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THE ANTARCTIC TREATY SYSTEM:

Legitimacy and Environmental Protection

**A thesis
submitted in full fulfilment
of the requirements for the degree of
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GAIL LESLEY BINGHAM**

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ABSTRACT

The purpose of this paper is to investigate whether the Antarctic Treaty System has the level of legitimacy necessary to ensure adequate protection for and conservation of the fragile Antarctic environment. This work will provide considerable new information in the field of legitimacy as it relates to the Antarctic Treaty System (ATS) as to my knowledge it is the first time an in-depth analysis of the subject has been made using materials from within the ATS.

To answer this question this thesis will begin with an investigation of the principle of legitimacy within international law. An overview of Antarctic exploration and exploitation, territorial sovereignty and the development of the ATS will follow this. This section will also contain a discussion on the issue of natural resource sovereignty, as it is this issue that is likely to develop as the major source of Antarctic conflict in the future. This introduction to Antarctic politics is intended to give the reader a complete picture of the political situation that currently exists in the region.

The final eight chapters will contain the substantive arguments of this paper. They consist of the application of legitimacy theory to various situations that exist within the ATS in order to establish whether these events have any adverse effects on the overall legitimacy of the ATS and therefore its ability to adequately protect and conserve the Antarctic environment. The majority of the information for these chapters has resulted from in-depth research of the meeting reports of the Antarctic Treaty Party Consultative and Special Consultative Meetings. Chapter Seven looks at the continued criticism that the ATS represents a 'closed and exclusive club of rich and powerful states. Chapter Eight investigates whether the apparent conflict between Article IX(2) of the Antarctic Treaty conflicts with the ATS's environmental protection role. Chapter Nine looks at the circumstances surrounding the establishment of the permanent secretariat. Chapter Ten investigates whether the

inability of the Parties to establish a liability annex to the Madrid Protocol has effected the legitimacy of the Protocol and by association the ATS. Chapter Eleven is an analysis of the effects that China's non-compliance with the provision of the Convention on the Conservation of Antarctic Marine Living Resources has on the legitimacy of the ATS. Chapter Twelve investigates whether the lack of jurisdiction over tourism in the Antarctic region has had any adverse effects on the legitimacy of the ATS. Chapter Thirteen is an overview of the status of recognition of the ATS within the United Nations.

At the conclusion of the analysis of international law and the meeting reports of the ATS contained in this thesis it became clear that despite the current problems that the ATS is experiencing the organisation does have the level of legitimacy necessary to protect the Antarctic environment. The Parties must be aware however that this legitimacy may not continue if they do not address these problem areas in a timely manner.

This work is dedicated to Antarctica

Humanities chance for environmental redemption

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This work has consumed one entire year of not only my life but of all those around me. To these people I owe a debt that can never be fully repaid and I thank them all collectively, as they are too numerous to name and they know who they are.

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Acronyms and Abbreviations

AAT	Australian Antarctic Territory
ASOC	Antarctic and Southern Ocean Coalition
ATCM	Antarctic Treaty Consultative Meeting
ATCP	Antarctic Treaty Consultative Party
ATP	Antarctic Treat Party
ATS	Antarctic Treaty System
ATS	Australian Treaty Series
BAS	British Antarctic Survey
BAT	British Antarctic Territory
CCAMLR	Convention for the Conservation of Antarctic Marine Living Resources
CCAS	Convention for the Conservation of Antarctic Seals
CEP	Committee for Environmental Protection
COMNAP	Council of Managers of National Antarctic Programs
CRAMRA	Convention on the Regulation of Antarctic Mineral Resources Activities
EIA	Environmental Impact Assessment
IAATO	International Association of Antarctic Tour Operators
ICSU	International Council of Scientific Unions
IGY	International Geophysical Year
ILM	International Law Materials
IUCN	World Conservation Union
IWC	International Whaling Commission

OAU	Organization of African Unity
PICJ	Permanent Court of International Justice
MARPOL	International Convention for the Prevention of Pollution from Ships
NAM	Non-Aligned Movement
NGO	Non-Governmental Organization
SCAR	Scientific Committee on Antarctic Research
UKTS	United Kingdom Treaty Series
UNEP	United Nations Environmental Programme
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
UST	United States Treaties and other International Agreements

INTRODUCTION

Imagine if you will a continent 7 million square kilometres in area with mountain ranges towering to 4,800 metres. Cover this land mass with a 14 million square kilometre expanse of ice and snow to a depth of 1.5 kilometres. Despite the harsh climatic conditions the ice sheet is sprinkled with over 400 different plant species, with some communities over five thousand years old. Along the coast of your imaginary continent envision the homes of 17 species of penguins and 35 species of seabirds totalling millions of individual animals. Around your continent add 20 million square kilometres of ocean. To this expanse of water add 75 million marine species such as plankton, krill, fish, seals, dolphins and whales. Now make your wonderland a pristine wilderness untouched by humanity.

But wait you don't have to dream your wonderland exists. It lies south of 60° South latitude and called Antarctica¹. In the real world that 1.5 kilometre thick ice sheet represents 100,000 years of accumulated snow and contains 90% of the world's ice and 68% of its fresh water. The only difference between Antarctica and your pristine wilderness is that humanity has discovered it and as you would like to visit your dream continent humanity has been streaming to visit the real thing. And as with all things that touched by humanity, their mere presence on this wondrous continent places its uniqueness in danger of destruction.

Antarctica is in danger because while humanity is racing to the continent to perform scientific research and unlock its hidden treasures there is no clear delineation as to whom if anyone is in control of this influx. For several decades the governance of the region has been guided by the Antarctic Treaty System (ATS) and they have done a remarkably good job of preserving the environment of the continent. However we are now in a new millennium and the dynamics of international co-operation and law

¹ For the purposes of this paper Antarctica is used as an over-arching generic term, which encompasses both the continental land mass, ice shelves and the Southern Ocean.

have changed. With this change in international dynamics it is necessary to ask the question: does the ATS have the level of legitimacy necessary to continue as the protector of the Antarctic environment? The answer to this question is one of major international importance because failure to preserve the Antarctic environment would be a tragedy of disastrous existential proportion.

It would not be a tragedy in the normal dramatic sense² but a ‘tragedy of the commons’. A ‘tragedy of the commons’ develops when common land is administered under a system of shared use that inevitably leads to over-exploitation. Under the common land paradigm each actor has the right to exploit the resources of the common area but nobody has the mandate or the incentive to control over-exploitation. The actors in this scenario are out to ensure the best possible outcome for themselves with no apparent regard for the effect their actions may have on the long-term sustainability of the resource.³ In 1968 when Hardin first wrote about the tragedy of the commons he concluded that our oceans at that time were suffering due to this paradigm because each maritime nation applied the philosophy of the ‘freedom of the seas’. “Professing to believe in the inexhaustible resources of the oceans”.⁴ Hardin also saw the American National Parks System as an example of this paradigm.⁵ Antarctica is another area that many feel is deserving of classification as a ‘commons’.

² The essence of dramatic tragedy is not unhappiness. It resides in the solemnity of the remorseless workings of things....This inevitableness of destiny can only be illustrated in terms of human life by incidents which in fact involve unhappiness. For it is only by them that the futility of escape can be made evident in the drama. Whitehead, *A Science and the Modern World* 17. As quoted in Hardin, G “The Tragedy of the Commons” (1968) 162 *Science* 1243, 1244.

³ Hardin, G “The Tragedy of the Commons” (1968) 162 *Science* 1243, 1244.

⁴ *Ibid*, 1245.

⁵ The parks he stated are open to all, without limit but the parks are not limitless. “Clearly we must cease to treat the parks as commons or they will be of no value to anyone”. *Ibid*.

Discovery

The identification of Antarctica as a candidate for a ‘commons’ classification is due largely to its unique history of discovery and exploration. Although the discovery and exploration of Antarctica are relatively modern events humanity has been intrigued with the existence of the great southern continent almost since the beginning of recorded history. The Greek philosopher Aristotle postulated its existence over 2,000 years ago.⁶ The presence of Antarktikos⁷ he reasoned would be necessary to balance out the large northern continents.⁸ There are also Polynesian legends that refer to a great white land to the south.⁹ European maps drafted in the Middle Ages portray Antarctica stretching southward below the equator. Ortelius, a 16th century cartographer, produced a world map that showed Terra Australis nondum cognita touching South America and meandering into the Pacific, Atlantic and Indian oceans and Australasia.¹⁰

In recognition of the accomplishments of his 1772-75 voyage Captain James Cook is acknowledged as the first modern Antarctic explorer. Although he was prevented from sighting the continent due to heavy pack ice he circumnavigated the continent and became the first European to cross the Antarctic Circle.¹¹ In 1819-21 the Russian Thaddeus Bellingshausen also circumnavigated the continent but like Cook he too failed to sight land.¹² In 1820 an American Nathaniel Palmer and Edward Bransfield from the United Kingdom both reported *sighting* the continent¹³, however it was not until 1821 that John Davis, another American, became the first person to make

⁶ Debenham, F *Antarctica: The Story of a Continent* (1959) 19.

⁷ Antarktikos means opposite the Bear and refers to Arktos (The Great Bear), the constellation of stars above the North Pole. Chester, J and Bangs, R “Discovery of Antarctica” (21.10.01) <<http://www.terraquest.com/va/history/ages/discovery.htm>>.

⁸ The Greeks knew about the Arctic and because in their world everything must be balanced, they reasoned that an Ant-arctic must exist. Debenham, supra n 6 at 19.

⁹ One such story tells of Ui-te-Rangiara a Raratongan traveller who “sailed south to a place of bitter cold where white rock-like forms grew out of the frozen sea”. Chester, supra n 7.

¹⁰ Liversidge, D *The Last Continent* (1958) 19.

¹¹ Brewster, B *Antarctica: Wilderness at Risk* (1982) 11.

¹² *Ibid.*

¹³ This latest wave of Antarctic explorers were drawn to the region by Cook’s reports of great seal stocks. *Ibid.*

landfall.¹⁴ As a result of these events Britain, the Soviet Union and the United States have each laid claim to the official discovery of Antarctica.¹⁵

1883 saw the start of a series of national expeditions to the Antarctic. The first to enter Antarctic waters was the American Lieutenant Charles Wilkes. At about the same time the French mounted an expedition led by Jules Dumont D'Urville. These were later followed by the two major British expeditions: the 1901 British expedition led by Robert Scott and another in 1909 which saw Ernest Shackleton journey to the Pole. Between 1900 and 1914 expeditions were made by Norway¹⁶, Sweden, Germany, Australia, France and Japan.¹⁷ The American Richard Byrd mounted the first of his expeditions in 1928. This was followed in 1940 by another British expedition led by James Clark Ross.¹⁸

In the mid 1940's activities on the continent began to take on a military flavour. Byrd's fourth journey to the ice in 1946 had a strong military purpose. Named 'Operation High Jump' it was seen both as a flag showing opportunity and a chance to conduct military manoeuvres in conditions not unlike those that would be faced in the Arctic region. The expedition consisted of twelve navy ships, including an aircraft carrier and nine planes. The expedition force consisted of 4,700 men of whom only 24 were scientists.¹⁹ Between 1943 and 1945 Britain had secretly established two bases on the Antarctic Peninsula, for primarily military purposes.²⁰

¹⁴ *Ibid.*

Quigg, *P A Pole Apart: The Emerging Issue of Antarctica* (1983) 12.

¹⁵ The issue of whom in fact was the first to discover the Antarctic continent is clouded by two factors. Firstly, the sighting of off shore islands did not count toward discovery of the continent, however because many of the islands were in fact linked to the continent by ice sheets it was in some instances centuries before the distinction could be made. Secondly because of the harsh conditions and long distances involved in Antarctic exploration records were sometimes lost. Therefore although these three parties lay claim to discovery it is in fact unclear which, if any, of them was first. Quigg, *Ibid* at 10.

¹⁶ Roald Amundsen raced Scott to the Pole in 1911. Brewster, *supra* n 11 at 13.

¹⁶ Quigg, *supra* n 14 at 12.

¹⁷ Brewster, *supra* n 11 at 13.

¹⁸ Quigg, *supra* n 14 at 12.

¹⁹ *Ibid.* 45.

²⁰ *Ibid.* 46.

This nebulous history of discovery and subsequent territorial claims has left the Antarctic subject to exploration and exploitation by numerous nations. Therefore the international community and specifically the Antarctic Treaty Parties should heed Hardin's warnings concerning the dangers of the commons as they debate the management of the Antarctica. The common land scenario as identified by Hardin in his 1968 article is one that could quite easily and rapidly develop south of 60° South latitude if humanity's intrusion into the Antarctic wilderness is not effectively managed. This concern has become more relevant in the modern era of Antarctic exploration because in the past humanity's presence in Antarctica has been kept in check by its geographic isolation and harsh conditions, however with advances in travel technology this situation is changing dramatically.²¹ This is reflected in the increase over the past decade in the number of scientists, support personnel²² and tourists²³ visiting the ice. *While international instruments do exist to protect the Antarctic environment it is my thesis that they may lack effectiveness due to underlying legitimacy issues.* While these issues have not yet invalidated the legitimacy of the ATS there is sufficient evidence to support the thesis that current problems that exist within the ATS may have developed beyond the point of acceptable glitches in procedure and reached the stage where they threaten the future legitimacy of the organisation.

²¹ It is now possible to fly to the ice by commercial aircraft. C-130 Hercules transports fly personnel in and out of the Antarctic on a regular basis. Once on the ice visitors can travel inland using a variety of modern transport; helicopters, caterpillar snow vehicles, skidoos, and motorised sledges. It is now also possible to enter the ice flows of the Southern Ocean in the winter months due the advent of ice strengthened expeditionary ships. COMNAP, "Antarctic Information" (21/10/01) <<http://www.comnap.aq>>.

²² According to a UNGA report in the 1989/1990 season there were between 9,500 and 10,000 scientific and support staff in Antarctica. 35% of these personnel were American. UNGA, "Report on Antarctica" (1/11/01) <<http://www.gndc.canterbury.ac.nz>>.

²³ In 1990 the Antarctic tourism industry took 4,800 passengers to the frozen continent. By 2000 this number had risen to 14,500, this represents more than a 150% growth in numbers in 10 years. ASOC, "Antarctic Tourism Information Paper" Tabled at ATCM XXIV July 2001. (13/08/01) <<http://www.asoc.org/eurentpress/IP40tourism.htm>>. IAATO, "Overview of Antarctic Tourism 2000" (5/4/01) <http://www.iaato.org/xxii_iaato_over2000.html>.

Antarctic Governance

The international instruments which currently constitute the system of governance for the Antarctic are those developed under the auspices of the 1959 Antarctic Treaty (the Treaty) and which are collectively known as the Antarctic Treaty System.²⁴ The Treaty as an international instrument is a communication of the express desire of the nations involved in Antarctic exploration that the region should be a place for the advancement of scientific knowledge and not a source of international conflict. The preamble to the Treaty states:

Recognising that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord;

Acknowledging the substantial contributions to scientific knowledge resulting from international cooperation in scientific investigation in Antarctica;

Convinced that the establishment of a firm foundation for the continuation and development of such cooperation on the basis of freedom of scientific investigation in Antarctica as applied during the International Geophysical Year accords with the interests of science and the progress of all mankind;

Convinced also that a treaty ensuring the use of Antarctica for peaceful purposes only and the continuance of international harmony in Antarctica will further the purposes and principles embodied in the Charter of the United Nations;²⁵

As a result the management system established under the Antarctic Treaty contained two priorities. Firstly, minimising the potential for international conflict. One of the consequences of this desire to avoid conflict was the development, and continuation, of an instrument whose primary role is to protect the political position, especially in relation to claims of sovereignty, of the original Treaty Parties. This role is clearly set out in Article IV(1) of the Treaty:

1. Nothing 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;

²⁴ The Antarctic Treaty System currently consists of: The Antarctic Treaty 1959 (ATS 1961 No. 12), Agreed Measures for the Conservation of Antarctic Fauna and Flora 1964, Convention for the Conservation of Antarctic Seals 1972 (ATS 1987 No 11.), Convention for the Conservation of Antarctic Marine Living Resources 1980 (ATS 1982 No 9.) and the Environmental Protocol to the Antarctic Treaty 1991 (ATS 1998 No. 5).

²⁵ Preamble, Antarctic Treaty 1959, Ibid.

