

The Antarctic Treaty System: A Model of Legal Creativity and Cooperation

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ABSTRACT. The Antarctic Treaty System (ATS), founded upon the Antarctic Treaty of 1959, has proved to be one of the successes of twentieth century international law and diplomacy. Over the last 50 years, the Antarctic Treaty has preserved the Antarctic continent as a zone of peace and cooperative scientific research and provided an effective model for the management of regions beyond the limits of national jurisdiction according to common values. The reasons for this success are, however, by no means obvious to the casual observer. The language of the treaty itself and of the related conventions on seals, marine living resources, and minerals and the Protocol on Environmental Protection is deliberately ambiguous and vague. The regime has weak inspection, enforcement, and governance mechanisms and has been slow to respond to conflict in the Southern Ocean over whaling and unregulated fishing. A key to understanding both the successes and limitations of the ATS lies in the differing juridical positions of the member states on sovereign claims to Antarctic territory. Every ATS agreement, measure, and decision and state practices in respect to Antarctica should be viewed through the prism of these national perspectives on sovereignty. This paper sets out the evolution of the ATS and explores the fundamental role of Article IV and “sovereign neutrality” as the glue that binds the Antarctic Treaty and its interlinked measures, decisions, and agreements. Article IV has enabled the Consultative Parties to sidestep potential conflicts over territorial claims and to manage activities in Antarctica in the wider interests of the international community. For the second decade of the twenty-first century, the vital question is whether the ATS is capable of responding effectively to the challenges posed by illegal fishing and whaling, climate change, commercial tourism, energy, and human security. The litigation in the *Japanese Whaling* case, brought by the Humane Society International in the Australian Federal Court, provides a salutary warning of the risks to the ATS of unilateral assertions of national jurisdiction over activities in the Antarctic region. The Consultative Parties are now on notice to justify the legitimacy of their mandate and to demonstrate the capacity of the ATS to respond to contemporary Antarctic issues. The 50-year historical evolution of the ATS and its demonstrated capacity for dynamic growth suggest that the regime and its members have the flexibility and political will to maintain its success in the future.

INTRODUCTION

The Antarctic Treaty System (ATS) of interlinked conventions, measures, and recommendations, founded upon the Antarctic Treaty of 1959, has proved

to be one of the successes of contemporary international law and diplomacy. For the last 50 years a tenth of the Earth has been regulated peacefully and in the interest of scientific research. Negotiated during the cold war, the treaty has ensured that potential conflict over the seven largely unrecognised and disputed claims to territorial sovereignty in Antarctica has been avoided. Indeed, as Phillip C. Jessup argued before the U.S. Senate Committee on Foreign Relations, the importance of the Antarctic Treaty “lies . . . in the fact that it will permit the last great empty continent from becoming an international bone of contention, a scene of controversy and actual fighting.”¹

The ATS has achieved this and much more. It has become a model for regional environmental management founded upon agreed common values of cooperative scientific research and peaceful purposes. It was negotiated by 12 states, 7 of which claimed rights as territorial sovereigns, at a time when there were as few as 55 states in the international community as a whole. Today, it might be questioned whether the 192 states that are now members of the United Nations (UN) are in any way bound by such a grandiose gesture that purported, over 50 years ago, to regulate activities on the largest continent on earth. The life of the law lies, of course, in experience. In fact, the Antarctic Treaty has withstood the tests of time and political, technological, and economic change. It now has 46 members, representing a significant majority of the world’s population. The resilience of the treaty was, for example, demonstrated recently when, despite global concerns for energy security, the 28 Antarctic Treaty Consultative Parties (ATCPs) confirmed their commitment to a prohibition on mineral resource exploitation.²

The 14 articles of the Antarctic Treaty, by today’s standards a model of elegant, concise simplicity, have ensured that the world’s largest, coldest, driest, and most inhospitable continent has been preserved for scientific research and peaceful purposes as a nonnuclear region. An understanding of the contribution of Antarctica to the global climate system is now recognised as vital, and the culture of free exchange of scientific data has, for example, facilitated unprecedented cooperation in understanding the causes of the ozone hole and the melting of glaciers.

Laurence Gould has claimed that the Antarctic Treaty is “unique in history which may take its place alongside the Magna Carta and other great symbols of man’s quest for enlightenment and order.”³ Such hyperbole on the fiftieth anniversary of the signing of the treaty prompts reflection upon the reasons for its success as a regime for governance under international law. This chapter considers the evolution of the ATS and explores the fundamental

role of Article IV and sovereign neutrality as the glue that binds the regime together by sidestepping potential conflicts over territorial claims, enabling Consultative Parties to manage activities in Antarctica in the wider interests of the international community. Also considered is a vital question for the twenty-first century: is the ATS capable of responding effectively to the challenges posed by unregulated fishing and whaling, climate change, commercial tourism, energy, and human security? The litigation in the *Japanese Whaling* case, brought by the Humane Society International in the Australian Federal Court, is examined as a salutary warning of the risks to the ATS of unilateral assertions of national jurisdiction over activities in the Antarctic region. The Consultative Parties are now on notice to justify the legitimacy of their mandate and to demonstrate the capacity of the ATS to respond to contemporary Antarctic issues.

