet Union refused "to accept new mesh size regulations that were researched and evaluated by the Scientific Committee".[73] Due to inadequate, inaccurate, or ignored fishing quotas, many of the Antarctic finfish species have been overfished.[74] The established environmental protection under the Treaty System obviously falls short of that envisaged by the proponents of the World Park.

The unresolved question of sovereignty may also act as an impediment. States are unwilling to accept any institution that may appear to derogate from their sovereign authority. The establishment of effective environmental protection must

---

[72] Personal interview with Janet Dalziell, Greenpeace New Zealand.

[73] Greenpeace, *South Georgia Finfishing*.

[74] Ibid. The Marbled Rockcod (*Notothenia rossii*) population is now estimated to be less than 2.5% of its original size. Similarly, the Mackerel Icefish (*Champsocephalus gunnari*) population is estimated at 3.5% of its original size.

include the creation of effective enforcement procedures. The question here is, who will have this enforcement authority? Are these powers of enforcement to be transferred geographically with regard to the existing or potential claims? Who will have authority over the unclaimed part of Antarctica and adjacent seas?

All of these questions concern states that have made claims or which reserve the right to make a claim to territory in Antarctica. One of the basic elements of sovereignty is enforcement authority. If a state allows an external organisation to exercise authority within the territory over which it purports to be sovereign this may well weaken that claim. As Treaty States go to a great deal of trouble and expense supporting their claims,[75] they are unlikely to agree to institutions that would erode their claims.

The other major problem concerns the question of permanency. Obviously the principles that define a World Park are intended to operate permanently. The environment is to be protected because of its intrinsic ecological value. The incorporation of the World Park principles within an organisation that is not designed specifically to preserve those principles may lead to a future situation where they are abandoned. An example of this would be the institution of mining in the Antarctic after the fifty-year ban. Because the Treaty System is established for reasons other than the specific promotion of World Park principles it will not provide the same degree of protection that an institution established solely for that purpose would provide.

IV: CONCLUSION

The international legal system is unlike national systems as it does not wield the sword of effective enforcement. There is no supreme legislator to whom all states submit jurisdiction. Consequently international law is almost completely dependant upon cooperation and agreement. The fact that sovereign nations are themselves the subjects of international law, combined with the reality that effective rule relies upon consensus, means that international law is constrained by the practice of international politics. The development of international law, and the concomitant concept of state sovereignty, has been radically influenced by these political parameters. There is no foreseeable reason why this should change. There is no reason why the determination of international law would be freed from its political servitude.

Yet a change in the political priorities of states may lead to a change in the law. The concept of sovereignty is currently accepted as an inviolable legal principle. The only scope for international law to impose upon the practices of a sovereign nation is if those practices transgress national borders and interfere with the

[75] Some states have even established permanent populations, conducted wedding ceremonies and contrived the birth of a child, all in efforts to strengthen their claim.

sovereignty of another state. This limitation of the jurisdiction of international law is determined by the primacy of the concept of sovereignty. Yet there are problems facing the international community today that were not contemplated when this concept was developed – problems such as the ecological crisis which the world is facing. This problem is not defined, or definable, in terms of arbitrary national borders. Consequently, in order to deal effectively with these problems, international law must be able to adapt, or it will be superseded by other remedies designed specifically to deal with these global problems.

The ability of the international legal system to adapt to the changing global political environment has been well illustrated by the Antarctic Treaty System.[76] When the Treaty was negotiated thirty years ago the geopolitical environment was defined by the Cold War struggle between the United States and the former Soviet Union. Additionally there was the very real potential for conflict between nations who had overlapping claims to territory in Antarctica. The disputed question of sovereignty was the main impediment to agreement and it was universally recognised that it was unlikely that any solution to this problem would be found.

The resultant compromise was, and remains, a novel solution to a seemingly intractable problem. The Treaty States, which included all of the claimant states and the two superpowers, suspended their claims in Antarctica and agreed to work together. The Antarctic Treaty System is an instance of cooperation that should serve as a model for international organisations. Looking beyond purely national aims, the original signatories agreed to keep the Antarctic free of conflict, demilitarised and preserved as an international scientific laboratory.

The Treaty System is not without faults. Although a large amount of legislation intended to protect the environment has been instituted, there is still no effective control over state actions. Some nations are guilty of overfishing and of disregarding regulations designed to ensure the survival of Antarctic fishing stocks. Other forms of environmental damage have occurred, ranging from shipping disasters to onshore fuel leaks and the demolition of penguin breeding grounds for the construction of a runway. Greenpeace has undertaken important activities in Antarctica designed to place the public spotlight on these issues.

It is however important to consider what may have happened had the Antarctic Treaty not been negotiated. There was every likelihood of physical manifestation of the underlying conflict that exists between some claimant states. The Falklands/Malvinas conflict is a poignant example, and the ability of the Treaty System to

[76] An example of this is the extension of the limits of territorial control of coastal states over their surrounding seas. Extensions of this zone were first contemplated as the result of the development of longer-range weapons. This has in turn been superseded by the concerns of these states to protect their fishing interests with the establishment of the 200 mile Exclusive Economic Zone . More recently the Convention on the Law of the Sea has established jurisdictional boundaries that were influenced by the existence of advanced technology enabling nations to exploit potential mineral deposits.

prevent the extension of the conflict into the Antarctic regions was an important achievement. Furthermore, the record of environmental damage in Antarctica must be viewed in relation to environmental damage that has occurred in areas that have not been regulated by such a Treaty. The need to protect the Antarctic environment is expressed almost immediately in the Preamble to the Treaty and is one of its major objectives.

Any viable challenge must not simply concentrate on the weaknesses of the Treaty system, nor can it rely on the promotion of idealistic goals, no matter how desirable, that it claims to be able to achieve. Rather, to have real weight against the existing system, any challenge must first establish that there are shortcomings within the Treaty System that render it unable to deal with the governance of the Antarctic continent, and second, must propose an alternative that can deal with this problem effectively. Account must be taken of the existent geopolitical environment and the fact that the Treaty signatories include most of the major world powers and governments representing some seventy per cent of the world's population.

Neither the World Park nor the Common Heritage challenge fulfil these criteria. The Group of 77, whence the Common Heritage challenge arises, do not have a particularly credible environmental record, nor is there any argument supporting their claim that they have a greater ability to govern the continent in the interests of humankind. This challenge, motivated as it has been for the most part by economic concerns, has only recently concentrated on the need for environmental protection in Antarctica. The validity of this new-found concern must be questioned, especially as in many, if not all of these states, there has been no concurrent domestic enlightenment. On the part of the World Park proposals, no tangible proposal has yet been presented. At best this proposal remains a desirable ideal.

While the challenges to the Treaty System may not provide a better alternative, they do constitute a real threat. Fortunately, however, the Treaty System has exhibited and continues to exhibit its ability to deal with the new pressures brought to bear by the changing political environment. As such, the Treaty System provides a parallel to the whole international legal system and the development of environmentally protective regulation. The Treaty System, originally faced with a problem complicated almost unmanageably by the disputed question of sovereignty, has proven to be an effective organisation capable of avoiding this single problem in the interest of the continent as a whole. It may be that a similar solution will have to be established if the international legal system is to resolve the environmental problems with which it is now confronted.