- (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 the contracting Parties as regards its recognition or non-recognition of any other State's rights of or claim or basis of claim to territorial sovereignty in Antarctica.²⁶

The second priority of the management system was to ensure the freedom of scientific investigation. This role was established in Article II.

Freedom of scientific investigation in Antarctica and co-operation toward that end, as applied during the International Geophysical Year, shall continue, subject to the provisions of the present Treaty.²⁷

Environmental Protection

As a result of the Parties setting the preceding two priorities for the continent there was no reference to conservation in the original text of the Antarctic Treaty. The idea of conservation of the Antarctic environment and associated ecosystems was only introduced in 1964 with the adoption of the Agreed Measures for the Conservation of Antarctic Fauna and Flora. There were two subsequent instruments that dealt with specific resource issues²⁸ but until recently no overarching environmental instrument existed within the ATS.

Over the course of the last decade there has been a steady growth in the level of public awareness concerning to the importance of the Antarctic environment. This awareness has developed both in relation to its major contribution to the global environment and the intrinsic value of its pristine wilderness. This increase in public awareness has led to a fundamental shift in governmental attitudes toward the preservation and conservation of the Antarctic environment. In response to this change in international focus in 1991 the ATS adopted the Environmental Protocol to

²⁶ Ibid. Article IV(1).

²⁷ Ibid. Article II.

²⁸ The Convention on the Conservation of Antarctic Seals 1972 (ATS 1987 No. 11) and the Convention on the Conservation of Antarctic Living Marine Resources 1980 (ATS 1982 No.9). The International Convention for the Regulation of Whaling 1946 (161 UNTS 72), though not an ATS instruments, was then and remains the principle instrument for the protection of Antarctic whales.

the Antarctic Treaty (the Madrid Protocol) its first comprehensive Antarctic environmental instrument. The preamble to the Madrid Protocol clearly sets out the ATS's environmental agenda:

The States Parties to this Protocol to the Antarctic Treaty...

Convinced of the need to enhance the protection of the Antarctic environment and dependent and associated ecosystems...

Reaffirming the conservation principles of the Convention on the Conservation of Antarctic Marine Living Resources;

Convinced that the development of a comprehensive regime for the protection of the Antarctic environment and dependent and associated ecosystems is in the interests of all mankind as a whole;...²⁹

This comprehensive environmental regime currently consists of the original Madrid Protocol and five annexes.³⁰ To date the Protocol has been ratified by 41 of the ATS's 45 member countries.³¹ The preceding clauses and the level of ratification of the Protocol tends to indicate that, through the adoption of the Protocol, the ATS has adopted to a conservation paradigm. There are however other clauses that combined with the subsequent actions of the Treaty Parties³² raise questions concerning the commitment the Parties toward this new paradigm, as the Protocol is predicated upon the principle that:

Bearing in mind the special legal and political status of Antarctica and the special responsibility of the Antarctic Treaty Consultative Parties to ensure that all activities in Antarctica are consistent with the purposes and principles of the Antarctic treaty...

Acknowledging further the unique opportunities Antarctica offers for scientific monitoring of and research on processes of global as well as regional importance.³³

²⁹ Preamble, Environmental Protocol to the Antarctic Treaty 1991, *supra* n 24.

³⁰ Annex I: Environmental Impact Evaluations. Annex II: Conservation of Antarctic Fauna and Flora. Article III: Waste Disposal and Management. Article IV: Prevention of Marine Pollution. Article V: Area Protection and Management.

³¹ This number represents all 27 Consultative Parties and 14 Contracting Parties. Four Contracting Parties have yet to ratify the Protocol: Canada, Turkey, Venezuela and Estonia.

³² These actions will be discussed in length later in this paper.

³³ Preamble, Antarctic Treaty 1959, *supra* n 24.

Research Goals

The purpose of this paper is to investigate whether the ATS, due to this possible lack of commitment and other associated factors, has the level of legitimacy necessary to ensure adequate protection for and conservation of the fragile Antarctic environment.

In order to answer this question this thesis will address the following issues: Chapter One will contain a discussion on legitimacy and what is understood to be the meaning of the principle within international law. Chapter Two contains an overview of the history of the exploitation of Antarctic resources and the current instruments for environmental protection in the region. This chapter will establish why establishing the legitimacy of the ATS is a paramount necessity for the continued effectiveness of these instruments. Chapter Three contains an investigation of the territorial claims in the Antarctic region and their standing in international law. The status of the territorial claims is of importance to the issue of legitimacy because the claims are one of the underpinning principles of the Antarctic Treaty. While the questionable status of the claims may not remove the legitimacy of the ATS as a whole it does raise the threshold test somewhat. Chapter Four addresses the issue of sovereignty over natural resources. It is necessary to look at this issue in relation to Antarctica because while the Antarctic Treaty Parties claim that the Treaty has removed the potential for conflict in relation to sovereignty issues the current status of international law in relation to sovereignty over natural resources may have somewhat clouded the issue. Chapter Five is a brief overview of the development of the Antarctic Treaty System. This overview is necessary to give the reader a complete picture of the political situation that currently exists in the region. The final eight chapters will contain the substantive arguments of this paper. They consist of the application of legitimacy theory to various situations that exist within the ATS in order to establish whether these events have any adverse effects on the overall legitimacy of the ATS and therefore its ability to adequately protect and conserve the Antarctic environment. The majority of the information for these chapters has resulted from in-depth research of the meeting reports of the Antarctic Treaty Party

Consultative and Special Consultative Meetings. Chapter Seven looks at the continued criticism that the ATS represents a 'closed and exclusive club of rich and powerful states. Chapter Eight investigates whether the apparent conflict between Article IX(2) of the Antarctic Treaty conflicts with the ATS's environmental protection role. Chapter Nine assesses whether during the negotiations for the establishment of the permanent secretariat certain Parties violated accepted procedures thereby casting doubts of the continued legitimacy of the system. Chapter Ten investigates whether the inability of the Parties to establish a liability annex to the Madrid Protocol has effected the legitimacy of the Protocol and by association the ATS as a whole. Chapter Eleven is an analysis of the effects that China's non-compliance with the provision of the Convention on the Conservation of Antarctic Marine Living Resources has on the legitimacy of the ATS. Chapter Twelve investigates whether the lack of jurisdiction over tourism in the Antarctic region has had any adverse effects on the legitimacy of the ATS. Chapter Thirteen is an overview of the status of recognition of the ATS within the United Nations. This is important to the issue of legitimacy because the United Nations is generally considered a reflection of the international community as a whole, the recognition of which is necessary in order to ensure legitimacy. The conclusion will contain an overall assessment of the current legitimacy standing of the ATS within international law and therefore their ability to ensure environmental protection for the region.

CHAPTER ONE

LEGITIMACY AS A LEGAL CONSTRUCT

In opening this discussion let me first stress that legitimacy in no way equates with legality. An instrument can be legal without being legitimate. Legality is an organization's standing in international law while legitimacy is the degree of its acceptance by the actors involved. There is no doubt in my mind that the Antarctic Treaty System is legal under international law, my only intent is to question its legitimacy.

1.1 What is Legitimacy?

Obtaining a legal definition of legitimacy has proven to be a wholly unsatisfactory activity. Black's Law Dictionary defines legitimacy as "lawfulness"³⁴ with lawful being "not contrary to law"³⁵ this definition is of course totally inadequate for the present purposes. This inadequacy is related to the manner in which legal theorists look at legitimacy. To the legal theorist legitimacy is a question of power and "power is legitimate when its acquisition and exercise conform to established law. To them legitimacy is equivalent to legal validity."³⁶ Therefore in order to ascertain what is meant by legitimacy in the current context it is necessary to turn to common usage and political theory. Webster's New World Dictionary defines legitimacy as "the quality or state of being legitimate", legitimate in turn is defined as "conforming to or in accordance with established rules, standards or principles".³⁷

Legitimacy in the international context is an even more elusive creature. Martin Wight wrote in his 1972 essay *International Legitimacy* that "in none of the literature on diplomatic theory or international law is it easy to find a broad definition of the

³⁴ Garner, B (ed) *Black's Law Dictionary* (7th ed) (1999) 912.

³⁵ *Ibid.*, 892.

³⁶ Beetham, D *The Legitimation of Power* (1991) 4.

³⁷ Webster's New World Dictionary (2nd college edition) (1980) 807.

theory of legitimacy.”³⁸ Jorgensen-Dahl commented that in 1991 the situation had not changed much. “Legitimacy as applied to international society has remained a very insufficiently explored notion.”³⁹ The primary reason for the inadequate definition of legitimacy in international law is related to the fact that legitimacy was originally designed to convey an idea of constitutional law and it has subsequently been co-opted, unsuccessfully some would say,⁴⁰ into the international arena. Therefore in order to get a feel for the requirements of legitimacy it is necessary to explore the principle within the confines of constitutional law and then apply these domestic principles to the international arena.

1.2 Legitimacy in Constitutional Law

The overriding principle of constitutional law under a parliamentary system is the sovereignty of Parliament⁴¹ under the auspices of this doctrine any enactment of Parliament is the highest source of law.⁴² Therefore a law that is enacted by a constitutionally elected government is always legal, but is it always legitimate? Socrates believed this to be the case.

Anyone, and especially a clever rhetorician, will have a good deal to urge about the evil of setting aside the law which requires a sentence to be carried out; and we might reply, Yes; but the State has injured us and given an unjust sentence”. Suppose I say that?...And was that our agreement with you? The law would say; or were you to abide by the sentence of the State? And if I were to express astonishment at their saying this, the law would probably add: “Answer, Socrates...Tell us what complaint you have to make against us which justifies you in attempting to destroy us and the State.”⁴³

³⁸ As quoted in Jorgensen-Dahl, A “The Legitimacy of the ATS” in Jorgensen-Dahl, A and Ostreng, W (eds) *The Antarctic Treaty System in World Politics* (1991) 287.

³⁹ *Ibid.*

⁴⁰ Stokke, O “The Effectiveness and Legitimacy of International Regimes” in Stokke, O and Vidas, D (eds) *Governing the Antarctic: The Effectiveness and Legitimacy of the Antarctic Treaty System* (1996) 55.

⁴¹ The doctrine of the Sovereignty of Parliament holds that “Parliament enjoys unlimited and illimitable powers of legislation. Parliament’s word can be neither judicially invalidated nor controlled by earlier enactment; its collective will, duly expressed, is law.” Joseph, P *Constitutional and Administrative Law in New Zealand* (1993) 418.

⁴² “What a Statute itself enacts cannot be unlawful, because what the Statute says and provides is itself the law, and the highest form of law known in this country” *Fitzgerald v Muldoon* [1976] 2 NZRL 615, electronic version <<http://www.lexis.com>>.

⁴³ Plato, *Crito* (Harvard Classics Vol 2) 36.

Socrates clearly believed that if a law is passed by the State then it is both lawful and legitimate and as such it is the duty of all citizens to abide by it. However in making this statement he has failed to address the possibility that a law can be lawful without being legitimate. The following paragraphs will outline the different theoretical approaches to legitimacy in law in an attempt to ascertain what quality it is that makes a law not only legal but also legitimate.

1.3 The Legal Positivists and Legitimacy Theory

1.3.1 John Austin

John Austin discussed the theory of legal positivism in a series of lectures he gave in 1832. Legal positivists he claimed see the law as a simple matter of “political superiors” imposing a system of rules on “political inferiors”. “Laws set by men to men”.⁴⁴ “Superiority signifies might: the power of affecting others with evil or pain and of forcing them...to fashion their conduct to one’s wishes.”⁴⁵ Austin then explained that this superiority was present in the sovereign⁴⁶ and then described how the sovereign obtained this superior position.

If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.⁴⁷

Therefore, according to Austin, governments obtain the right to pass laws from a combination of their position of power and the habitual acceptance of the people. However there is a basic flaw when you try and apply Austin’s theory to legitimacy. The citizens over whom the government has control confer legitimacy on the law through acceptance. It is however difficult to see how acceptance by force could ever be deemed legitimate. Therefore, while Austin’s theory is a good starting point

⁴⁴ Austin, J “A Positivist Conception of Law” (1832) reprinted in Feinburg, J and Gross, H (eds) *Philosophy of Law* (5th ed) (1995) 31.

⁴⁵ *Ibid.*, 36

⁴⁶ The sovereign can be either an individual or a system of government.

⁴⁷ Austin, *supra* n 44 at 40.

because it is based on power and not consent it does not adequately explain the principle of legitimacy within the context of the law.

1.3.2 H.L.A. Hart

In the 1960's H.L.A. Hart added a more modern construct to Austin's basic theory because he believed that the idea of the sovereign ruling through coercive power failed to address some of the salient features of the modern legal system.⁴⁸ The main reasons for the failure of the theory says Hart are:

First...a criminal statute...commonly applies to those who enact it and not merely to others.
 Secondly, there are other varieties of law, notably those conferring legal powers to adjudicate or legislate (public powers) or to create or vary legal relations (private powers) which cannot, without absurdity, be construed as orders backed by threats.
 Thirdly, there are legal rules...[which] are not brought into being by anything analogous to explicit prescription.
 Finally, the analysis of law in terms of the sovereign, habitually obeyed and necessarily exempt from all legal limitation, failed to account for the continuity of legislative authority characteristic of a modern legal system, and the sovereign, person or persons could not be identified with either the electorate or the legislature of a modern state.⁴⁹

Hart believed that in order to understand a system as complex as a modern legal system it is necessary to differentiate between two different types of rules. Firstly there are primary rules. These rules are of the type that requires humans to do or to abstain from certain acts. Primary rules are mandatory and must be followed whether the individual wishes to or not. These primary rules are supported by secondary rules. Secondary rules allow humans to introduce new primary rules, modify and extinguish existing rules and to devise ways to ensure the implementation of the rules. To put it simply primary rules impose duties while secondary rules confer power. Application of the secondary rules leads to the establishment of structures such as legislatures and courts.⁵⁰

The application of these primary and secondary rules says Hart will remove the basic flaw in Austin's theory. The theory of law as coercive power is a good start he

⁴⁸ Hart, H.L.A. "A More Recent Positivist Conception of Law" in Hart, H.L.A. (ed) *The Concept of Law* (1961) reprinted in Feinburg, J and Gross, H (eds) *Philosophy of Law* (5th ed) (1995) 42.

⁴⁹ *Ibid*, 43.

believes but does not differentiate between obligation and duty. Power can create an obligation through fear of harm and will force compliance but it does not instil in the person a feeling of duty. In making this assumption I believe Hart has established one of the main differences between legal and legitimate. *A law is legitimate because individuals, whether persons or states, feel they have a duty to comply with it, not because they are forced to do so. This is a major factor when applying legitimacy within the field of international law, where no coercive force is present.*

1.4 Natural Law Theory and Legitimacy

Natural Law theorists see the law in the totally different light than the Positivists. They see the law as created by humanity for humanity. Natural law theorists define natural law as the way the law should be and refer to the principle that the law should represent the correct answer to a moral question.⁵¹ Following this principle of law and morality theorists have attempted to develop answers to the questions; where did natural law originate and what makes individuals comply with it? Upon reading the following theories it will become apparent to the reader that while the natural law theorists are fairly consistent as to the source of natural law they vary dramatically as to its application. Grotius considered the application of natural law to be a system of governance, while for Hobbes natural law was illustrated in the power governments exerted over the people. Rousseau on the other hand saw the application of natural law as an instrument of democracy. Like Hobbes it was about power but the power rested in the people. Therefore the issue of what is legitimate under natural law theory depends to a large extent on which theory is applied.

1.4.1 Hugo Grotius

While the concept of natural law was first postulated in Ancient Greece, Hugo Grotius is considered by many to be both the founder of modern natural law theory

⁵⁰ Ibid.

⁵¹ Dworkin, R "Natural Law Revisited" University of Florida Law Review (1982) reprinted in Feinburg, J and Gross, H (eds) *Philosophy of Law* (5th ed) (1995) 156.

and the father of international law. Grotius believed that Divine Law (natural law) was the source of all law and bound both states and individuals.

The Law to which we appeal is one such as no king ought to deny to his subjects... For it is a law derived from nature, to the common mother of us all.⁵²

The laws of nature bind nations, states Grotius, but for a slightly different reason from that which binds individuals.

The civil power is the sovereign power of the state. A state is a perfect body of free men, united together in order to enjoy common rights and advantages. The less extensive right, is not derived from the civil power itself, although subject to it, is various, comprehending the authority of parents over children, masters over servants and the like. But the law of nations is a more extensive right, deriving its authority from the consent of all, or at least of many nations.