HISTORY

To those who are new to it, the Antarctic Treaty System may seem to be an unnecessarily ambiguous, contrived, and suboptimal regime. A moment’s reflection on the history of the evolution of the regime explains its current structure, procedures, and limitations. The historical background also illumines the dynamic, evolutionary nature of a legal regime that has responded to diverse political, economic, and resource priorities over the last 50 years. The treaty was negotiated during the cold war, completed shortly after Castro took over Havana, and has survived efforts to open it up for mineral exploitation. Antarctica was on the agenda of the UN General Assembly for over 30 years, but as an indication of the stability of the ATS, the “Question of Antarctica” was removed from the agenda in 2006.⁴ There have also been calls for Antarctica to be declared a “world park” and to be adopted as the “common heritage of mankind.”⁵ Along the way, the evolving ATS has told us much about effective international governance in the face of apparently insurmountable legal obstacles. We have also come to understand how international law and diplomatic language can play a creative role in global problem solving.

The early twentieth century negotiating history for an Antarctic regime reflects the predominant concern of claimant states, and states conducting scientific research activities there, to protect their interests. Claims to territorial sovereignty over sectors in Antarctica have been made by the United Kingdom (1908), Chile (1940), France (1924), Norway (1939), and Argentina (1927–1957) on

the traditional legal grounds of discovery, effective occupation, and geographical proximity.⁶ The claims by New Zealand and Australia are founded in the transfer of claimant status by the United Kingdom in 1923 and 1933, respectively, and have since been maintained on the grounds of occupation and exploration. Of these claimants, only five, Australia, New Zealand, Norway, France, and the United Kingdom, mutually recognise the claims of the others. Overwhelmingly, the international community has either objected to the claims on the grounds, among others, that Antarctica is not amendable to territorial sovereignty or ignored them. Although the United States and the Soviet Union had made the most extensive commitment of resources to Antarctic research and exploration by the 1940s, neither had made a claim to sovereignty. Rather, each reserved the right to do so in the future.⁷ Other states, such as Belgium, Japan, and South Africa, had historical and research interests in Antarctica and sought to ensure a role in determining the future governance of the region. Although India, Brazil, Uruguay, and Peru had also expressed their interests in Antarctic affairs, they were ultimately not included in negotiations for an agreement.⁸

The potential for conflict in the wider area of the Southern Ocean was already apparent by the 1940s, when the United Kingdom and the United States established bases on Stonington Island. Quite apart from the profound legal perspectives that separated the negotiating states, the late 1950s were politically unstable times. This period was one of intense anxiety during the cold war, and 1959 was the year Castro invaded Cuba. A legal solution was not likely to be achieved. In 1955, the United Kingdom unsuccessfully attempted to have the question of the validity of Antarctic claims made by Argentina and Chile adjudicated by the International Court of Justice.⁹

In the summers of 1946/1947 and 1947/1948, Argentina and Chile sent naval expeditions to the Falkland Islands Dependencies to assert their historic claims to the area.¹⁰ Indeed, the press wrote of the “scramble for Antarctica” as early as 1947, and the United Kingdom, Chile, and Argentina adopted the policy of barring naval demonstrations and manoeuvres below the 60th parallel to reduce rising temperatures in the “South American Quadrant.”¹¹ It had become clear both that some form of joint administration of the subantarctic area was needed and that any agreement should preserve the diversity of legal perspectives of the states with interests in the Antarctic and Southern Ocean.

The first national proposal to consider some form of international regulation of Antarctica was made by Norway in 1934.¹² The planned conference was then cancelled

because of the impending threat of war. Subsequently, further proposals for internationalisation, including a UN trusteeship under Chapter XII of the UN Charter or a condominium, were made by the United States, the Soviet Union, Australia, New Zealand, the United Kingdom, and India, respectively. The first glimmerings of the precepts upon which the ATS came to be founded were proposed in 1939 by Julio Escudero, an international lawyer from Chile, who argued that any international agreement should not prejudice sovereign rights in Antarctica, that territorial claims should be “frozen” through a moratorium, and that scientific cooperation should be ensured.¹³ He addressed the sovereignty issue by arguing that any agreement should provide that activities south of 60°S latitude should not prejudice sovereign rights in Antarctica.

With the end of the Second World War came renewed attempts to seek a solution to the problem of Antarctic governance. Although the driving force for negotiation of an agreement lay in protection of national interests, science was well recognised by leaders such as President Eisenhower as a “tool of diplomacy” during this period. In addition to support among the scientific community for free access to Antarctica, the wider “internationalist” objectives of nongovernmental organizations, diplomats, and private citizens should not be forgotten. In December 1947, for example, three petitions were made by the Woman’s International League for Peace and Freedom urging the creation of a UN committee to take control of both the Arctic and Antarctic, an idea that was rejected, as the UN had no competence in polar regions.

In 1948, the United States proposed that some form of internationalisation should be considered and emphasised the importance of scientific research in Antarctica. Chile responded that any attempt to unite all claims through internationalisation would be antithetical to its ‘full and absolute sovereignty’.¹⁴ Australia, Argentina, and Chile remained implacable in defending their sovereignty claims. In contrast, New Zealand was, at this time, willing to consider the establishment of Antarctica as a world territory under the auspices of the UN. In February 1956 and again in 1957, India proposed that the question of Antarctica should be considered by the General Assembly.¹⁵ The U.S. proposal had the cathartic effect of prompting the Soviet Union to consider its interests. In February 1949, the Geographical Society of the USSR resolved that the Soviet Union had “irrefutable rights . . . to participate in a solution of problems of the Antarctic” and that the Soviet Union had priority in discovering the continent. In 1957, the United Kingdom, Australia, and New Zealand proposed renewed consideration of an agreement to create an

international consortium to ensure free access to scientific research and nonmilitarisation of Antarctica, a proposal that was rejected by Chile and Argentina on sovereignty grounds. France also remained steadfast in its objection to the creation of an international regime and joined Chile, Argentina, and Australia in rejecting any form of permanent secretariat or organisational structure. The juridical battle lines were thus drawn.