It is proper to add many, because scarce any right can be found common to all nations, *except the law of nature, which itself too is generally called the law of nations.*⁵³ (my italics)

These divine laws or the laws of nature were given to man claims Grotius at three times in their history.

Now this law was given either to mankind in general, or to one particular people. We find three periods, at which it was given by God to the human race, the first of which was immediately after the creation of man, the second upon the restoration of mankind after the flood, and the third upon the glorious restoration through Jesus Christ. These three laws undoubtedly bind all men, as soon as they come to a sufficient knowledge of them.⁵⁴

Therefore the laws of nature, which come from God, mandate the conduct of both nations and individuals. The question that must then be asked is how do the laws of nature bind individuals and nations that don't believe in the Christian God? Grotius answers this which a clarifying point. The law of nature is eternal and everlasting and would exist even if God did not, therefore as God is just his rules would never conflict with the laws of nature, as a consequence the same laws can bind believers and non-believers alike.⁵⁵ That is once they have knowledge of their existence.

1.4.2 Thomas Hobbes

Hobbes as a proponent of natural law theory was greatly influenced by Grotius however he felt that while Grotius clearly established where laws originated his

⁵² Grotius, H *On Freedom of the Seas* (trans) Van Deman Magoffin, R (1916) 10.

⁵³ Grotius, H *On the Law of War and Peace* (trans) Campbell, A (2001) 13.

⁵⁴ Ibid.

⁵⁵ Ibid. 16.

theory did not fully establish why people followed them. In an attempt to answer this question in his 1651 work *Leviathan* Hobbes advanced the theory of the social contract. According to Hobbes man originally lived in a state of nature and the first law of this state was:

A law of nature, (*lex naturalis*) is a precept, or general rule, found out by reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved.⁵⁶

However the condition of man under this first law of nature was one of constant warfare. As a result of this constant warfare man desired peace so they developed the second law of nature:

[T]hat a man be willing, when others are so too, as far-forth, as for peace, and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other man, as he would allow other men against himself.⁵⁷

By accepting the second law of nature man transferred those rights necessary for peace and security to another person. This transfer constitutes a *contract* and acceptance of the contract can be either express or inferred.⁵⁸ Therefore according to Hobbes' theory governments have the legitimate right to pass laws because each person by their continued membership in society has given implied acceptance of the social contract.

1.4.3 Rousseau

In 1762 Rousseau advanced the belief that acceptance of the social contract did not transfer an individual's rights to the sovereign but rather made him a part of the sovereign:

Each of us puts his person and all his power in common under the supreme direction of the general will; and we as a body receive each member as an indivisible part of the whole. Immediately, this act of association produces, in place of the individual persons...a moral collective body, which is composed of as many members as there are votes in the assembly...As regards the associates they are collectively called the people, and are individual citizens as being participants in sovereign authority and subjects as being bound by the laws of the state.⁵⁹

⁵⁶ Hobbes, T *Leviathan* (World's Classics ed) (1996) 86.

⁵⁷ *Ibid.*, 87.

⁵⁸ *Ibid.*

⁵⁹ Rousseau, J *The Social Contract* (World's Classics ed) Betts, C (trans) (1994) 56.

Therefore laws are legitimate not only because the people have given consent to the government to enact them but because by the nature of the social contract each member of society is a part of the sovereign law making body. If this approach is applied to international law then by comparison a law would be legitimate for each member of the international community that is a part of the law making body. This definition is however still not fully satisfactory within the context of international law because it fails to address two issues. Firstly that of legitimacy within those bodies where the law making is done by a selected group of the membership⁶⁰ and secondly the issue of legitimacy in relation to Parties outside the organisation.

1.5 David Beetham

In 1991 David Beetham developed a theory of legitimacy which contains aspects of both positivism and naturalism. In it he stated that power is legitimate if it is exercised with consent and in accordance with the rules.⁶¹

Disputes about the legitimacy, or rightfulness, of power are not just disputes about what someone is legally entitled to have or to do; they also involve disagreements about whether the law itself is justifiable, and whether it conforms to a moral or political principle that are rationally defensible.⁶²

Legitimacy then according to Beetham concerns the moral or normative aspects of power relationships.⁶³ Power is legitimate if;

- a. it conforms to established rules
- b. the rules can be justified by reference to beliefs shared by the dominant and subordinate, and there is evidence of consent by the subordinate to the particular power relationship.⁶⁴

1.6 Legitimacy in International Law

While the afore mentioned principles of constitutional law have provided the foundations for the establishment of legitimacy in international law it has not merely

⁶⁰ Examples of such groups are the Security Council of the United Nations as well as the Consultative Group of the Antarctic Treaty System.

⁶¹ Beetham, *supra* n 32 at 4.

⁶² *Ibid.*, 4.

⁶³ *Ibid.*, 25.

been an exercise of transporting one to the other. This is because the entities that are the agents of international law while having individual sovereignty do not maintain “Parliamentary Sovereignty” in the international arena. Therefore there is no overarching mandate in international law that states a law is a law because it was legally enacted by a supreme authority.

1.6.1 Thomas Franck

Thomas Franck in attempting to adapt the constitutional law concept of legitimacy to international law developed the following and most widely accepted two-part definition of international legitimacy.⁶⁵ International legitimacy is primarily the “property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively”⁶⁶ and secondarily it is the perception “that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”⁶⁷

The principle concept in Franck’s definition is “normative”. Webster defines normative as “of or establishing a norm”. A “norm” is “a standard model or pattern for a group, a standard of conduct that should or must be followed”.⁶⁸ Therefore the legitimacy of an international regime can be defined as the persuasive force of its norms, procedures and rules. Or in other words a regime is legitimate when the various actors associated with the organisation accept specific rules because they recognise their normative basis and accept that they should be followed.⁶⁹ Alternatively if the actors involved do not accept the normative nature of the rules the organisation lacks legitimacy. The actors associated with the organisation in turn fall into two different categories those who form part of the organisation (internal actors)

⁶⁴ Ibid. 16.

⁶⁵ Stokke, *supra* n 36 at 22.

⁶⁶ Franck, T *The Power of Legitimacy Among Nations* (1990) 16.

⁶⁷ Ibid. 19.

⁶⁸ Webster. *supra* n 37 at 970.

⁶⁹ Stokke. *supra* n 40 at 23.

and those who are not part of the organisation but are associated with the activities of the organisation in some manner (external actors).⁷⁰

1.6.2 Olav Schram Stokke

The proceeding discussion on the various theories of legitimacy serve to show that there is no universally accepted understanding or application of the principle. The choice of what constitutes legitimacy is therefore based very much on individual philosophies. As such the selection of an analytical method for the assessment of the legitimacy of the ATS became a pragmatic issue. In this light I decided that the analytical method advanced by Stokke in 1996 would best suit the purposes of my thesis. However, in making this selection I am fully aware that this method may not suit the philosophical beliefs of all readers.

Stokke developed his method of assessment by building on the work of Beetham and Franck and applying it specifically to the international arena. For the purposes of the analysis of legitimacy within the construct of international organisations Stokke divided legitimacy into two broad categories, both of which must be complied with before a regime may be called legitimate.

Firstly the extent of the applicability of the rules of the regime. Applicability refers to the quality of the rules, roles and procedures that the regime sets up. Applicability can be further divided into two parts. Firstly an internal aspect which addresses the extent to which the rules and procedures address the problem for which the organisation was designed.⁷¹ Secondly an external component which requires that the “normative and structural components of a regime” comply with the major developments in the international community. This external component addresses the changing nature of legitimacy in that it requires that an organisation adapt to changing international norms in order to maintain its legitimacy.

⁷⁰ Ibid.

⁷¹ Stokke, *supra* n 40 at 23.

The second category deals with the level of acceptance of the organisation's rules. Stokke's second category also has internal and external components. The degree to which its members acknowledge, implement and adhere to the rules and procedures of the organisation is used to gauge internal acceptance.⁷² The strength and persistence of third party criticism is used to assess external acceptance.⁷³

In relation to the Antarctic the internal actors would be defined as the State Parties to the Antarctic Treaty and associated instruments developed under the auspices of the Treaty.⁷⁴ The external actors are those groups that are associated with the Antarctic Region in some manner but are not members of the ATS.⁷⁵

1.6.3 The Consequences of Acceptance and Applicability on International Legitimacy

As a result of the ability to have varying degrees of acceptance and applicability international legitimacy is not always an absolute. It is a continuum ranging from absolute acceptance to total rejection.⁷⁶ This continuum principle also means that legitimacy is not eternal, because an organisation was legitimate yesterday does not guarantee it will have legitimacy today and vice versa. This aspect is related to the fact that the nature of the problem or subject matter addressed by the organisation may change over time.⁷⁷ As such because part of an organisation's legitimacy is based on the ability of its rules and procedures to resolve the problems for which the organisation was designed if these rules and procedures fail to change with the organisation, the organisation loses legitimacy.⁷⁸

⁷² Ibid, 24.

⁷³ Ibid, 25.

⁷⁴ SCAR will also be classified as an internal actor, for reasons that will be discussed in detail later.

⁷⁵ The main categories in this group are non-party States, the United Nations and NGO's.

⁷⁶ Ibid.

⁷⁷ Rothchild, J "Political Legitimacy in Contemporary Europe" in Denitch, B (ed) *Legitimation of Regimes* (1979) 39.

⁷⁸ Beetham, *supra* n 36 at 208.

It also stands to reason that at some point on the continuum an organisation that faces a legitimacy issue must begin to lose some of its effectiveness. Because if the actors don't believe in the normative values been advanced by the organisation they are going to feel under no obligation to comply with them. This situation applies both to those actors within and outside the organisation.

1.7 Compliance and Legitimacy in International Law

Under international law it is not sufficient to merely establish that laws are legitimate. It is an accepted principle of international law that a sovereign nation has nearly absolute authority to deal with its internal and external affairs in any manner it pleases. As such under the doctrine of national sovereignty, even if the laws are legitimate sovereign nations are under no legal obligation to comply with them. This then raises the question why do sovereign nations obey international law?

It is generally acknowledged that nation-states accept international law because of consent.⁷⁹ It is however a different type of consent, unlike the individual who gives implied consent through his membership of society the consent of nations requires a formal acceptance process. However this process of formal acceptance is not absolute because even this voluntary acceptance is limited by the doctrine of national sovereignty. While the doctrine of national sovereignty has to a certain extent been eroded by a number of international instruments⁸⁰ to all intents and purposes it arguably remains the overarching doctrine of international affairs. Therefore a nation-state is under a moral duty but not a legal obligation to adhere to international

⁷⁹ Fawcett, J *The Law of Nations* (1968) 6.

⁸⁰ This issue by its very nature leads one into the controversy between universality and cultural relativism. However I have neither the time nor space to enter into this debate in the current context. Sufficient to say that the Western dominated political thought supports the contention that instruments such as the Human Rights Declaration and the Geneva War Crimes Conventions are universal in nature and apply to all nations without the need for their individual consent. Cultural relativists however believe the opposite and see such instruments as the imposition of Western culture on non-consenting nations. For further in-depth debate read: Mathew, P "Human Rights" in *Public International Law: An Australian Perspective*. (eds) Blay, S Piotrowicz, R and Tsamenyi, M (1997). Hannum, H "The Status of the Universal Declaration of Human Rights in National and International Law (1998/9) 12 Interights Bulletin. Ghai, Y "The Critics of the Universal Declaration" (1998/9) 12 Interights Bulletin.

instruments it has ratified and is under no obligation what so ever to comply with instruments it has not ratified. The issue of compliance with international law is complicated further by the fact that the international community, due to the doctrine of national sovereignty, ultimately cannot force compliance⁸¹ even when a nation has given their consent to be bound by an instrument. As such if a sovereign nation does not feel any given rule of international law is legitimate then they are under no legal obligation to comply with it and are not likely to feel a moral obligation to do so.

All this places the Antarctic continent in a unique position in international law. With no clear sovereign authority its governance is subject to the consent principle of international organisations. However international law appears unable to adequately define the extent of this consent and who must give consent for what and which Parties have which rights in the region. As such the legitimacy of any system of Antarctic governance would at best be clouded. Therefore any organisation that professed to be the legitimate organ of governance for the region would need to be particularly diligent in ensuring that their claims have the support of the international community.

⁸¹ The exception to this situation is limited military actions under the auspices of the UN Security Council.

CHAPTER TWO

THE HUMAN PRESENCE IN ANTARCTICA: A CHRONOLOGY OF OVER-EXPLOITATION FOLLOWED BY CONSERVATION

The historic relationship of humanity with the marine living resources of Antarctica has followed an established and disturbing pattern of discovery, over-exploitation, moving on to the next resource, followed by belated attempts to conserve what has already been destroyed. Today it is recognised that the fragile Antarctic environment cannot tolerate this level of abuse and if the region is to be preserved for future generations then the legacy of over-exploitation must be reversed. This realisation has led to the emergence of a new environmental ethos, which has resulted in the development of environmental instruments to protect the Antarctic environment from further harm. However while these instruments should in theory be adequate to ensure environmental protection they can only maintain their effectiveness as long as the organisations propounding them have international legitimacy.

2.1 Convention on the Conservation of Antarctic Seals

Fur seals became the first Antarctic victims of over exploitation in the late 1800's. Due to extensive over-exploitation of the resource the population of Antarctic fur seals, in some locations, had been virtually eliminated by the end of the 1820's⁸², at which point the sealers moved on to the harvest of elephant seals for oil.⁸³ Within 10 years they had reduced the elephant seal population by 70%.⁸⁴ The commercial sealing industry although not maintaining the unsustainable annual harvests of the 1820s and 30s did not end in Antarctic waters until 1964.⁸⁵

⁸² In 1920 alone 91 ship harvested 1.2 million seals. Hanson, J and Gordon, J *Antarctic Environments and Resources: A Geographical Perspective* (1998) 198.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, 199.

⁸⁵ Sealing ceased at this time because it was no longer commercially viable. *Ibid.*

In response to this history of over exploitation the Antarctic Treaty Consultative Parties (ATCPs) in 1972 adopted the Convention for the Conservation of Antarctic Seals. The purpose of the Convention was to protect the Antarctic seal population from further exploitation.

Recognizing the general concern about the vulnerability of Antarctic seals to commercial exploitation and the consequent need for effective conservation measures...

Recognizing that the stocks of Antarctic seals are an important living resource in the marine environment which requires an international agreement for its effective conservation;...

Recognizing that this resource should not be depleted by over-exploitation, and hence that any harvesting should be regulated so as not to exceed the levels of the optimum sustainable yield;...

Desiring 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....⁸⁶

At the time of the drafting of the Seal Convention the Antarctic seals were not in any immediate danger of commercial exploitation. The Convention was in fact created to prevent future over-exploitation should there be a return of commercial sealing to the Antarctic. Therefore it is both proactive and reactive in nature. Subsequent events indicate that the ATCPs may indeed be justified in their concerns over the return of commercial harvesting to the Antarctic. In 1987 the Russians announced that in accordance with their rights under Article IV of the Convention⁸⁷, they had culled 5,000 seals from Antarctic waters, "to clarify possible ways of utilising Antarctic seals for the needs of the national economy."⁸⁸ More recent events could have repercussions not only for Antarctic seals but also for seals world-wide. Over the

⁸⁶ Convention for the Conservation of Antarctic Seals, Preamble.

⁸⁷ Convention on the Conservation of Antarctic Seals, 1972. Article IV.

1. Notwithstanding the provisions of this Convention, any Contracting Party may issue permits to kill or capture seals in limited quantities and in conformity with the objectives and principles of this Convention for the following purposes.

(a) to provide indispensable food for men or dogs;
 (b) to provide for scientific research; or
 (c) to provide specimens for museums, educational or cultural institutions.

2. Each Contracting Party shall, as soon as possible, inform the other Contracting Parties and SCAR of the purpose and the content of all permits issued under paragraph (1) of the Article and subsequently of the numbers killed or captured under these permits.