These tentative initiatives for Antarctic governance were shortly to be overtaken by preparations for the International Geophysical Year (IGY) from 1 July 1957 to 31 December 1958. Antarctic scientific research was a major focus of the IGY, and the Special Committee for Antarctic Research (SCAR) was set up under the International Council for Scientific Unions. Although the IGY provided an opportunity for the Soviet Union and the United States to cooperate on scientific research in Antarctica, the politics of the cold war intruded as the bases established in the name of science on the continent might, it was feared, be used subsequently to undermine sovereignty claims. The Australians most particularly understood the point that Soviet bases established during the IGY within the Australian Antarctic Territory (AAT) were not likely to be dismantled. It is possible that recognition of the permanence of these bases encouraged Australia to view some form of wider governance as the better means of protecting its interests.¹⁶ With some prescience, Argentina and Chile had earlier insisted at the 1955 IGY Conference in Paris that scientific research should “not modify the existing status in the Antarctic regarding the relations of the participating countries.” Their insistence on maintaining the status quo appears to have subsequently formed the basis of a “gentlemen’s agreement” by which participating governments agreed not to “engage in legal or political argumentation” over Antarctic sovereignty during the IGY.¹⁷

Although it is doubtful that such an understanding had any legal validity, the idea of putting aside differing juridical views on sovereignty fell on fertile ground. The United States took the initiative in 1958 to adopt a strategy of “quiet, confidential and informal” discussions with interested states.¹⁸ The United States suggested adopting the earlier Chilean *modus vivendi*, which would maintain the status quo with respect to sovereignty and ensure non-militarisation and scientific cooperation. In May 1958, with the close of the IGY, the United States invited 11 states with a “direct interest” in Antarctica to attend a conference in Washington, D.C., in October 1959. These states were the seven territorial claimants, states which reserved the right to make a claim in the future (United States and Soviet Union), and those with research activities

in Antarctica during the IGY (South Africa, Belgium, and Japan). The mooted inclusion of Brazil, Poland, and India proved too problematic, and they were not invited. Somewhat surprisingly, and with caveats, each invited state agreed to take part in the negotiations. An informal preparatory working group was established to produce a draft agreement adopting the core principles that the status quo with respect to sovereignty claims would be maintained and that nonmilitarisation of Antarctica and scientific cooperation would be guaranteed.

By today’s standards, the negotiations were breathtakingly fast. The conference met over six weeks (15 October to 1 December 1959), and the Antarctic Treaty was adopted on 1 December 1959, coming into force 18 months later on 23 June 1961. As Hanessian points out, apart from the 1958 Law of the Sea Conventions and the creation of the International Atomic Energy Agency, the Antarctic Treaty was to be the only important treaty to include all the major powers of the time since the Second World War.¹⁹

This then was all the more reason to marvel that the leaders of delegations at the negotiating table were so generous in their commitment to the core principles of the proposed treaty. Sir Esler Denning, the UK representative, in particular, appreciated the responsibility that lay with the 12 negotiating states. When explaining to third states that “might question the right of any single group of countries even to give the appearance of legislating on a matter of world-wide concern,” he argued that the “Treaty is, in fact, to be almost entirely a self-denying ordinance on the part of the signatories, who will derive from it virtually no privileges but only obligations.”²⁰

Such a high-minded sentiment, although optimistic at the time, has resonance today. Viewed 50 years later, survival of the ATS may well depend upon the success of the “self-denying” vision of Treaty Parties in meeting contemporary needs for Antarctic environmental governance.

The Antarctic Treaty is disarmingly simple. It applies to the area south of 60°S latitude, including ice shelves, but does not affect the rights of states under international law in respect of the high seas. Only the most minimal institutional structure is permitted in order to achieve the primary objectives that “Antarctica shall be used for peaceful purposes only,” that any measures of a military nature and nuclear explosions or disposal of radioactive waste are prohibited, and that there should be freedom of scientific investigation. The treaty requires the Contracting Parties to exchange information and scientific personnel and establishes a process for inspections by observers. A slender process for Antarctic governance is created by

the agreement that Contracting Parties can meet as determined by them. Those states that were listed in the preamble to the treaty are entitled to attend meetings, along with acceding states who meet the criterion that they can demonstrate their interest in Antarctica by conducting “substantial scientific research” there. These states have become known as the Consultative Parties, as distinct from those acceding states that are not able to demonstrate the appropriate level of research activity. The vital point of difference is that only the Consultative Parties are entitled to vote at, or attend, meetings. In contrast, the Non-Consultative Parties are invited to such meetings. Consultative Party Meetings are now held every year for two weeks to discuss matters of common interest and for representatives to make recommendations to their governments. Formal “measures” can also be adopted by the Consultative Parties on issues such as the preservation and conservation of natural resources and jurisdiction. It is a weakness of the treaty that measures will only become binding when all Consultative Parties have subsequently approved them by consensus. The requirement of unanimity reflects the differing juridical positions on sovereignty but has a limiting effect on effective governance.

This brief survey of the Antarctic Treaty has thus far failed to mention two of the most important and controversial provisions. The first concerns the means by which the treaty was to protect all possible juridical perspectives on Antarctica. The second is the constraint imposed by the treaty on the exercise of jurisdiction by contracting states over nonnationals.

SOVEREIGN NEUTRALITY

The idea of sovereign neutrality has been the vital building block for the development of the Antarctic Treaty System. Indeed, all aspects of Antarctic governance need to be viewed through the prism of differing juridical perspectives on sovereignty. Article IV provides that

Nothing in the present Treaty shall be interpreted as:

A renunciation by any contracting party of previously asserted rights or claims to territorial sovereignty in Antarctica;

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;

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.

To paraphrase, the treaty should not be interpreted as a renunciation of previously asserted rights or basis of a claim, nor is the treaty to prejudice the position of any party as regards its recognition or nonrecognition of any other state’s right of claim or basis of a claim. The words “any basis of claim” in paragraph 1(b) may protect the prior interests of nonclaimant states such as the United States and the Soviet Union, which had not previously sought to assert a claim but which might do so in the future. The words “or those of its nationals” will cover claims made on behalf of, but not ratified by, the state concerned. In this way, the potential claimants may protect their “rights” to make a claim in the future. Nonclaimants may also be protected by Article IV, paragraph 1(c), which provides that a Contracting Party does not prejudice its position as “regards its recognition or non-recognition of the rights or claims of other states.” This provision also protects claimants who have already recognised the Antarctic sovereignty of other states. Claimants are further protected by Article IV, paragraph 1(a), which provides that the treaty is not a renunciation of “previously asserted rights or claims to territorial sovereignty.” Similarly, Article IV, paragraph 1(b), provides that “any basis of claim” that a state may have is not to be reduced or diminished by the treaty.

The words of Article IV are circuitous and ambiguous, leaving each state free to interpret the provision as it deems necessary to protect its juridical position. Despite this, few legal clauses have proved to be as successful in international dispute resolution as Article IV. Few such clauses have formed the foundation for so extensive a superstructure of interlinked treaties for the governance of so large a part of the world. Deliberately obscure, creating what Marcoux described as a “purgatory of ambiguity,”²¹ Article IV has enabled states with diametrically inconsistent juridical positions on Antarctic sovereignty to engage cooperatively and fruitfully in one of the most effective regimes for global governance to be established within the international community.

Not only does Article IV enable states with differing legal perspectives on Antarctica to participate in the Antarctic Treaty, but it has also formed the glue for the subsequently negotiated interlinked agreements that now compose the regime. Parties to the Antarctic Fisheries Convention are, for example, bound by Article IV of the Antarctic Treaty in their relations with each other, even though they may not all be parties to the Antarctic Treaty.²²

Important though it is to understand the function of Article IV within the ATS, it is also clear, as the United Kingdom’s Sir Arthur Watts pointed out in 1986, that the provision has not “solved” the sovereignty problem.

National claims to territorial sovereignty or interests in Antarctica are “still very much alive.”²³ Fifty years after the treaty was negotiated, the claimant states remain adamant that they have valid and genuine claims to sovereignty. Moreover, there are no strategic reasons why claimant states should relinquish their juridical positions. If at any time the major interests of the claimant states are not met through the ATS, for example, in the event of weak environmental protection or overfishing, the trump card of sovereignty remains to be played. The Antarctic Treaty cannot, however, arrest time. New ideas of “common spaces” and a growing intolerance for traditional notions of territorial sovereignty in a pristine and beautiful continent suggest that it will be difficult to gain international support for national claims in Antarctica.

EVOLUTION OF THE ANTARCTIC TREATY SYSTEM

Before setting out the evolution of the regime created under the Antarctic Treaty umbrella, it might be useful to review the technical means of Antarctic law making. Under Article IX the Consultative Parties are required to meet at “suitable intervals and places” for, among other things, “recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty.” Any such measures could be either mandatory or hortatory, the majority being the latter. In 1995, by Decision 1, the term “recommendation” was deleted, and new terms were adopted. The term “measures” is to address mandatory obligations under Article IX. “Decisions” are also mandatory, but as they are administrative in nature, they do not require subsequent Article IX approval by all Consultative Parties. For the future, “resolutions” were to be hortatory only. This new terminology and legal status for Consultative Party determinations are vital to understanding the governance mechanisms adopted over the life of the treaty.

The states negotiating the Antarctic Treaty were not initially concerned with resource issues and referred to environmental matters only in Article IX, paragraph 1(f), calling for “preservation and conservation of living resources in Antarctica.” Despite the primary geopolitical objectives of the treaty, the Consultative Parties rapidly came to appreciate that a primary function of Antarctic governance for the future was to preserve and conserve the environment. Indeed, it has been a feature of Antarctic governance that the Consultative Parties attempted to be “proactive” in negotiating measures and agreements that addressed issues before they became politically too difficult to address.

Employing the mechanism for regulation under the Antarctic Treaty, the Agreed Measures for the Conservation of Antarctic Fauna and Flora were adopted in 1964. These measures provide for the adoption of “specially protected areas” of outstanding scientific interest and for a permit system for the taking of designated species. Two voluntary standards were subsequently adopted: the 1975 Code of Conduct to protect against human interference in the Antarctic environment and a Statement of Accepted Principles and Good Conduct Guide for Tourist Groups.

The first separate treaty to be negotiated by the Antarctic Treaty Consultative Parties was the Convention for the Conservation of Antarctic Seals (CCAS) in 1972. It was believed that pelagic seals on the floating ice pack of the Southern Ocean and high seas could not be regulated by the Antarctic Treaty itself as the treaty has no application to the high seas. In Article 1 of CCAS, the Consultative Parties agreed to affirm the provisions of Article IV of the Antarctic Treaty so that nothing in CCAS could prejudice the maritime claims of the parties in Antarctica. The Convention for the Conservation of Antarctic Seals is intended to promote and achieve the objectives of “protection, scientific study and rational use of Antarctic seals, and to maintain a satisfactory balance within the ecological system.” Certain species are not to be killed or captured by nationals of the parties within the seas south of 60°S latitude.