⁸⁸ Environmental Defence. "Soviets Confirm Start of Commercial Seal Harvest" (1987) Newsletter Vol XVIII, No 5 (10/10/01)

<http://www.environmentaldefense.org/pubs/EDF-Letter/1987/Nov/d_seals.html>.

past few years there has been a marked increase in both the price of and demand for sealskins on the Canadian market.⁸⁹ In 2001 the annual North American Fur and Fashion Exposition displayed a collection of seal skin garments. As a result of the success of the collection there is talk of the establishment of a seal tannery in order to make the product more available to the market.⁹⁰

It is possible that these events, while appearing to be isolated and insignificant, may be signalling a resurgence in the commercial viability of sealing operations and if this is so the Convention for the Conservation of Antarctic Seals may soon be facing its first big test. Therefore the question of legitimacy becomes one of major importance. The Sealing Convention operates under the auspices of the ATS. As such if the ATS lacks legitimacy then it is unlikely that the Convention, even in the face of the return of the seal populations to their pre-exploitation levels⁹¹, can maintain its effectiveness and adequately protect the Antarctic seals in the event of a resurgence of commercial activity.

2.2 The International Whaling Convention and The Convention on the Conservation of Antarctic Living Marine Resources⁹²

It is one of Antarctic science's ironies that one of the major factors in the return of seal numbers to their pre-exploitation numbers has been the increase in the availability of their primary food source, krill, due to the reduction in the number of whales.⁹³

⁸⁹ Northern News Service. "Seal Market Comeback" (August 2001) <<http://www.nnsi.com>>.

⁹⁰ Ibid.

⁹¹ Hanson, *supra* n 82 at 209.

⁹² Some readers may be questioning what relevance the legitimacy of CCAMLR has on the legitimacy of the ATS. While it is acknowledged that CCAMLR is a free-standing Convention with its own Commission and Secretariat, these two groups have a high degree of interaction and their decision-making groups are essentially identical. As such the evidence supports the contention that the legitimacy, or lack thereof, of one of these entities directly reflects on the other. For an in-depth analysis of this issue see Chapter Eleven *infra* at 103.

⁹³ Ibid.

The exploitation of Antarctic whales began in 1904 with the establishment of a shore based whaling station on South Georgia Island. One whaling boat operated from this station and in that year harvested 195 whales. By 1912 the region was home to six shore stations, 21 floating factories and 62 whale catchers who were responsible for the harvesting of 10,670 whales.⁹⁴ The British Colonial Office controlled these shore-based operations through the issuing of licenses.⁹⁵ However by 1925 technology had developed to the point where the factory ships could follow the whalers into the open sea where the British had no authority to pass regulations and by 1930 41 factory ships and 232 catchers were working the Ross Sea area. The combined catch for the year was 40,000 whales.⁹⁶ Whaling declined during WWII but soon returned to pre-war levels because of the high demand for whale oil. This is despite the fact that there had been no recovery in the whales stocks. As a result by 1961 the blue and fin whale stocks had collapsed and the whalers moved on to the smaller sei and minke whales.⁹⁷

The over-exploitation of the Antarctic whales, and indeed whales world-wide, was of concern to many in the international community and several attempts had been made during this period to prevent further exploitation beyond sustainable levels. In 1931 the international community negotiated the Convention for the Regulation of Whaling (the Whaling Convention) in order to protect the Right Whales. Article 4 of the Convention clearly prohibits the harvesting of these whales:

The taking or killing of right whales, which shall be deemed to include North-Cape whales, Greenland whales, southern right whales, Pacific right whales and southern pygmy whales is prohibited.⁹⁸

In 1937 a new agreement extended this protection to grey whales and placed certain prohibitions on the harvesting of other species.

⁹⁴ Ibid, 202.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid, 204.

⁹⁸ Convention for the Regulation of Whaling 1931, Article 4.

Article 5 includes a restriction of the taking of calves, immature whales and mothers with calves. Article 9 declares the limits of the Convention to be all the waters of the world, including the high seas, territorial and national waters. Article 3 carries an exception for aboriginal whaling.

Article 4

It is forbidden to take or kill Grey Whales and/or Right Whales.

Article 5

It is forbidden to take or kill any Blue, Fin, Humpback or Sperm whales below the following lengths, viz. :

- (a) Blue whales 70 feet,
- (b) Fin whales 55 feet,
- (c) Humpback whales 35 feet,
- (d) Sperm whales 30 feet.⁹⁹

Article 7 of this agreement placed a restriction on the length of the whaling season, for baleen whales¹⁰⁰, in Antarctic waters;

It is forbidden to use a factory ship or a whale catcher attached thereto for the purpose of taking or treating baleen whales in any waters south of 40° South Latitude, except during the period from the 8th day of December to the 7th day of March following, both days inclusive, provided that in the whaling season 1937-38 the period shall extend to the 15th day of March, 1938, inclusive.¹⁰¹

The current international body for the regulation of whaling is the International Whaling Commission (IWC), which was established under the authority of Article 3 of the Whaling Convention. In 1982 the Commission made a decision that came into effect in 1985 which introduced a zero catch quota for all commercial harvesting;

Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision.¹⁰²

This action was followed in 1994 by the addition of Article 7(b) to the Whaling Convention, which created the Southern Ocean Sanctuary and prohibited commercial whaling in the region.

In accordance with Article V(1)(c) of the Convention, commercial whaling, whether by pelagic operations¹⁰³ or from land based stations, is prohibited in a region designated as the

⁹⁹ International Agreement for the Regulation of Whaling, 1937. Australian Treaty Series 1946 No 11. (4/11/01) <www.austlii.edu.au/au/other/dfat/treaties/1946/11.html>.

¹⁰⁰ Baleen whales are defined in Article 18 of the agreement as being all whales, which are not toothed whales.

¹⁰¹ International Agreement on the Regulation of Whaling 1937, Article 7..

¹⁰² Article 10(e) of the Schedule to the International Convention for the Regulation of Whaling, 1946 as modified by the 1982 meeting of the Commission.

(6/8/01) <<http://ourworld.compuserve.com/homepages/iwcoffice/Schedule.htm>>.

¹⁰³ Pelagic whaling is that done on the open sea through the use of factory ships.

Southern Ocean Sanctuary. This Sanctuary comprises the waters of the Southern Hemisphere southwards of the following line: starting from 40 degrees S, 50 degrees W; thence due east to 20 degrees E; thence due south to 55 degrees S; thence due east to 130 degrees E; thence due north to 40 degrees S; thence due east to 130 degrees W; thence due south to 60 degrees S; thence due east to 50 degrees W; thence due north to point of beginning. This prohibition applies irrespective of the conservation status of baleen and toothed whale stocks in this Sanctuary, as may from time to time be determined by the Commission. *Nothing in this subparagraph is intended to prejudice the special legal and political status of Antarctica.*¹⁰⁴ (my italics)

Article 56 of the 1982 United Nations Law of the Seas Convention states:

1. In the exclusive economic zone, the coastal State has:
 - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone...¹⁰⁵

Although the extent of the Exclusive Economic Zone (EEZ) has not been defined in any international instrument review of national legislation indicates that it is customary for this area to be set at the 200 mile limit.¹⁰⁶ This has led to the development of a unique situation in the Antarctic whereby certain of the Claimant States have enacted national legislation establishing a 200 mile EEZ in relation to their Antarctic claims but have chosen not to enforce them preferring instead to apply the collective measures of the ATS.¹⁰⁷ The application of these ATS instruments is however voluntary and under international law the Claimant States would be fully entitled to exercise their exclusive rights to the resources of this zone. As such the political rights of the Claimant States recognised by the IWC in Article 7(b) includes the right of access to the marine resources.

Article 1 of the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) states;

This Convention applies to the Antarctic marine living resources of the area south of 60 degrees south latitude and to the Antarctic marine living resources of the area between that latitude and the Antarctic convergence which form part of the Antarctic marine ecosystem.

¹⁰⁴ Ibid. Article 7(b) of the Schedule to the International Convention for the Regulation of Whaling, 1946 as modified by the Commission in 1994.

¹⁰⁵ Article 56 1982 United Nations Law of Sea convention, ATS 1994 No 31.

¹⁰⁶ Orrego Vicuna, F *The Exclusive Economic Zone* (1989) 245.

¹⁰⁷ Ibid. 178.

However Article VI clearly states that on the issue of whales CCAMLR defers to the IWC.

Nothing in this Convention shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling and the Convention for the Conservation of Antarctic Seals.

These two articles in essence create a circular situation with each organisation deferring to the authority of the other. As such if the ATS loses its legitimacy then it cannot grant to the IWC the right to exercise control over the Antarctic whales. Likewise if the ATS were to lose its legitimacy the Claimant States would likely opt to exercise their EEZ rights under UNCLOS. If this occurred there is currently no international instrument that could prevent them from exploiting the Antarctic Whales. Therefore the legitimacy of the ATS is essential for the continued conservation of the whales.

2.3 The Convention for the Conservation of Antarctic Marine Living Resources and the Fishing Industry

The harvesting of Antarctic finfish¹⁰⁸ species began in the 1969/70 season and the activity rapidly reached unsustainable levels. Reported catches of marbled rockcod peaked at 399,700 tonnes in 1969/70 then declined to 101,506 tonnes in 1970/71 and 2,740 in 1971/72 as the fishery collapsed due to over-fishing.¹⁰⁹ Mackerel icefish were also exposed to intensive fishing during this period with peak annual catches of 71,260-146,450 tonnes in the early 1970s however these catches dropped in the mid 1980s. It has been theorised that the drop in catch was due to localised depletion of stocks.¹¹⁰ As a result of these and other associated instances of unsustainable harvesting it is estimated that 12 of the 13 commercial species in the region can currently be classified as depleted.¹¹¹

¹⁰⁸ Finfish is a term used to separate true fish from shellfish, crayfish, jellyfish etc. Fishbase. "Fish Base Glossary" (15/8/01) <<http://www.fishbase.org>>.

¹⁰⁹ CCAMLR Scientific Committee. "Fisheries Monitoring" (12/10/99) <http://www.ccamlr.org?English/e_sci_cttee/e_fish_moint/e_fish_monit_intro.htm>.

¹¹⁰ Ibid. .

¹¹¹ Hanson, supra n 76 at 211.

With the depletion of the finfish stocks the fishing industry turned its attention to krill. Krill, which consists of 49% protein, is the major source of energy in the Antarctic marine food chain. With a nutritional value that is slightly less than whole egg protein but higher than milk protein krill has been viewed as a potential protein source for the developing world.¹¹² Given this simple nutritional fact it is easy to see why the potential for the over-exploitation of this resource is so high. It is of major importance that krill in the region are not over-exploited because as a keystone species at the bottom of the Antarctic food chain any significant reduction in its biomass could have dramatic repercussions for the entire Antarctic marine ecosystem.¹¹³

The commercial harvesting of Krill began in 1972 with annual catches exceeding 300,000 tonnes, the peak reported catch was 425,870 tonnes in 1985/86. Following the 1992 season the annual reported catches have dropped to between 80,000 and 100,000 tonnes,¹¹⁴ but even with these reduced catches krill fishing is the principle economic activity in the Southern Ocean.¹¹⁵

In the late 1970's the history of over-exploitation of Antarctic marine resources (seals, whales and finfish) combined with concerns about the harvesting of krill inspired the Antarctic Treaty Consultative Parties (ATCP) to commence negotiations which resulted in the Convention on the Conservation of Antarctic Marine Living Resources 1980 (CCAMLR).¹¹⁶ While at its conception the main concern of the parties was the effects of the over-exploitation of krill on the Antarctic marine

¹¹² *Ibid.*, 216.

¹¹³ *Ibid.*, 217.

¹¹⁴ The decline in catches has been attributed to economic factors rather than decline in the fishery. Among these were; a shift from krill to finfish and the break-up of the Soviet Union which was the dominate party in the fishery. CCAMLR, "Fisheries" (21/10.99)

<http://www.ccamlr.org/English/e_sci_cttee/e_fish_monit/e_harvested_species_intro.htm>.

¹¹⁵ CCAMLR, CCAMLR Newsletter No 22, Jan 2001 (13/2/01)

<http://www.ccamlr.org/English/e_nltr/e_nltr22_p1.htm>.

¹¹⁶ CCAMLR, "Management of the Antarctic" (8/11/01) <<http://www.ccamlar.org>>.

ecosystem the Convention has effectively established control over all Antarctic fisheries.

1. The objective of this convention is the conservation of Antarctic marine living resources.
2. For the purposes of the Convention, the term "conservation" includes rational use.
3. Any harvesting and associated activities in the area to which this Convention applies shall be conducted in accordance with the provisions of the Convention and with the following principles of conservation:
 - (a) prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment...
 - (b) maintenance of ecological relationships between harvested, dependent and related populations of Antarctic marine living resources and restoration of depleted populations to the levels defined in sub-paragraph (a) above; and,
 - (c) prevention of changes or minimisation of the risk of changes in the marine ecosystem which are not potentially reversible over two or three decades....¹¹⁷

Since its establishment, under Article 7 of the Convention, the CCAMLR Commission has adopted numerous conservation measures¹¹⁸ in order to prevent further over-exploitation of Antarctic finfish. While I believe that many of these conservation measures have been very effective in the battle against over-exploitation the Commission nevertheless has its critics.¹¹⁹ The most common complaints revolve around the issue of illegal fishing in the Southern Ocean¹²⁰. Illegal fishing has been identified by the Commission as the most significant issue currently facing the Convention Parties¹²¹ however critics such as Greenpeace claim that the Commission is only paying lip service to the problem and continues to buckle to the economic pressure placed on them by the fishing industry.¹²² Also researchers outside the ATS have raised doubts about the quota system established by the Commission. They

¹¹⁷ Convention on the Conservation of Antarctic Marine Living Resources 1980, Article II.

¹¹⁸ These include the establishment of quotas for the various fisheries and the regulation of marketing through the catch documentation scheme. CCAMLR, "Conservation Measures" (8/11/01) <<http://www.ccamlr.org>>.

¹¹⁹ Fifteen countries participated in the CCAMLR fisheries program in the 1998/99 season. The main species controlled by CCAMLR programs in that year were: krill (*Euphausia superba*), Patagonian toothfish (*Dissostichus eleginoides*), Antarctic toothfish (*Dissostichus mawsoni*) and mackerel icefish (*Champsocephalus gunnari*). In-depth detail concerning the effectiveness of the conservation measure can be accessed on the CCAMLR website. <www.ccamlr.org>.

¹²⁰ The issue of illegal fishing and its effects on the legitimacy of the ATS will be discussed in depth in chapter eleven.

¹²¹ CCAMLR, supra n 108.

believe that due to slow growth rates, late achievement of sexual maturity and low reproduction the Antarctic finfish cannot survive the high level of harvest allowed by the Commission quotas.¹²³

The Commission has also adopted conservation measures for two Antarctic krill fisheries.¹²⁴ The measures establish a total catch for the two areas of 1.95 million tonnes for the 98/99 and 99/2000 seasons. These figures allow a catch that is currently considerably higher than the actual catches for the respective seasons.¹²⁵ While the Commission is attempting through these measures to establish a sustainable harvesting regime there appears to be an anomaly in their current approach. In 2000 the Commission scientists conducted extensive research on the extent and nature of the krill stocks. This program collected a large volume of data on the krill stocks, which the Commission reported would take years to fully analyse.

In January and February 2000, vessels...took part in the CCAMLR-2000 Krill Survey in the Southwest Atlantic (Area 48)...The survey has yielded a substantial amount of complex data. *Analysis will take many years and will result in a significant increase in the knowledge of krill distribution ...Already work carried out...has enable the Commission to set more accurate limits for krill fishing in 2001.*¹²⁶ (my italics)

Following the publishing of this report the Commission increased the krill quotas for the 2000/01 season.¹²⁷ This action raises questions as to the management policies of the Commission. They had already reported that they had a large amount of data on the krill stocks yet to be fully analysed. The total catch of krill for the previous two seasons had been well below the set quota. Therefore in the absence of any apparent pressure to increase quotas it is difficult for the casual observer to understand why the

¹²² Greenpeace, "Business as Usual for CCAMLR as Antarctic's Fish and Wildlife Hang in the Balance" (3 Nov 2000) <Greenpeace.org/oceans.html>.

¹²³ Hanson, supra n 76 at 211.

¹²⁴ Conservation measure 32, which covers area 48 and conservation measure 45, which covers area 58.4.2. CCAMLR "Conservation measures" (7/11/01) <http://www.ccamlr.org/english/e_pubs/e_measures/e_cm98_99/e_cm98_99p3.htm>.

¹²⁵ The reported catches for the seasons were 103,318 for 1998/99 and 101,286 for 1999/2000. CCAMLR "Newsletter" No 21 Dec 1999 and No 22 Jan 2001 (13/2/01) supra n 105.

¹²⁶ Ibid.

¹²⁷ The catch for the 2000/01 season was increased from 1.95 to 4.45 million tonnes. CCAMLR, "Newsletter" 22 Jan 2001, supra n 105.

Commission did not leave the quotas unchanged until all the information had been analysed. Anomalies such as this are not sufficient in themselves to threaten the legitimacy of the Commission. However, if such anomalies continue to occur they could result in the development of concerns among the external actors as to the continued ability of the Commission to adequately prevent the over-exploitation Antarctic marine resources.

While it is difficult at this point to assess whether the criticisms of the Commission's efforts are justified, for our purposes it does not matter. Because the conservation measures established by the Commission are voluntary in nature the Commission must be seen to be legitimate before it can adequately protect the Antarctic fisheries. The legitimacy of the Commission is particularly vital in relation to the krill fishery because what exists here is a unique situation in the history of Antarctic resource exploitation; a chance to establish a sustainable fishing regime prior to over-exploitation.

2.4 Conclusion

It is clear from the above discussion that the legitimacy or lack thereof of the ATS and its associated organisations has definite ramifications for environmental protection in the Antarctic. This is because the environmental protection mechanisms in place in the region, as with all international instruments, rely on voluntary compliance. Therefore if the ATS as the initiator of these instruments lacks legitimacy the countries involved in the Antarctic are not likely to feel obligated to comply with them. This would normally only be of nominal concern because one would assume that if one group of international conventions failed to offer the required protection that another would expand to fill the void, however in relation to the Antarctic this may not be the case. It would appear that these instruments may have expressly or implicitly waived jurisdiction over the Antarctic region. We have already discussed this paradigm in relation to the IWC, however it has been suggested that the United

Nations Convention on the Law of the Sea (UNCLOS) has also implicitly waived its jurisdiction over the region in favour of the ATS.

According to some authors, the Convention of 1982 is deprived of all effect with respect to the South Pole, any reference to the Antarctic having been carefully avoided in the preparatory work owing to the divergence of opinion on this question.¹²⁸

It must be acknowledged at this point that the international law situation as it relates to Antarctica's environmental protection instruments is no different from the problems faced by the rest of the international legal community. That is the doctrine of national sovereignty and the need for formal consent compounded by an inability to enforce. However the situation in the Antarctic is somewhat different from that which exists in the rest of the world. Antarctica is the last great wilderness the majority of which remains untouched by humanity. The majority of international instruments are dealing with the existing problems of humanity and as such they have a certain leeway in regards to getting it right. In Antarctica however, we have a unique situation where if humanity gets it right the first time they can prevent harm from occurring. Although it would be an optimum situation to have the current problems solved for the entire international law arena it is critical that the imperfections be corrected in relation to the Antarctic. With this in mind the legitimacy of the ATS becomes an issue of paramount importance because the ATS cannot hope to overcome the problems that exist in the international legal system unless it maintains an optimum level of legitimacy. In Antarctica the legal community has an opportunity to demonstrate to the world that international law can work. To lose such a great opportunity would be a tremendous loss for international law, but if this opportunity were lost due to lack of legitimacy it would be a tragedy for Antarctica.

¹²⁸ Gautier, P "The Maritime Area of the Antarctic and the New Law of the Sea" in *The Antarctic Environment and International Law* Verhoeven, J Sands, P and Bruce, M (eds) (1992) 133.

CHAPTER THREE

THE LEGITIMACY OF TERRITORIAL SOVEREIGNTY CLAIMS IN ANTARCTICA

Before commencing *an in-depth* debate on the legitimacy of the ATS it is first necessary to briefly analyse the Antarctic territorial sovereignty claims both historically and in their current context. This analysis is necessary because under the doctrine of national sovereignty if the territorial claims are legitimate and recognised by international law then a debate surrounding the legitimacy of the ATS would be irrelevant because the national governments of the Claimant States could do as they wished within their territorial boundaries. However if the legitimacy of the territorial claims is questionable and they are not recognised in international law then the legitimacy of the ATS as the organ of governance for the Antarctic becomes an issue of paramount importance.

Sovereignty claims in the Antarctic are currently held in limbo by Article IV of the Antarctic Treaty. Article IV while preventing the filing of new claims or the extension of existing claims acknowledges the existence of and gives priority to those claims filed prior to the drafting of the Treaty.

1. Nothing in the present Treaty shall be interpreted as:
 - (a) a renunciation or diminution by any Contracting Party of previously asserted rights of 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 rights 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.¹²⁹

¹²⁹ Antarctic Treaty 1951, Article IV.

There are seven states that have such claims, Australia, Argentina, Chile, France, Great Britain, New Zealand and Norway.¹³⁰ We will also look at the positions of Russia and the United States in relation to territorial claims because although they have not filed official claims they have reserved the right to do so at a later date.¹³¹

3.1 Basis for Claims to Territorial Sovereignty in International Law

One of the essential elements of statehood under international law is the occupation of a territorial area. The supreme authority vested in the state in relation to this area is called territorial sovereignty.¹³² The Permanent International Court of Justice (PICJ) suggested in the *Legal Status of Greenland* case that:

[A] claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist; the intention and will to act as sovereign, and some actual exercise or display of such authority.¹³³

They later added in the *Island of Palmas Arbitration* that,

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.¹³⁴

¹³⁰ It is interesting to note that Japan while been a major player in the Antarctic region has no territorial claim. This is a result of Article 2(e) of the Treaty of Peace 1951. "Japan renounces all claim to any right or title to or interest in connection with any part of the Antarctic area, whether deriving from the activities of Japanese nationals or otherwise." Treaty of Peace with Japan, signed 8 September 1951, entered into force 28 April 1952. (27/9/01)

<<http://www.vcn.bc.ca/alpha/sfp/SanFranciscoPeaceTreaty1951.htm>>.<O:P></O:P>

¹³¹ The possibility that these two powerful nations could file a claim at some point in the future is a matter of some importance. Especially as claims based on the doctrine of discovery would enable them to make claims to large areas of the Antarctic that are currently subject to claim by other States.

¹³² Shearer, I *Starke's International Law* (11th ed) (1984) 144. Shaw, M *International Law* (3rd ed) (1991) 278.

¹³³ *Legal Status of Eastern Greenland (Norway v Denmark)* (1933) PICJ Series A/B No 53. Electronic version <<http://www.ksuemail.kennesaw.edu/~cli/green.htm>>.

¹³⁴ *The Island of Palmas Arbitration* 22 AJIL (1928) 875.

Sovereignty therefore equates to the ability of an entity to adequately perform the functions of a State and territorial sovereignty is the ability of that 'State' entity to exercise those functions within a defined space.

This definition however leaves unanswered two vital questions:

1. What are the functions of the state?
2. How does the State initially acquire the territory over which it wishes to exercise control?

3.1.1 Functions of the State

The independence that allows a state to claim territorial sovereignty over a region creates a system of powers and rights that correlate with the functions of the state within that territory. Although these powers and rights are numerous there are three central to the current debate.

1. The state has the power to control domestic affairs within the territory.
2. In a Westminster style government both common law and statute give the state broad powers of discretion over the admission and deportation of aliens to and from their territory.
3. The state has the exclusive jurisdiction over crimes committed within the territory.¹³⁵

3.1.2 Territorial Acquisition

There are five methods of territorial acquisition currently recognised under international law. These are; annexation,¹³⁶ accretion,¹³⁷ prescription,¹³⁸ cession,¹³⁹

¹³⁵ Shearer, *supra* n 122 at 91.

¹³⁶ Annexation occurs when a state takes over the territory of another state. This can occur in two ways: 1. Conquering or subjugation. 2. Annexation of territory subject to virtual subordination. In both these situations possession of the land must be followed by a formally declared intention to annex. The international community will not, or should not, recognise an annexation that is the result of an aggressive act that is contrary to the provisions of the United Nations Charter. *Ibid.* 152.

and occupation. Occupation is the predominant method of territorial acquisition claimed in Antarctica.

Occupation often follows discovery and is the establishment of sovereignty over territory that is not under the sovereign influence of any other state (*terra nullius*). Occupation is an important aspect of claiming sovereignty over new lands because it is an accepted principle of international law that discovery is not sufficient to establish sovereignty unless followed by a significant acts of occupation. These acts must demonstrate that the state has both the intention to act as sovereign (*animus occupandi*) and the ability to exercise adequate sovereignty over the territory. Intention and ability can be demonstrated through physical possession, symbolic acts,¹⁴⁰ legislative and executive action¹⁴¹ or recognition of the claim by other states.¹⁴²

3.2 The Occupation Requirement in Antarctica

Because of the severe climatic conditions, which exist in Antarctica, habitation in the normal sense could never be achieved. The uniqueness of occupation in relation to uninhabitable areas such as the Antarctic has been addressed by PICJ.

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved.¹⁴³

¹³⁷ This occurs when new territory is added to a state's boundaries by the intervention of natural causes. No formal action is required for the state to claim territorial sovereignty over such areas. *Ibid.*

¹³⁸ This situation occurs when a state exercises peaceful *de facto* jurisdiction over the sovereign territory of another state for an extended period of time or as the result of lengthy adverse possession. *Ibid.* 153.

¹³⁹ Cession occurs when one sovereign state transfers its territory to another sovereign state. *Ibid.*

¹⁴⁰ An example of such a symbolic act can be seen in the *Clipperton Island Arbitration* (1931) 26 AJIL (1932) 390. In this situation the fact that France had published a declaration of sovereignty in English in a Hawaiian journal was deemed to be sufficient to constitute a symbolic act of sovereignty. Shearer, *supra* n 122 at.

¹⁴¹ "... Legislation is one of the most obvious forms of the exercise of sovereign power..." *Legal Status of Eastern Greenland*, *supra* n 123.

¹⁴² Shearer, *supra* n 72 at 147.

¹⁴³ *Island of Palmas Arbitration* 2 RIAA 840.

The Court discussed the issue again in 1933 in its decision concerning the legal status of Eastern Greenland.

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights.... This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries....¹⁴⁴

Therefore while not establishing any overarching principle as to what constitutes occupation in uninhabitable areas the preceding judgements indicate that the threshold for occupation of such areas would likely be lower than that required in other regions.

3.3 Basis for Claims of Territorial Sovereignty in Antarctica¹⁴⁵

Although the International Court has indicated that they may lower the occupation threshold for Antarctica the Claimant States must still provide evidence that their territorial sovereignty claims comply with international law.

3.3.1 Argentina (Antartico Argentino)

The Argentinean claim is declared as the region between 25° West and 74° West longitudes, extending south of 60° South to the Pole. Although Argentina did not issue a formal statement of claim to this territory until 1957 the claim is based on the premise that the area has always been part of their metropolitan territory.¹⁴⁶ The basis of this claim is inheritance from Spain of lands granted to them by a Papal Bull issued

¹⁴⁴ *Legal Status of Eastern Greenland*, supra n 123.

¹⁴⁵ There are five interesting points surrounding the territorial sovereignty claims in Antarctica:

1. The States involved are merely Claimant States, as their status in relation to the areas they claim has not been legally established.
2. The claims of Argentina, the United Kingdom and Chile currently overlap.
3. There is a large portion of the Antarctic, which is not subject to claim from any State.
4. While some territorial claims are recognised by other Claimant States no other States have recognised the territorial claims in Antarctica.
5. Non-Claimant States are divided into two groups, those who have no basis or desire to assert claims and a group of two, Russia and America, that have reserved the right to file a claim in the future.

¹⁴⁶ In 1904 Argentina took possession of the South Orkneys by Executive Decree and in 1946 defined the western limits of its claim. On February 28 1957 the government re-established The National Territory of Tierra del Fuego, the Antarctic and the Islands of the South Atlantic. Hanessian, J "National Interests in Antarctica" in Hatherton, T (ed) *Antarctica* (1965) 12.

by Pope Alexander VII in 1493.¹⁴⁷ The effect of this Bull was to divide the world in two, giving Africa to Portugal and the New World to Spain. In 1494 the Treaty of Tordesillas moved the prior boundaries to a line drawn from the Arctic to the Antarctic Poles between 46° and 49° west longitude.¹⁴⁸ Argentina maintains that as the maps of the time showed Terra Australis as a continent almost touching South America it can be inferred that what ever lay to the south belonged to Spain and its heir.

Although inheritance is the historic basis of the Argentinean claim they base the continued legitimacy of their claim on occupation¹⁴⁹ and administrative acts.¹⁵⁰ In

¹⁴⁷ The Papal Bull followed the arbitration of a dispute between the kingdom of Portugal and the kings of Castille and Aragon over newly discovered territories. "Furthermore, under penalty of excommunication *late sententie* to be incurred *ipso facto*, should anyone thus contravene, we strictly forbid all persons of whatsoever rank, even imperial and royal, or of whatsoever estate, degree, order, or condition, to dare, without your special permit or that of your aforesaid heirs and successors, to go for the purpose of trade or any other reason to the islands or mainlands, found and to be found, discovered and to be discovered, towards the west and south, by drawing and establishing a line from the Arctic pole to the Antarctic pole, no matter whether the mainlands and islands, found and to be found, lie in the direction of India or toward any other quarter whatsoever, the said line to be distant one hundred leagues towards the west and south, as is aforesaid, from any of the islands commonly known as the Azores and Cape Verde: apostolic constitutions and ordinances and other decrees whatsoever to the contrary notwithstanding. Pope Alexander VI *The bull Inter Caetera* May 4 1493. <<http://www.nativeweb.org/page/legal/indig-inter-caetera.html>>.

¹⁴⁸ That, whereas a certain controversy exists between the said lords, their constituents, as to what lands, of all those discovered in the ocean sea up to the present day, the date of this treaty, pertain to each one of the said parts respectively; therefore, for the sake of peace and concord, and for the preservation of the relationship agreed that a boundary or straight line be determined and drawn north and south, from pole to pole, on the said ocean sea, from the Arctic to the Antarctic pole. This boundary or line shall be drawn straight, as aforesaid, at a distance of three hundred and seventy leagues west of the Cape Verde Islands, being calculated by degrees.... And all lands, both islands and mainlands, found and discovered already, or to be found and discovered hereafter, by the said King of Portugal and by his vessels on this side of the said line and bound determined as above, toward the east, in either north or south latitude, on the eastern side of the said bound provided the said bound is not crossed, shall belong to, and remain in the possession of, and pertain forever to, the said King of Portugal and his successors. And all other lands, both islands and mainlands, found or to be found hereafter, discovered or to be discovered hereafter, which have been discovered or shall be discovered by the said King and Queen of Castile, Aragon, etc., and by their vessels, on the western side of the said bound, determined as above, after having passed the said bound toward the west, in either its north or south latitude, shall belong to, and remain in the possession of, and pertain forever to, the said King and Queen of Castile, Leon, etc., and to their successors.

Treaty of Tordesillas 1494. <<http://www.yale.edu/lawweb/avalon/moder/mod001.htm>>.

¹⁴⁹ Argentina claims that they have demonstrated continuous and uninterrupted occupation of the Antarctic region since 1904. The basis of this claim are the activities conducted at their weather station on the South Orkneys. Quigg, *supra* n 14 at 118.

fact of all the Claimant States Argentina has been the most active in asserting their claim through effective occupation.¹⁵¹ The region of the Antarctic claimed by Argentina became subject to their domestic laws in 1957 when it was placed under the administration of the Governor of Tierra del Fuego. Since that time the government of Argentina has engaged in numerous official¹⁵² and symbolic¹⁵³ activities in order to further advance their sovereignty claims. Argentina currently maintains an active scientific presence on the ice, operating six permanent and seven summer stations in the 2000 season.¹⁵⁴

3.3.2 Australia (Australian Antarctic Territory)

Although Australia had been active in the Antarctic since before 1908 they did not file a formal claim to territorial sovereignty until 1933. On February 7 of that year a British Order-in-Council claimed the territory south of 60° South latitude and lying between 160° and 45° East longitudes, excluding that area claimed by France, and

¹⁵⁰ Argentina has in the past claimed two other principles to support their territorial claim, however neither of these are currently recognised by international law.