The technique of drafting a separate treaty to deal with a specific issue while maintaining dominance by the Antarctic Treaty Parties and protected by a sovereign neutrality clause provided a valuable precedent for the subsequent negotiation in 1980 of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR). The ATCPs had recognised at the Eighth Consultative Meeting in 1975 that international interest in exploiting krill and other marine living resources of the Southern Ocean demanded effective regulation. By the late 1960s commercial and unregulated fishing was making considerable inroads in certain fish stocks, such as the marbled rockcod in the waters around South Georgia. Yet another motivation for speedy negotiation of CCAMLR was recognition that a failure to regulate the living resources in the area south of 60° parallel could jeopardise the interests of the claimant states and undermine the authority of the ATCPs to manage the area. CCAMLR has been one of the most successful agreements within the ATS in that, in contrast to the Antarctic Treaty itself, the ATCPs succeeded in creating an international organisation with legal personality, headquarters, an executive secretary, and staff. A commission has been established that meets annually and has a decision-making capacity based on consensus rather than unanimity.

Rather more controversial than the protection of marine resources or the environment was the question of how to regulate mineral exploration and exploitation in Antarctica. Again, the Consultative Parties adopted the, by now familiar, technique of negotiating a new treaty with inter-linking, sovereignty-neutral clauses. The Convention on the Regulation of Antarctic Mineral Resource Activities was completed in 1988 but never came into force.²⁴ It was almost immediately made redundant by the Madrid Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol) of 1991 that prohibited any activity relating to mineral resources, other than scientific research.²⁵ In effect, an indefinite prohibition on mining exploration and exploitation has been agreed. After 50 years any Consultative Party may request a conference to review the operation of the protocol. A three-quarters majority of Consultative Parties will then be required to overturn the prohibition. The protocol establishes a Committee for Environmental Protection (CEP) to advise and make recommendations to the parties and to report to the annual Antarctic Treaty Consultative Meetings (ATCM). Of critical importance to the effectiveness of the protocol has been the recent agreement upon the terms of Annex VI, with respect to the strict liability of operators in Antarctica. Under Article 6, an operator who fails to take a “prompt and effective response action to environmental emergencies arising from its activities shall be liable to pay the costs of response action taken by the Parties.” The terms “prompt,” “effective,” and “respond” are not defined and remain to be interpreted in the practices of the ATS.

Finally, and importantly for the future of the ATS, the Consultative Parties agreed at the 24th ATCM in St. Petersburg in 2001 to create a permanent secretariat with headquarters in Buenos Aires, Argentina. This new body does not have international personality and plays an essentially support role for the ATCMs and the CEP, with further responsibilities under the Liability Annex. The Consultative Parties have responded to concerns that the activities of the ATS are not transparent by establishing a Web site, and the secretariat has been effective in supporting the activities of the ATS. Nonetheless, the Consultative Parties remain reluctant to agree to the secretariat exercising any real autonomy or discretionary power.

**JURISDICTION: HUMANE SOCIETY
INTERNATIONAL V. KYOTO SENPAKU
KAISHA LTD (JAPANESE WHALING CASE)**

A potent risk to the stability of the ATS is the temptation for claimant states to exercise jurisdiction within their

claimed sectors. Although it is a sine qua non of national sovereignty that the state may assert jurisdiction over all persons found within its territory or territorial seas, Article VIII of the Antarctic Treaty confines jurisdiction over observers and scientific personnel and their staff to the Contracting Party of which they are nationals. It is “one of the major unresolved questions” raised by the Antarctic Treaty that it leaves open whether foreign nationals may, in other circumstances, be subject to the jurisdiction of other states in respect of their Antarctic activities.²⁶ In practice, claimant states have routinely confined the exercise of jurisdiction over acts and persons within their Antarctic territories to their nationals and have refrained from applying domestic laws to the nationals of other states. The long-standing state practice of restricting the traditional jurisdictional reach of a territorial state has avoided clashes over sovereignty and enabled cooperation on the primary objectives of Antarctic science.²⁷

A challenge to this amicable compromise of juridical positions has recently arisen in the litigation before the Federal Court of Australia in the *Humane Society International v. Kyoto Senpaku Kaisha Ltd (Japanese Whaling Case)*.²⁸ The international legal problem arose in the following way. A Japanese company, Kyodo Senpaku Kaisha Ltd, had taken over 400 minke whales in the Australian Whale Sanctuary that had been declared off the coast of the AAT, throughout Australia’s exclusive economic zone (EEZ). The taking of whales in the sanctuary was contrary to the Environment Protection and Biodiversity Conservation Act 1999 (EPBC), which makes it an offence to kill or interfere with marine mammals.²⁹ The act extended to foreign fishing vessels and their crews. The Federal Court of Australia declared that whaling by the Japanese company was illegal and issued an injunction restraining it from further whaling in the area. The declaration of a whale sanctuary in the waters off the AAT is a legally consistent element of Australia’s sovereignty claim.³⁰ However, to enforce Australian legislation against a nonnational, in this case the Japanese company, is contrary to Article VIII of the Antarctic Treaty.

In the usual course of events, Australia would take action to enforce an injunction properly issued by the Federal Court of Australia. The Australian government chose not to do that, on the grounds that the act should not be enforced against foreign citizens unless they had submitted to the jurisdiction of the Australian courts.³¹ The Australian government thus avoided the deeply divisive consequences within the Antarctic Treaty System that were likely to have been sparked had the injunction been enforced. There is also the risk that the International Court of Justice or the International Tribunal for the Law of the Sea might gain jurisdiction over the dispute, in which case

Article IV would provide little protection for Australia's position at international law.

Although confrontation with Japan was avoided, the *Japanese Whaling* case exposes the vulnerability of the ATS where state parties threaten to take unilateral action to enforce their laws in and around Antarctica. The litigation also illustrates the embarrassing consequences for governments of giving procedural capacity to a private entity, e.g., the Humane Society International, to apply directly to a court to apply national legislation. Had Australia decided to enforce the injunction against the Japanese company, the weaknesses of Australia's international legal position in Antarctica would potentially have been open to international scrutiny. Enforcement against a nonnational would have exposed not only the difficulties in substantiating Australia's 42% claim under international law but also the questionable validity of its proclamation of a 200 nautical mile EEZ adjacent to its claimed territory.³² Apart from the complications arising from an assertion by Australia of maritime jurisdiction in Antarctica, the unilateral exercise of jurisdiction over a nonnational might prompt other Antarctic claimants to apply their legislation to foreign nationals. Although, for the most part, an Antarctic claimant state has every reason to avoid disputes over sovereignty and to act within the constraints of the Antarctic Treaty, there will be occasions when popular demand for the application of more stringent and enforceable national legislation, especially to protect the environment, seems attractive. For the Australian government to enforce a court injunction to prevent Japanese whaling in the Southern Ocean would have been popular, both within the national and international spheres. Where national environmental legislation is more stringent and effective than the measures and decisions of the ATS, the temptation to act outside the boundaries of the Antarctic Treaty may become increasingly attractive, although it also carries considerable risks.

TWENTY-FIRST CENTURY CHALLENGES TO THE ANTARCTIC TREATY SYSTEM

Successful though the ATS has been over its 50 year evolution, the twenty-first century poses some new, sensitive, and complex challenges to the authority of the regime.

COLLABORATION WITH OTHER INTERNATIONAL ORGANISATIONS

The *Japanese Whaling* case exposes the imperative that the ATS should interact collaboratively with other

international organisations that have interests in the Southern Ocean and Antarctica. The Antarctic Treaty itself does not deal with whales, the rationale being that the International Convention for the Regulation of Whaling (ICRW), established 10 years earlier in 1949, was the international institution specifically empowered to regulate whales. The International Whaling Commission has not, however, been able to take effective action against Japan for its "scientific whaling" in the Southern Ocean. This failure has arguably stimulated litigation by the Humane Society International to enforce national legislation, with all the attendant risks discussed above.

It may now be time to reconsider the traditional position taken within the ATS that it should not attempt to regulate whaling in the Southern Ocean. The Madrid Protocol is, for example, sufficiently widely drafted to include marine mammals. Article 2 provides that parties are committed to protect the "dependent and associated ecosystems" of the Antarctic.³³ Such language appears to include migratory whales. It is also relevant that the environmental principles of the protocol extend to activities in the Antarctic Treaty area, including whaling by ships. Article 3 of the protocol requires that all activities in the area are "planned and conducted so as to avoid . . . further jeopardy to endangered or threatened species."³⁴ It is not easy, however, to harmonise obligations under the protocol with other, apparently contrary, provisions within the ATS. Article VI of CCAMLR, for example, provides that the convention is not to "derogate from the rights and obligations . . . under the ICRW." Reports commissioned by the Paris, Sydney, and Canberra Working Groups on Whaling have attempted to resolve such treaty conflicts through traditional legal techniques of interpretation. These technical legal arguments are not entirely convincing in their efforts to harmonise international agreements that grew like Topsy to provide solutions to contemporary issues. The agreements within the ATS and other treaties with interests in the Southern Ocean are jostling for space with each other as activities there increase. Rationalisation and good faith collaboration are now required.

Beyond the specific issue of whaling in the Southern Ocean is the wider question of overlapping mandates under other international agreements and institutions with growing interests in Antarctica. The parties to the Madrid Protocol are obliged to "consult and cooperate" with parties to other international institutions.³⁵ Such bodies could include the UN International Seabed Authority, the International Maritime Organisation, the International Whaling Commission, the UN Continental

Shelf Commission, the UN Food and Agriculture Organisation, the World Health Organisation, the UN Environment Programme, the International Hydrographic Organisation, the Antarctic and Southern Ocean Coalition, the International Union for Conservation of Nature, the International Association of Antarctica Tour Operators, and regional fisheries organisations. All these bodies may be invited to ATCM and meetings of CCAMLR. There is evidence of some commendable collaboration emerging, including that among the East Antarctic coastal states (South Africa, France, New Zealand, and Australia) in response to unreported fishing of Patagonian tooth fish and the South Indian Ocean fishing arrangement. It is hoped that greater efforts to act through strategic alliances and to develop thematic regional cooperation will develop in the future.

ANTARCTIC CONTINENTAL SHELF DELIMITATION

For the claimant states, their Antarctic territory automatically brings with it sovereign rights to the resources of the continental shelf under the 1982 UN Law of the Sea Convention. The importance of the continental shelf lies in its significant oil resources. The U.S. Energy Information Administration reported in 2000 that the Weddell and Ross seas hold 50 billion barrels of oil, similar to Alaska's known reserves.³⁶ Before long, it might be expected that the UN Continental Shelf Commission will be asked to consider the limits of an Antarctic continental shelf claim. Any such request will, in turn, beg the question of the validity of the relevant claim to territorial sovereignty. A request for recognition of an Antarctic continental shelf will, moreover, pose yet another unanswered question of interpretation of Article IV, paragraph 2, prohibiting any "new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica." It is strongly arguable that delineation of the limits of the continental shelf is not a new "claim" for the purposes of Article IV, paragraph 2, because delineation is merely an assertion of sovereign rights that derive from the existing territorial claim. The commission is more likely to challenge the validity of the territorial claim itself, rather than the rights that arise from that claim. Although Australia has submitted the delimitation of its Antarctic continental shelf to the commission, it has asked that the commission refrain from making any ruling on the issue at present. In this way, the legal question of interpretation has been avoided for the time being. It might be observed, however, that not all states have adopted the Australian approach. New Zealand and the United Kingdom have, for example, relied on a more

"minimalist" approach by making a partial submission only, reserving their right to submit their delineations for an extended continental shelf at some time in the future, if they decide to do so.