Geographical Contiguity/Proximity: Contiguity is a principle of international law used in the nineteenth century as the basis for claiming sovereignty over offshore islands. However it is considered unlikely that this principle could be effectively used in the case of Antarctica as such a large expanse of ocean separates the two land masses. Therefore Argentina has adjusted its claim to one of proximity, this has the result of giving Chile a superior claim but discrediting that of Britain. Quigg, *supra* n 14 at 114.

Geographical Affinity: Both Argentina and Chile have argued that structurally the Antarctic Peninsula and Ellsworth Land are a continuation of the Andes and therefore natural extensions of the territory of both States. However, if this argument were accepted the claims would not extend to the Pole as the TransAntarctic Mountains and the polar plateau have no geographical relationship to the Andes. *Ibid.* 115.

¹⁵¹ As a demonstration of their effective occupation Argentina colonised Hope Bay in 1978. Soon after the colony was established Emilio Marcos Palma became the first child to be born in the Antarctic. By March the settlement consisted of eighteen men, eight women and nineteen children. This group included two teachers who subsequently set up a school. The families spent one year on the ice. The next summer they returned home and another group of families arrived for a year long stay. Emilio and subsequent children who have been born on the ice have been declared citizens of Argentina and the Antarctic. Beck, P "Argentina and Britain: the Antarctic Dimension" in Hennessy, A and King, J (eds) *The Land that England Lost: Argentina and Britain, a Special Relationship* (1992) 262.

¹⁵² In 1961 Argentine President Frondizi made a presidential visit to the Antarctic ice. The 1961 visit was followed up in August 1973 by a government decree-in-law which declared Marambio base to be the provisional seat of government and for one month the entire Argentine cabinet conducted their daily business from there. *Ibid.*

¹⁵³ Such as the regular issue of postage stamps, the erection of name plates in the Antarctic and the frequent publication of articles stressing Argentina's involvement in Antarctica.

placed it under Australian authority. The Australian claim is the largest on the continent at 6.5 million square kilometers.¹⁵⁵ Australia bases its territorial claim on discovery¹⁵⁶ and continued administrative acts.¹⁵⁷ Australia currently has four permanent year round stations in Antarctica.¹⁵⁸

3.3.3 Chile (Territorio Chileno Antartico)

In 1831 the Republic of Chile submitted a letter to the British Government asserting a claim that Chilean territory in Antarctica extended at least to the 65° south latitude. In 1940 Chile filed an adjusted claim which covered the sector from 53° West to 90° West longitudes. This sector overlaps the claims of both Britain and Argentina.¹⁵⁹ Chile bases its right to claim sovereignty on the basis of inheritance from Spain¹⁶⁰, Contiguity/proximity and geographical affinity¹⁶¹, and administrative acts.¹⁶² Chile currently has four permanent and five summer bases in the Antarctic region.¹⁶³

¹⁵⁴ COMNAP, "Stations and bases" (20.09.01) <<http://www.comnap.aq>>.

¹⁵⁵ Hanessian, *supra* n 136 at 13.

¹⁵⁶ The claim to discovery is based on the British expeditions of Biscoe, Kemp, Balleny and Ross in the first part of the nineteenth century and the Australian expeditions that followed. Two expeditions the Australasian Antarctic Expedition in 1911 and the British-Australian-New Zealand Research Expedition in 1929, both led by Sir Douglas Mawson, are considered to be actions that cemented the Australian claim. *Ibid*.

¹⁵⁷ In 1954 Australia enacted the Australian Antarctic Territory Act, which provides for the application of Australian Capital Territory laws in the AAT. *Ibid* 14.

The Commonwealth Electoral Act 1918 allows for the appointment of an Electoral Returns Officer for Antarctica. The Australian Horticultural Corporation (Export Control) Regulations 1990 defines Antarctica as part of the Australian domestic market. Australian Legislation, (28/9/01) <<http://www.scaleplus.law.au>>.

¹⁵⁸ Australian Antarctic Division, "Antarctic Information" (17.09.01) <<http://www.aad.au/stations>>.

¹⁵⁹ Hanessian, *supra* n 136 at 15.

¹⁶⁰ In 1539 Charles the V of Spain allegedly granted Pedros Sanchez de la Hoz the territory from the Strait of Magellan to the South Pole, west of 40° longitude and therefore Chile declares that they are the only legitimate Spanish heir to Antarctica. Since this time Chile claims de la Hoz and his successors have been the bona fide governors of Antarctica. Quigg, *supra* n 14 at 114.

¹⁶¹ The arguments put forward for this claim are the same as those already discussed in relation to Argentina. *Supra* at n 94.

¹⁶² In 1948 Chilean President, Gonzalez Videla became the first Head of State to visit the Antarctic. In 1956 the government enacted the Statute of the Chilean Antarctic Territory placing the region under the administration of the governor of the Magallanes Province and as such subject to Chilean domestic law. Hanessian, *supra* n 136 at 15.

In 1955 the adoption of a special regime for the administration of the Territory incorporated it into the political structure of Chile. Sahuric, E *The International Law of Antarctica* (1992) 25.

¹⁶³ COMNAP, "Stations and bases" (20/09/01) <<http://www.comnap.aq>>.

3.3.4 France (Terre Adelie)

In 1924 by presidential decree France announced its formal claim to Terre Adelie the limits of which were defined as the narrow quadrilateral between 136° and 142° East longitudes and between 66° and 67° South longitudes.¹⁶⁴ The French base their territorial claim on discovery¹⁶⁵ and continued administrative acts¹⁶⁶. France currently maintains four permanent and one summer station in Terre Adelie.¹⁶⁷

3.3.5 New Zealand (Ross Dependency)

In 1923 the British Government passed the Ross Dependency Boundaries and Government Order in Council. This order gave authority to the Governor-General of New Zealand to administer the Ross Dependency on behalf of the United Kingdom.

The said Governor is further authorised and empowered to make all such rules and regulations as may lawfully be made...for the peace, order and good government of the said Dependency...

The Governor is authorised to make and execute on his Majesty's behalf, grants and dispositions of any lands...¹⁶⁸

By adoption of this Order in Council Britain filed claim on behalf of New Zealand to all the islands and territory lying between 160° East longitude and 150° West

¹⁶⁴ Hanessian, supra n 136 at 16.

¹⁶⁵ In the sixteenth century French explorer Palmuyer de Gonville returned from a two year exploration with extraordinary tales of a southern tropical paradise. The resulting legend of Gonville land persisted for 200 years until the first modern explorers discovered the Antarctic continent. The first modern French sighting of the continent was in 1739 when Jean Baptiste sent Charles Bouvet de Lozier to find new trading ports in Far East and explore the southern regions of Gonville land. This expedition led to the discovery Bouvet Island. Yves Kerguelen who discovered and took possession of the archipelago of Kerguelen followed this expedition in 1772. However it was not until 1840 that Dumont d'Urville became the first Frenchman to reach the Antarctic continent, he subsequently named the area Terre Adelie after his wife. Ibid.

¹⁶⁶ The administration of the French Antarctic territories was placed under the jurisdiction of the Governor of Madagascar in 1924. However in 1955 the French Government reconfirmed their administration of the Antarctic and established it was an overseas territory under the control of the Administrateur Supérieur des Terres Australes et Antarctiques Françaises. This act moved the seat of administration for the region to Paris. In 1971 France enacted Law No. 71-569 which applied the penal and civil law of France to the French Antarctic Territory. Sahuric, supra n 152 at 27.

In 1956 the Administrator adopted his own flag, although the flag of France remains the official one for the region. (1/10/01)

<http://www.geocities.com/CapitalHills/Senate/2785/Fr_Antarctic Lands.html>.

¹⁶⁷ COMNAP, "Stations and bases" (20/09/01) <<http://www.comnap.com>>.

¹⁶⁸ Ross Dependency Boundaries and Government Order in Council 1923 (Imp) ss IV and V.

longitude and south of 60° South latitude, this area includes the Ross Ice Shelf.¹⁶⁹ The claim was based on discovery by British explorers¹⁷⁰ and continues to be supported through New Zealand's administrative acts.¹⁷¹ New Zealand maintains one permanent station in the region.¹⁷²

3.3.6 Norway (Dronning Maud Land)

The Norwegian claim was established through an Order-in-Council in 1939, which was enacted in order to pre-empt an anticipated German claim.¹⁷³ The proclamation declared Norwegian sovereignty over that part of the Antarctic mainland coast that lies between 20° West Longitude and 45° West Longitude.¹⁷⁴ Because Norway does not recognise the sector principle it is assumed that the claim does not extend to the Pole. The basis of the Norwegian claim is Norway's history of extensive whaling dating back to 1892 and Roald Amundsen's expedition to the Pole in 1911.¹⁷⁵ Norway's claim is supported by continued administrative action.¹⁷⁶

¹⁶⁹ Hanessian, *supra* n 136 at 18.

¹⁷⁰ This claim is based on the activities of British explorers James Clark Ross, Scott and Shackleton in the late 18 and early 1900s.

¹⁷¹ In 1908 Shackleton was appointed postmaster to the Antarctic and specially overprinted New Zealand stamps bearing the inscription "King Edward VII Land" were issued to him. In 1923 New Zealand gazetted whaling regulations for the Ross Dependency, these were issued under the authority of the 1926 Order in Council but formed an amendment to the Fisheries Amendment Act 1912. Brewster, *supra* n 11 at 22. Templeton, *MA Wise Adventure: New Zealand and Antarctica 1920-1960* (2000) 38.

Over the years the governor General of New Zealand has appointed magistrates and coroners for the Ross Dependency both to date none has exercised their authority there. A returning officer is appointed for the Dependency but no electoral roll exists. Auckland District Law Society, *How Strong is New Zealand's Claim to the Ross Dependency?* (1979) 4.

The Antarctica Act 1960 gives the New Zealand court system jurisdiction over crimes committed in the Ross Dependency. The Conservation Act 1987, Part II gives the Department of Conservation the responsibility for the conservation of the natural and historic resources of the Ross Dependency. The Immigration Act 1987, requires all non-New Zealand nationals to apply for a New Zealand entry permit prior to visiting the Dependency.

¹⁷² COMNAP, "Stations and bases" (20.9.01) <<http://www.comnap.aq>>.

¹⁷³ In 1938 with the idea of establishing a claim Herman Goering despatched the Schwabentland expedition whose goal was to lay sovereign claim to as much of Antarctica as possible. Over a six-day period planes flew over and photographed 600,000 sq km and dropped metal swastikas at 25km intervals. However, the German sovereignty claim was lost in the chaos of WWII. Brewster, *supra* n 11 at 24.

¹⁷⁴ Sahurie, *supra* n 152 at 29.

¹⁷⁵ Amundsen was the first person to reach the Pole in December 1911 and he claimed a circular region around the Pole which he named King Haakon VII Plateau. Although Norway has never taken

Norway opened a permanent station in 1958 but was forced to vacate it in 1960 due to lack of funding. The station was subsequently loaned to South Africa. Norway currently operates two summer only stations on the ice.¹⁷⁷

3.3.7 United Kingdom (British Antarctic Territory)

The British claim asserted by the filing of Letters of Patent in 1908, created the Falkland Islands Dependencies and consisted of all the land between 20° and 80° West Longitudes to the Pole and Scotia Arc Island. Further Letters of Patent were filed in 1917 as the 1908 letters had inadvertently included part of the Argentine and Chilean claims. The new Letters of Patent delimited the claim to include all islands and territories between 20° and 50° West Longitudes and south of 50° South Latitude and between 50° and 80° West Longitudes and south of 58° South Latitude.¹⁷⁸ The basis of the British claim is discovery¹⁷⁹, extensive exploration¹⁸⁰ and administrative acts¹⁸¹. Britain currently has six bases in the region (four permanent and two summer).¹⁸²

action on this claim in 1929 and 1939 they reminded the United States that they had a priority interest in the area. Hanessian, *supra* n 136 at 21.

¹⁷⁶ Dronning Maud Land is currently administrated by the Norwegian Department of Polar Affairs a division of the Ministry of Justice and Police. The Department also acts as the Secretariat for the Interministerial Committee on Polar Affairs which was established by Royal Decree in 1965 to coordinate the activities of all government departments involved in Polar affairs. Norwegian Government Information, (2/10/01) <<http://www.odin.dep.no>>.

¹⁷⁷ COMNAP. "Stations and bases" (20.9.01) <<http://www.comnap>>.

¹⁷⁸ Hanessian, *supra* n 136 at 27.

¹⁷⁹ Captain James Cook was the first to circumnavigate the Antarctic during his 1772-75 voyage. In 1819 Edward Bransfield while completing a survey of the South Shetlands Islands is believed to have first sighted the continental land mass. The following year in 1820 James Weddell became the first person to sail south of 74° 15' and reported seeing open water extending far south in longitude 34° West. In 1830 Biscoe sailed further south than any previous expedition. It was Biscoe's voyage that confirmed what up until then had only been speculation, a large land mass did exist in the Antarctic. In 1833 Peter Kemp sailed south from Kerguelen and became the first person to sight Heard Island and then proceeded on to discover what is now called the Kemp Coast. In 1838 John Balleny sailed south from New Zealand and achieved a higher latitude than any previous explorer and discovered the Balleny Islands. In 1841 a British expedition under James Clark Ross successfully crossed the ice pack and reached the open water of the Ross Sea. Fogg, G A *History of Antarctic Science* (1992)41-83.

¹⁸⁰ In 1872 the Challenger expedition conducted an oceanographic survey of Antarctic waters. The British Antarctic expedition 1901-1904 produced an extensive description of the physical geography of McMurdo Sound. In 1909 Ernest Shackleton pioneered the route to the South Pole, climbed Mount Erebus and became the first explorer to use motor transport in Antarctica. *Ibid.*, 99-120.

¹⁸¹ In 1904 the British authorities commenced the issuing of licences to control whaling and sealing in the claimed territory. From 1910-30 British magistrates were in residence on South Georgia Island. The 1908 and 1917 Letters of Patent placed the BAT under the jurisdiction of the Governor of the

3.3.8 United States

The United States has never filed a formal claim to any territory in the Antarctic, this is despite that fact that such a claim would be as strong as any of those already filed.¹⁸³ Much of the area subject to such a claim would likely overlap with areas already subject to claim by other States. The basis for an American claim would be discovery¹⁸⁴ and extensive exploration¹⁸⁵. America currently has three permanent stations on the ice.¹⁸⁶

3.3.9 Russia

Russia bases their eligibility to file a territorial claim on Thaddeus Von Bellingshausen's 1819 voyage.¹⁸⁷ However, following this voyage Russia showed no interest in the region until Norway filed their territorial claim in 1939.¹⁸⁸

Falkland Islands. In 1919 the British government decide that the entire Antarctic continent should ultimately be included in the British Empire. In 1962 the British area claimed on the continent was separated from the Falkland Islands part of the claim and renamed the British Antarctic Territory. The Governor of the Falkland Islands was named High Commissioner for the Territory. Brewster, *supra* n 21 at 23. Hanessian, *supra* n 136 at 27. Sahurie, *supra* n 152 at 13.

¹⁸² British Antarctic Survey, "Stations and Bases" (20/9/01) <<http://www.antarctica.ac.uk>>.

¹⁸³ Quigg, *supra* n 14 at 127.

¹⁸⁴ In 1820 Nathaniel Brown Palmer sailed into Antarctic waters and became one of three persons who claim to have been the first to sight the Antarctic continent. His discovery was contemporaneous with the Russian Bellingshausen and the Englishman William Smith. Hanessian, *supra* n 136 at 34.

¹⁸⁵ The first official government expedition was lead by Charles Wilkes in 1838. In 1928 Richard Byrd conducted an expedition to the ice and the following year made the first flight over the South Pole. As a result of Byrd's expedition America laid basis for a claim to over 2 million sq km of the continent and in 1938 President Roosevelt announced a plan to permanently occupy Antarctica as a basis for future claims.

"The most important thing is to prove (a) that human beings can permanently occupy a portion of the Continent winter and summer; (b) that it is well worth a small annual appropriation to maintain such permanent bases because of their growing value for four purposes – national defence of the Western hemisphere, radio, meteorology and minerals." F.D.R. Roosevelt to Byrd, 12 July 1939 in Elliott Roosevelt (ed) *F.D.R. His Personal Letters* (1950) 906.

As a result Byrd travelled to Antarctica a third time and established two permanent bases, which were subsequently abandoned in 1941 because of the deteriorating international situation. America returned to Antarctica in 1946 with Operation High Jump. This was a military operation designed to prepare troops for possible confrontation with USSR across the Arctic Basin. This was followed by another military operation in 1947. Hanessian, *supra* n 136 at 34-37.