THREATS TO SECURITY WITHIN THE ANTARCTIC REGION

As Antarctica and the Southern Ocean are vulnerable to increasing threats from terrorism and conflict, we may need to view the effectiveness of the ATS through the prism of wider concerns for security. There have been, for example, several maritime incidents that may be a harbinger of future threats to the Antarctic area. Whereas in the past it might validly be claimed that the Antarctic Treaty system was effective in confining the Falklands conflict to the sub-antarctic region, the terrorist attack on the *Rainbow Warrior* in New Zealand, the fire on the *Nissin Maru* of the Japanese fleet in February 2007, and recent activities by the Sea Shepherd Conservation Society in January 2008 in respect to Japanese whaling suggest that the region might well be a theatre of conflict in the future. Threats are also posed to human security within the Southern Ocean (though not yet within the region of Antarctica) by piracy and by rising numbers of asylum seekers, posing questions about the efficacy of search and rescue capacities.

It is, moreover, likely that global concerns for security from conflict will expand to wider concerns for energy, food, and the security of economic opportunities in the Antarctic. Tourism poses a risk to the environment and is also a human risk in the event of a serious shipping incident in which the many thousands of tourists on a single vessel are likely to strain rescue operations. Commercial risks to sustainable fishing are also likely in the future, with unreported fishing in the Southern Ocean of Patagonian tooth fish and southern bluefin tuna. Further, largely untapped, opportunities for commercial gain lie in clean water and bioprospecting. Resource security is thus a potential challenge to the current mining moratorium.

CONCLUSIONS

New thinking and initiatives are required to strengthen the system. The ATS is, fairly or otherwise, seen by many as insular and nontransparent, incapable of enforcing its measures, and slow to respond to contemporary threats. What are the solutions?

- It would be wise to make modest suggestions for reform that do not include significant legal change.

For example, the ATCM might adopt the model of CCAMLR by creating an Antarctic Treaty Commission with legal personality. Under such a structure, the chair of the ATCM might be granted power to act on behalf of the ATCM. It will be necessary to develop any such proposal by reference to its objects and purposes and powers to achieve them.

- Some form of independent performance review, similar to those adopted by CCAMLR and the Indian Ocean Tuna Commission, would add credibility to the governance of the ATS.
- Greater resources need to be devoted to the region to plan for and manage risks on a “be prepared” basis.
- The well-recognized lack of capacity to enforce measures agreed by the Consultative Parties against nonparty states may become a more significant impediment to governance. Increased efforts to encourage further accessions to the ATS by the international community should be made.
- The two-week annual meeting of the ATCPs seems, on its face, to be inadequate. Although it is recognized that the committees, such as the Scientific Committee, meet much more regularly and report to the ATCM, the need for more-active governance suggests additional resources will be necessary in the future.
- The reporting obligations of the Antarctic Treaty System are not met by most state parties, and basic functions such as monitoring and administration are only minimally carried out. These obligations need to be implemented and monitored.

One of the factors contributing to the success of the Antarctic Treaty has been that it created a “process, not just a piece of paper”.³⁷ This means that the treaty provides the means by which, in an organic way, the states parties could develop principles and procedures for Antarctic governance that would ensure its primary objectives while leaving intact their respective views on sovereignty.

The ATS provides a valuable model for the evolution of international regimes that avoids irresolvable sovereignty and boundary issues. As access to living and nonliving resources becomes a vital matter of national and global security over the coming years, the ATS provides an exemplar for the promotion of peaceful problem solving. The ATS also demonstrates how regions beyond national jurisdiction might be managed in the future according to identified common interests and values that are more comprehensive those of traditional national sovereignty.