¹⁸⁶ COMNAP, "Stations and bases" (20.9.01) <<http://www.comnap.aq>>.

¹⁸⁷ In 1819 Thaddeus Von Bellingshausen circumnavigated the Antarctic Continent and discovered Peter I Oy and Alexander Island. Russian interest in Antarctica was revived in 1939 as a direct result of Norway's claim of sovereignty over Dronning Maud Land. In response to that claim Russia sent a

3.4 Status of Antarctic Claims in International Law

Although some of the Antarctic claims have been recognised by other Claimant States they have yet to be recognised by the international community and international acceptance is a requirement for the legitimisation of modern territorial claims. While historically it was an accepted fact that the discovery of unknown lands would be accompanied by territorial claims that did not require international acceptance, the claims to Antarctica differ in one important aspect. That difference is these claims arose in the twentieth century, a time described by Gautier as

a period when it was already no longer possible for the concerned states to take exclusively for themselves a continent without the agreement of the principle members of a fast-changing international community.¹⁸⁹

Besides the issue of acceptance by other nations the territorial claims in Antarctica face another problem that effects their standing in international law.

3.5 Sector Claims

The territorial claims in the Antarctic region are unique in international law in that they are sector claims. The principle of sector claims applies only to the Polar Regions and alleges that a basis for sovereignty over a sector can be established by obtaining sovereignty over land at the fringe bounded on the eastward and westward margins of longitude and extending that control toward the Pole.¹⁹⁰ Basically this creates a pie like structure with the Pole as the centre.¹⁹¹ The justification for this type of claim is the inapplicability of the normal principles of geographical control to the Poles.¹⁹² Proponents of the system claim that they represent a just and equitable division of Polar lands. However critics maintain that the acceptability of sector

“Note of Protest” to Norway observing that it would “reserve its opinion as to the national status of territories discovered by Russian citizens.” Hanessian, *supra* n 136 at 27-30.

¹⁸⁸ Beck, P *The International Politics of Antarctica* (1986) 37.

¹⁸⁹ Gautier, *supra* n 118 at 121.

¹⁹⁰ Shearer, *supra* n 122 at 149.

¹⁹¹ See map of Antarctic claims *infra* at 50.

¹⁹² *Ibid.*

claims rests on nothing more than the mutual consent of the Claimant States and at best they represent nothing more than notification of future intention to assume full control.¹⁹³ Therefore even if there was an acceptance of the possible legitimacy of the Claimant States right to sovereignty it is likely that before they could be fully recognised in international law they would need to redefine the boundaries without resorting to the use of the sector principle.

3.6 Conclusion

While it is not possible to state categorically that the territorial claims in the Antarctic have no legitimacy in international law it is fair to say that they are questionable at best. If we go back to Stokke's analytical method¹⁹⁴ then in order for the claims to have external legitimacy they must comply with the normative structure of the international community. The evidence suggests that none of the Claimant Nations could successfully meet the traditional occupation requirement necessary under international law that would allow formal recognition of their claims.¹⁹⁵ With the possible exception of Argentina¹⁹⁶ the Claimant States would also have difficulty establishing their sovereign rights under the more liberal test applied to sparse areas by the PICJ. The inability of the Claimant States to comply with the normative structure for territorial sovereignty necessarily means that their claims have not been recognised by the international community therefore can not be considered legitimate.

¹⁹³ Ibid.

¹⁹⁴ Supra at 20.

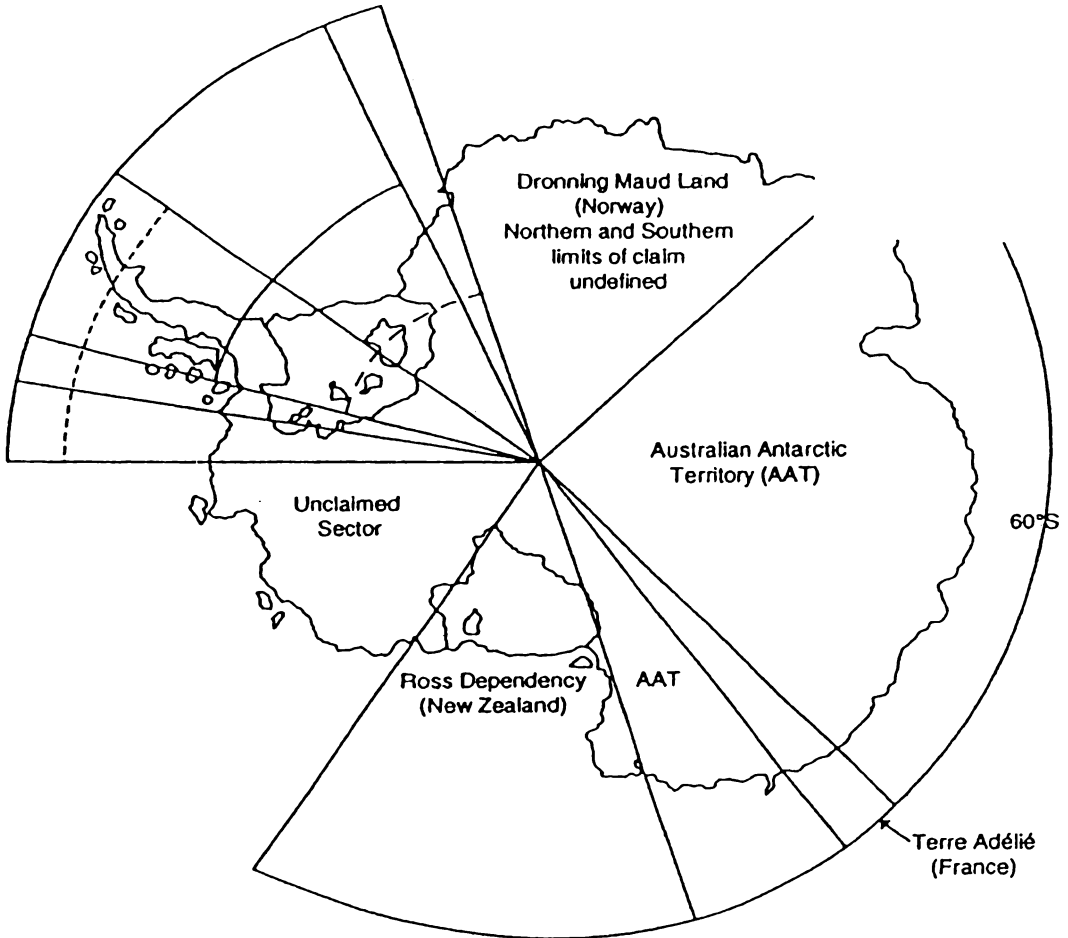
¹⁹⁵ This is particularly true of a possible Russian claim as they had no established interest in the region until nearly 120 years after the qualifying act of discovery.

The lack of effective occupation in relation to New Zealand's claim to the Ross Dependency was addressed in a study conducted by the Auckland Law Society in 1979. The report pointed out that there appeared to be few acts that pointed to New Zealand having established sovereignty in the region. In actual fact there existed actions that tended to point away from the existence of New Zealand sovereignty. Most notable of these is that in 1979 New Zealanders not only required a Reserve Bank export permit to take New Zealand dollars to the Pole but they were required to use US dollars for purchases made at the American base located within the Dependency. Auckland District Law Society, *How Strong is New Zealand's Claim to the Ross Dependency?* (1979) 4.

¹⁹⁶ Presently as things stand even Argentina would have difficulty maintaining their claim in international law. This is because the majority of actions stated by them and the other Claimant States as supporting evidence for the legitimacy of their claims occurred post 1959, and Article IV(2) of the 1959 Treaty clearly states that no actions taken while the Treaty is in force can be used to support a territorial claim.

As such if a strict application of international law were advocated then the Antarctic region is subject to the sovereign rule of no nation. In the absence of sovereign authority a legitimate system of governance is of major importance in relation to both political stability and environmental protection. The Claimant States and those interested in Antarctic science had the foresight to recognise this and developed the Antarctic Treaty System. However in order to ensure that this organisation functions at its optimum level of effectiveness it must be shown to have legitimacy.

- Key to area of competing claims
- - - British Antarctic Territory
 - Argentine Antarctic Sector
 - - - - Chilean Antarctic Territory



**Antarctic Territorial Claims
(60°S – Limit of Antarctic Treaty)**

Map courtesy of
 Elliott, L *International Environmental Politics: Protecting the Antarctic*
 (New York: St Martin Press, 1994).

CHAPTER FOUR

SOVEREIGNTY OVER NATURAL RESOURCES AND THE COMMON HERITAGE OF MANKIND IN ANTARCTICA

In order to fully understand the issues surrounding the potential for loss of legitimacy within the ATS it is necessary to have a basic understanding of current international law as it relates to natural resource sovereignty. This is because resource sovereignty, that is the question of who controls the natural resources of a region, is one of the underpinning issues for many of the challenges to the legitimacy of the ATS. Natural resource sovereignty is also currently the number one candidate as a potential flash point for conflict in the region.

4.1 Natural Resources Sovereignty in International Law

Natural resource sovereignty has been the object of a great deal of international debate over the last two decades. The United Nations General Assembly (UNGA) established the Commission on Permanent Sovereignty over Natural Resources in 1958. The mandate of the Commission was to investigate whether there was a necessity for strengthening the sovereign rights over natural resources and to consider the rights and duties of States under international law.¹⁹⁷ The report of the Commission resulted in the recognition of the sovereignty of a state over its natural resources as an accepted principle of international law.¹⁹⁸

The General Assembly,

Declares that:

1. the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned; ...

¹⁹⁷ United Nations. "Study of Sovereignty over Natural Resources" *Yearbook of the United Nations* (1959) 416.

¹⁹⁸ Chowdhury, S "Permanent Sovereignty over Natural Resources" in Hossain, K and Chowdhury, S (eds) *Permanent Sovereignty over Natural Resources in International Law* (1984) 1.

7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.¹⁹⁹

While assisting with the clarification of the issue of natural resource sovereignty the UN Report is of limited use within the context of resources not confined within the national boundaries of a state. As a result of the legal vacuum left by the UN Report as to the status of such resources a new principle evolved, 'the common heritage of mankind'.²⁰⁰ While this doctrine was originally applied to Outer Space and the High Seas there were soon calls to have it extended to Antarctica.

4.2 Mineral Resources and the Common Heritage of Mankind

Prior to the introduction of the 'common heritage of mankind' the leading doctrine of Maritime Law was the freedom of the high seas. This doctrine was based on four assumptions, originally derived from the work of Grotius. These assumptions were:

1. That the sea cannot be the object of private or state appropriation.
2. That the resources of the sea are inexhaustible.
3. That the use of the high sea by one state should not limit the use of another.
4. That mankind was not capable of seriously harming the marine environment and that the oceans were so vast that there was limited chance of serious conflict.²⁰¹

These common law principles were codified in Article 2 of the 1958 Convention on the High Seas.

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by other rules of international law. It comprises, *inter alia*, for coastal and non-coastal States:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;

¹⁹⁹ United Nations Resolution 1803 (XVIII) 1962 as reprinted in Brownlie, I (ed) *Basic documents in International Law* 1995) 235.

²⁰⁰ Schrijver, N *Sovereignty over Natural Resources* (1997) 202.

²⁰¹ *Ibid*, 214.

(4) Freedom to fly over the high seas.

These freedoms, and others which are recognised by the general principles of international law, shall be exercised by all States with reasonable regard for the interests of other States in their exercise of the freedom of the high seas.²⁰²

The situation on the high seas that had lead to the development of these laws changed in the 1960s when manganese was discovered in the deep seabed. With the advent of deep-sea mining it became clear that the more technologically advanced states were in a position to exploit the situation to the detriment of the equal access guaranteed to the less advanced countries by high seas law.²⁰³ This combined with the concerns surrounding increasing fish catches as a result of improved fishing technology lead to the commencement of a global debate concerning the future of high seas law. These factors combined with the fact that forty-one nations had joined the United Nations since the establishment of the 1958 Convention, many of whom challenged the principles and rules of the laws codified in the Convention, lead to the convening of the third Law of the Seas Conference in 1973.²⁰⁴

The tenet that the resources of the high seas²⁰⁵ and the seabed should be considered the ‘common heritage of mankind’ became one of the focal points, particularly among the developing countries, of debate for this conference. Prince Wan Waithayakon the President of Thailand had first mentioned the principle at the 1950 conference but the idea did not gain any support.²⁰⁶ However the concept gained momentum in 1966 when US President Johnson stated:

Under no circumstances, we believe, must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must

²⁰² United Nations Convention on The High Seas 1958, Article 2.

²⁰³ Schrijver, *supra* n 187 at 215.

²⁰⁴ *Ibid.* 216.

²⁰⁵ At this point the High Seas consisted of the Seas outside the 12 mile territorial limit, not the current 200 mile Exclusive Economic Zone.

²⁰⁶ *Ibid.*

ensure that the deep seas and the ocean bottom are, and remain, the legacy of all human beings.²⁰⁷

In 1967 Malta proposed that the General Assembly place the seabed and ocean-floor beyond national jurisdiction and declare it to be the 'common heritage of mankind'.²⁰⁸ Earlier in that same year the UNGA had given such a designation to outer space.²⁰⁹ In an explanatory memorandum presented to the first committee Malta stressed:

The sea-bed and ocean floor covered approximately five sevenths of the earth's surface; the ocean floor under the abyssal depths was the only area of the world which had not yet been appropriated for national use because until recently its use for defence purposes or the exploitation of natural resources had not been technologically feasible. Recent developments in science and technology, however, had made the exploitation of such resources a practical possibility within the next decade. These resources promised to be considerable...there was now a real danger,... that the technically equipped countries might wish to appropriate the ocean floor for their national use...The result would be a competitive scramble for sovereign rights over the ocean floor leading to an escalating arms race, widening the gap between the rich, technologically developed countries and the poorer countries and endangering the traditional freedom of the high seas.²¹⁰

The First Committee was in general agreement that Malta had raised some points of considerable international interest and requested more information on the issue.²¹¹ The result of this further investigation was the adoption in 1970, although there was reluctance toward this move from both Western countries and those from Eastern Europe²¹², of the *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction*.

The General Assembly,...

Solemnly declares that:

1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.

²⁰⁷ UN Doc. A/C.1/PV. 1524, 1 November 1967, at 4. As reprinted in Schrijver, *N Sovereignty over Natural Resources* (1997) 216.

²⁰⁸ United Nations. "The Question of Promoting the Peaceful Uses of the Sea-bed and the Ocean Floor" *United Nations Yearbook 1967* Vol 21 (1967) 41.

²⁰⁹ Schrijver, *supra* n 187 at 216.

²¹⁰ United Nations, *supra* n 194 at 42.

²¹¹ *Ibid.*, 44.

²¹² *Ibid.*

2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.
3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international regime to be established and the principles of this Declaration....
7. The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether landlocked or coastal, and taking into particular consideration the interests and needs of the developing countries.²¹³

Although there remains intense debate as to its position within the legal system the adoption of this resolution established the ‘common heritage of mankind’ as a principle of international law.²¹⁴

On the same day that the UNGA adopted the above resolution they passed another resolution calling for the convening of the third UN Conference on the Law of the Sea.²¹⁵ This conference, the third in the UN process, involved numerous sessions over the space of nine years resulted in the development in the 1982 United Nations Convention on the Law of the Sea. The preamble to the Convention clearly restates the UN’s commitment to the seabed as common heritage:

*Desiring by this Convention to develop the principles embodied in resolution 2749 (XXV) of 17 December 1970 in which the General Assembly of the United Nations solemnly declared inter alia that the area of the sea-bed and the ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States....*²¹⁶

However it is clear from some of the comments voiced by developing States after the signing of the Convention that they were not happy with the extent that the principle of common heritage was carried into the Convention.

²¹³ United Nations, “GA Res. 2749 (XXV) 17 December 1970” *Yearbook of the United Nations* 1970 Vol 24 (1979) 222.

²¹⁴ Schrijver, *supra* n 187 at 216.

²¹⁵ *Ibid.*

²¹⁶ Preamble to the 1982 United Nations Convention on the Law of the Sea as reprinted in Brownlie, I (ed) *Basic documents in International Law* (4th ed) (1995) 144.