NOTES

1. Senate Committee on Foreign Relations, ExB, 86th Cong., 2nd sess., 14 June 1960, 48.
2. Antarctic Treaty Consultative Meeting XXXII in Washington, D.C., 6 April 2009.
3. British Antarctic Survey, “Antarctic Treaty 50th Anniversary—2009,” http://www.antarctica.ac.uk/about_antarctica/geopolitical/treaty/anniversary.php (accessed 5 June 2009).
4. P. J. Beck, “The United Nations and Antarctica: The End of the Question of Antarctica?” *Polar Record* 217 (2006): 222–252.
5. The first call for Antarctica to be the “common heritage of mankind” was made in the UN General Assembly by Malaysia’s Prime Minister Mahatir in September 1982; UN General Assembly, 37th Sess., UN Doc. A/37/PV 10, 1982. In 1987 Greenpeace established the World Park Base in the Ross Dependency, claimed by New Zealand, to press its demand that Antarctica be declared a world park within which commercial exploitation and pollution should be prohibited and research limited.
6. Argentina’s claim to sovereignty was incremental in the sense that from 1904 it occupied islands such as the South Orkneys and South Shetlands.
7. The remaining unclaimed sector, about one fifth of the continent, is Marie Byrd Land, between the Chilean and New Zealand sectors; Russia, although making no formal claim, cites the explorations by Admiral Bellingshausen in the 1830s as giving it a priority interest in Antarctic affairs.
8. R. D. Hayton, “The Antarctic Settlement of 1959,” *American Journal of International Law* 54 (1960): 352; The Argentine and Chilean claims spring from their inheritance of Spanish title, which in turn, rests on the fifteenth century Treaty Of Tordesillas, which gave all lands to the west of the 46th meridian to Spain and all lands to the east to Portugal; Chile also relies on a grant in 1539 of all territories to the south of the Strait of Magellan; E. W. Hunter Christie, *The Antarctic Problem* (London: Allen & Unwin, 1949), 277; British sovereignty was founded in “effective occupation” from at least 1908.
9. ICJ Reports 1956, pp. 12, 15.
10. C. H. M. Waldock, “Disputed Sovereignty in the Falkland Islands Dependencies,” *British Yearbook of International Law* 25 (1948): 311–353; J. Hanessian “The Antarctic Treaty 1959,” *International and Comparative Law Quarterly* 9 (1960): 436.
11. *Washington Post*, “Antarctic Claims,” 2 January 1947; Hanessian, “Antarctic Treaty,” p. 436; Hayton, “Antarctic Settlement,” p. 350.
12. R. Bulkeley writes that individuals also played a role by advocating internationalisation, including T. W. Balch, an international lawyer, in 1910, with the support of the *New York Times*, and Herbert Brown a weather forecaster, “The Political Origins of the Antarctic Treaty,” in “Invited Reflections on the Antarctic Treaty,” *Polar Record* 46(1):9–11.
13. Hanessian, “Antarctic Treaty,” p. 444.
14. Hanessian, “Antarctic Treaty,” p. 441.
15. G. Triggs, *International Law and Australian Sovereignty in Antarctica* (Sydney: Legal Books, 1986), p. 277.
16. Hayton, “Antarctic Settlement.”
17. Triggs, *Australian Sovereignty*, p. 423; M. M. Whiteman, *Digest of International Law*, vol. 11 (Washington: U.S. Department of State, 1963–1973), p. 1238.
18. Hanessian, “Antarctic Treaty,” p. 455.

19. Hanessian, "Antarctic Treaty," p. 467.

20. Hayton, "Antarctic Settlement," p. 356.

21. J. M. Marcoux, "Natural Resource Jurisdiction on the Antarctic Continental Margin," *Virginia Journal of International Law* 11 (1971): 379.

22. Article III, CCAMLR.

23. Cited by D. K. Anton, "Australian Jurisdiction and Whales in Antarctica," *Asia Pacific Journal of Environmental Law* 11, nos. 3 & 4 (2008): 188.

24. The Convention on the Regulation of Antarctic Mineral Resource Activities has not been ratified by any state.

25. In force, 1998.

26. D. Rothwell, "Japanese Whaling in Antarctica," *Asia Pacific Journal of Environmental Law* 11, nos. 3 & 4 (2008): 142.

27. It is arguable that state practice now supports a customary rule that prohibits the exercise of jurisdiction against nonnationals for their acts or omissions in the treaty area, Anton, "Whales in Antarctica," p. 179.

28. *Humane Society International v. Kyoto Senpaku Kaisha Ltd (Japanese Whaling Case)*, [2004] FCA 1510; [2005] FCA 678; [2006] FCAFC 116; [2007] FCA 124; [2008] FCA 3 (granting injunction on declaration that there was a breach of Australian law); [2008] FCA 36 (leave for substituted service of orders).

29. Sec. 475 gives interested persons standing to seek orders restraining breaches of the act.

30. Australia claims a 12 nautical mile territorial sea off the AAT, a 200 nautical mile EEZ (the Antarctic EEZ is "excepted waters" in respect of the Australian Fisheries Zone and not subject to the Fisheries Management Act of 1991 [EPBC], sec. 3), and a juridical continental shelf of 200 nautical miles; Australia made its submission in 2004 to the UN Commission on the Limits of the Continental Shelf under Article 76 of The United Nations Convention on the Law of the Sea, but asked

that the commission should "not take any action for the time being with respect to the Antarctic area," 1 July 2008.

31. The attorney-general's submissions to the Federal Court of Australia suggested that restraint was required by international law, a view that is legally questionable, www.envlaw.com.au/whale7.pdf; the EPBC Act does not include any provision making the act subject to Australia's obligations under international law and gives an enforcement capacity to any interested persons under sec. 475.

32. Only four states, France, New Zealand, Norway, and the United Kingdom, accept Australia's territorial claim since 1933; more specifically, Japan has been consistent in refusing to recognize Australia's claim, including in 2006 when the Humane Society International attempted to serve Kyoto with the Federal Court of Australia injunction, [2008] FCA 3[20]; Australia is vulnerable to the argument that all the maritime claims (except with respect to the continental shelf claim made in 1953) are in breach of Article IV, paragraph 2, because they are new sovereign claims or extensions of claims; if so, Australia would have no jurisdiction over the activities of a nonnational in the waters of the Southern Ocean off the AAT.

33. The meaning of the phrase "dependent and associated ecosystems" is unclear and was adopted in the protocol to ensure that any major pollution incidents stemming from mineral exploration or exploitation would be covered in respect of the waters adjacent to Chile.

34. Article 3, paragraph 2(b)(v).

35. The protocol is, in any event, subservient to the Antarctic Treaty, and it is arguable that it does not regulate whaling activities in Antarctic Treaty area. The CCAMLR Commission, through its Scientific Committee, has the stronger claim to take action in respect to whaling, although it has thus far chose to tread carefully.

36. Cited by Anton, "Whales in Antarctica," p. 192.

37. British Antarctic Survey, "50th Anniversary."