...the seabed provisions [are] a complex of concessions made by the great majority of nations to the few that aspire to reap greater and more immediate profits.²¹⁷

Mauritius and Yugoslavia shared the position of the Group of 77 that the sea-bed provisions represented the upper limits of concessions; to go further would render the common heritage principle meaningless.²¹⁸

...the Convention did not adequately reflect the concept of the sea-bed as common heritage; it believed that a few industrialized countries would be the major beneficiaries.²¹⁹

Given the success of the developing nations in getting the common heritage principle into the Law of the Sea Convention, combined with their frustration at the apparent limitations placed on its application, it is hardly surprising that this principle was to raise its head again in relation to the debate over Antarctic resources.

Before moving on to a discussion of natural resource sovereignty in Antarctica it is necessary to add that though the principle of common heritage gained a great deal of favour in the 1980s opponents of the system have eroded its acceptance over the past decade.²²⁰ In fact some international law commentators have expressed the opinion that it has now reached the point where it is of historical significance only.²²¹

4.3 The Status of Natural Resources in Antarctica

While Article IV of the Antarctic Treaty is purported to have forestalled any potential conflict concerning sovereignty in the Antarctic this does not appear to be the situation in relation to sovereignty over natural resources. Sovereignty over natural resources was in fact one of the major points of conflict during the drafting of the

²¹⁷ United Nations, "Statement from Brazil in Summary of UNGA Debate" *Yearbook of the United Nations* 1982 Vol 36 (1982) 221.

²¹⁸ United Nations, "Summary of UNGA Debate" *Yearbook of the United Nations* 1982 Vol 36 (1982) 221.

²¹⁹ United Nations, "Statement from Pakistan in Summary of UNGA Debate" *Yearbook of the United Nations* 1982 Vol 36 (1982) 221.

²²⁰ The US is a major opponent of the common heritage principle and has managed over the years to have the principle essentially removed from UNCLOS. In doing this the Law of the Sea Commission has altered position to where it now recognises the importance of market forces in resource exploration. Gillespie, A *The Illusion of Progress* (2001) 145.

²²¹ *Ibid.*

Convention on the Regulation of Antarctic Mineral Resource Activities. The result of this conflict was an attempt by the Parties to draft a document that addressed the needs of all members. This involved a balancing of the needs of the developing countries and the Claimant States. An example of this balancing act is seen in the membership of the Regulatory Committees.

2(c) the Regulatory Committee shall... consist, in total of 10 members.

- (i) four members identified by reference to Article 9(b) which assert rights or claims...
- (ii) six members which do not assert rights or claims as described in Article 9(b)...

3 make a recommendation to the Commission concerning the membership of the Regulatory Committee

- (b) adequate and equitable representation of developing country members of the Commission, having regard to the overall balance between developed and developing country members of the Commission, including at least three developing country members on the Commission...²²²

However despite the recognised necessity of balancing the needs of all parties the subsequent document contained special rights for the Claimant States. As Argentina claimed:

At the same time, my Delegation takes note that the territorial claims in Antarctic are the basis for a variety of provisions in the Convention that cause certain effects on the application of the regime that regulation Antarctic mineral resource activities. Those provisions establish that States Parties claiming sovereignty in Antarctica shall exercise certain specific rights in fixed stages of the application of the Convention in regard to the area of Antarctica that they are claiming.²²³

Although the drafters of the Convention believed they had reached a compromise that would prevent future conflict, the statement of Adriaan Bos, Head of the Netherlands Delegation, indicates evidence would suggest that if the Convention had come into force and mineral exploration had proceeded the Convention may not have been sufficient to totally remove conflict over resource sovereignty.

²²² Article 29, Convention on the Regulation of Antarctic Mineral Resource Activities, 1988. The Article 9 group consists of the seven claimant states plus America and Russia.

²²³ Antarctic Treaty System, "Statement of Alberto Daverede, Head of Delegation from Argentina" *Final Report SATCM on Antarctic Minerals* held 2 June 1988 at Wellington 30.

It was therefore disappointing that at the moment when the procedures for this conference were established the Non-Consultative Parties to the Antarctic Treaty were denied full participation in the adoption of the Treaty and that they are excluded from the final decision....We are disappointed that in several places in the text a distinction is made between Consultative and Non-Consultative Parties with regard to subjects which are clearly of equal interest to Consultative and Non-Consultative Parties of the Antarctic Treaty.²²⁴

4.4 Conclusion

The non-entry into force of the Minerals Convention and the subsequent mining ban established under the Environmental Protocol has forestalled any conflict over minerals sovereignty in the Antarctic, however the potential for conflict at a future date still exists. The date of this conflict is likely to be 50 years hence when the Environmental Protocol is subject to review. Article 25(2) of the Madrid Protocol states;

If, after the expiration of 50 years from the date of entry into force of this Protocol, any of the Antarctic Treaty Consultative Parties so requests by a communication addressed to the Depository, a conference shall be held as soon as practicable to review the operation of this Protocol.²²⁵

This Article preserves the rights of the ATCPs to lift the mining ban at a future date. As such the sovereignty issue in Antarctica has not been resolved it has merely been postponed until 2041. If at this time an attempt was made to lift the mining ban the developing conflict has the potential to tear the ATS apart. This makes the issue of the legitimacy of the ATS one of major importance, because a strong organisation is more likely to weather such a crisis.

²²⁴ Antarctic Treaty System, "Statement of Adriaan Bos, Head of Delegation from the Netherlands" *Final Report Special Antarctic Consultative Meeting on Antarctic Mineral Resources held 2 June 1988 in Wellington* 18.

²²⁵ Article 25(2) Environmental Protocol to the Antarctic Treaty, *supra* n 24.

CHAPTER FIVE

DEVELOPMENT OF THE ANTARCTIC TREATY SYSTEM

5.1 Conflict in Antarctica

While there had always been some degree of conflict between the Parties with territorial claims or other interests in the Antarctic by the late 1940s early 1950s the conflicts had developed to a point where they had become a matter of major concern. At this time two of the adverse relationships had reached the point where an escalation of the conflict to all out aggression was a real possibility. The two areas of concern were the bitter tripartite dispute between Britain, Chile and Argentina concerning the disputed parts of their respective claims and the growing tensions between the United States and Russia. These conflicts are central to the legitimacy debate because it was the desire to resolve these conflicts that defined the membership of the group that drafted the Antarctic Treaty. It was subsequently the exclusive nature of the membership of this group that became the driving force behind the first attack on the legitimacy of the ATS.

5.1.1 Britain, Chile and Argentina

A major source of conflict in the Antarctic, both historically and currently, are the overlapping claims of Argentina, Britain and Chile. Because Argentina and Chile both consider themselves to be the only legitimate heirs to the old Spanish territories in Antarctica they have in the past come into conflict, however this historic situation seems to have been resolved by the 1984 Treaty of Peace and Friendship.²²⁶ As a result of this alliance the majority of the current conflict has seen Argentina and Chile

²²⁶ Treaty of Peace and Friendship between Argentina and Chile 1984 ILM 24:1.

Article 15: In Antarctica, Articles 1 to 6 of the present Treaty shall apply. (the peace and friendship provisions) The remaining provisions in no way affect, or may be interpreted in a sense that affect.

lined up against Britain.²²⁷ In this regard they assert that regardless of whom is the rightful Spanish heir to the region, Britain under the terms of the Treaty of Madrid 1670 has no right to any territorial claims in the region.²²⁸ Prior to 1958 the instances of conflict between these three sovereign nations²²⁹ were numerous and often led to open confrontation.²³⁰ While Britain made frequent offers to adjudicate the problem through the use of the international legal establishment which both Chile and Argentina declined.²³¹

5.1.2 United States and Russia

By the early 1950's the increased activities of Russia and America in the Antarctic had raised fears that the Cold War rivalry between the two superpowers could be extended to the region.²³² During the 1940's America's Antarctic policy centred around prevention of any Soviet participation in the administration of or settlement in the Antarctic, this included preventing any Russian attempt to establish territorial

directly or indirectly, the sovereignty, or rights or legal positions of the Parties or delimitations in the Antarctic or in their adjacent maritime areas, including the soil and the subsoil thereof.

²²⁷ Hanessian, supra n 136 at 27.

²²⁸ The Treaty was signed between Britain and Spain and was a commitment on the part of the British to remove their official support of pirate activities in the Caribbean, but the up shot was that each party agreed to recognise the others territorial claims. According to Argentina and Chile this included Spain's territorial rights under the Treaty of Tordesillas. Ward, A Prothero, G and Leathes, S (eds) *Cambridge Modern History Vol X "The Restoration"* (1934) 272.

²²⁹ It is probably more accurate to say two nations as Chile has very much taken a back seat and the majority of the conflict is bi-partisan between Argentina and Britain.

²³⁰ In 1942 Britain sent a ship to Antarctica to deny German raiders access to sheltered points in the region and to ensure that German friendly Argentina did not seize control of the Drake Passage. However by the time the British arrived the Argentines had already left, leaving behind several brass plaques representing their recently defined claim. In 1943 the British ambassador returned one of the plaques to the Argentine government. In 1947 the conflict rose to the point where Argentina sent two cruisers and six destroyers escorting troopships to Deception Island and commenced the building of a station across the bay from the British base. By the time a British cruiser and a frigate had arrived the Argentine ships had departed. In 1952 an Argentinean naval officer fired a machine gun over the heads of a British party attempting to land supplies in Hope Bay. A year later British forces tore down Argentine and Chilean huts that had been built a few hundred yards from the British base and arrested and deported two Argentines. Hanessian, supra n 85 at 27-30. Quigg, supra n 14 at 121.

²³¹ In May 1955 the United Kingdom made a unilateral application to the International Court of Justice which was subsequently refused by both the other parties. Quigg, *Ibid.*

²³² Hanson, supra n 30 at 186.

claims.²³³ This policy is reflected in a U S National Security Council memorandum, which stressed the need for:

Orderly progress toward a solution of the territorial problem of Antarctica, which would ensure control by the US and friendly parties...²³⁴

In 1946 the Americans conducted military manoeuvres in the Antarctic. ‘Operation High Jump’ was designed to prepare troops for possible confrontation with USSR across the Arctic Basin. This was followed by another military operation in 1947.²³⁵

In response to the open resentment of their presence in the region the Russians resisted what they considered attempts to deny their historical rights in the region. On June 7 1950 Russia sent a note to America and the other Antarctic powers stating that “the Soviet government cannot recognise as lawful any decision on the Antarctic regime taken without its participation.”²³⁶

5.2 The International Geophysical Year

At the same time that the national governments were addressing conflict concerns the world’s scientists had developed a level of co-operation that put aside political differences. As a result of this co-operation the International Council of Scientific Unions (ICSU), which represented the major scientific organisations of the world, developed an initiative that resulted in the formation of a program of international scientific study, designated the International Geophysical Year (IGY). From the outset it was stressed that each representative in this program was representing their science not their country.²³⁷ To advance the goal of international scientific study the ICSU created the Comité Spécial de l’Annee Geophysique International (CSAGI) to co-ordinate activities. The Antarctic was recognised by this committee as “a region of almost unparalleled interest in the field of geophysics and geography, and hence worthy of a significant scientific initiative.”²³⁸ On July 1 1957 the venture began

²³³ Beck, *supra* n 178 at 40.

²³⁴ Ernest, G Hearings on the Expedition to the Antarctic Regions, House Committee on Appropriations, 2 June 1939. Reprinted in Quigg, *supra* n 14 at 137.

²³⁵ Hanessian, *supra* n 136 at 27.

²³⁶ Beck, *supra* n 178 at 40.

²³⁷ *Ibid.*, 48.

²³⁸ *Ibid.*, 47.

with participation from the scientific communities of 64 countries. Three World Data Centres were set up to ensure the free exchange of information; one in the US, the second in Russia and a third that was sub-divided between western Europe, Australia and Japan.

The International Geophysical Year activities were carried out with a spirit of enthusiasm and co-operation and from the outset the hope was expressed on both sides of the iron curtain that the spirit of co-operation would extend to other spheres.²³⁹ The year was in fact so successful that on the recommendation of Russian scientists it was extended for another year (International Geophysical Cooperation Year).²⁴⁰ For this second year a new body, the Special Committee for Antarctic Research (SCAR), replaced CSAGI in relation to the Antarctic. This group which was intended to provide a permanent mechanism for scientific co-operation and research in the Antarctic was renamed the Scientific Committee for Antarctic Research in 1961.²⁴¹ SCAR later took on a principle role within the ATS.²⁴²

The success of the International Geophysical Year eased the tensions, at least in Antarctica, between Russia and the United States and as a result of the spirit of co-operation they both developed similar policies for the region. They would both remain in Antarctica and pursue scientific investigation, both would recognise no

²³⁹ Fogg, *supra* n 139 at 99.

²⁴⁰ *Ibid.*, 175.

²⁴¹ Beck, *supra* n 178 at 51.

²⁴² SCAR's position within the ATS is unusual in that it has become a major component of the system but its role has never been formalised through inclusion in any of the ATS Treaty instruments. Its position was however defined by the Parties at ATCM I in 1961.

"The Representatives agree, without prejudice to the rights of Governments, to make such arrangements as they may deem necessary to further the objectives of scientific co-operation set forth in the Treaty:

- (1) that the free exchange of information and views among scientists participating in SCAR, and the recommendations concerning scientific programmes and co-operation formulated by this body constitute a most valuable contribution to international co-operation in Antarctica;
- (2) that since these activities of SCAR constitute the kind of activity contemplated in Article III of the Treaty, SCAR should be encouraged to continue this advisory work which has so effectively facilitated international co-operation in scientific investigation.

Antarctic Treaty System, "Recommendation I-IV" *Final Report ATCM I* held 10-14 July 1961 at Canberra, Australia.

territorial claims and would likewise refrain from making such claims but reserved their right to do so at a later date.²⁴³

5.3 Development of the Antarctic Treaty

Despite the scientific success of the IGY the twelve states active in Antarctic exploration²⁴⁴ realised that the political situation as it existed in the Antarctic still had the potential to turn the region into a source of international conflict. As a result they decided to formalise the spirit of scientific co-operation that had developed during the IGY into a political alliance. The Antarctic Treaty was the result of this alliance and the Parties combined desire to remove the Antarctic as a source of international conflict and preserve it for scientific use. Although as Beck pointed out it would be naïve to suggest a direct cause and effect relationship between the IGY and the drafting of the Antarctic Treaty. The IGY did have the effect of bringing the Antarctic to the attention of the world and providing an international climate in which the Treaty negotiations could commence.²⁴⁵

However the success of the IGY was not the only factor that contributed to the commencement of treaty negotiations. In the mid to late 1950' the Antarctic Nations became concerned about the level of interest being expressed in the Antarctic by nations with no record of activity in the region. This concern was triggered by India's 1958 move to have Antarctica placed on the UN Agenda and the fact that Brazil, Uruguay and Peru had expressed interest in filing sovereignty claims.²⁴⁶

In February and March 1958 the parties met to discuss their concerns at which time the United States put forward a proposal for the development of an Antarctic regime. As a result of these meetings in May 1958 the United States invited those eleven

²⁴³ Ibid. 41.

²⁴⁴ Although 67 nations were involved in the International Geophysical Year only twelve of those were active in the Antarctic. The seven claimant states: Australia, Argentina, Chile, France, New Zealand, Norway and the United Kingdom and Russia, Japan, United States, Belgium, South Africa. Ibid. 49.

²⁴⁵ Ibid. 53.

²⁴⁶ Rothwell, D *The Polar Regions and the Development of International Law* (1996) 68.

nations “who had expressed a direct interest in Antarctica through participation in the IGY” to a meeting to discuss the future of the continent.²⁴⁷ All eleven nations accepted the invitation and within a month representatives of the invited governments commenced, what was to be a series of 60, secret and informal preparatory negotiations in Washington DC.²⁴⁸ It was the limited scope of participation and the secret nature of these meetings that was to years later add fuel to the first attack on the legitimacy of the ATS. That is that it is a closed and exclusive club. Formal negotiations for the treaty began in Washington on 15 October 1959 and the 12 nations signed the Antarctic Treaty on 1 December 1959. The Treaty entered into force 23 June 1961.

²⁴⁷ Beck, *supra* n 178 at 62.

²⁴⁸ *Ibid.*

CHAPTER SIX

LEGITIMACY AND THE ANTARCTIC TREATY SYSTEM

The first twenty years of the ATS appear to have been relatively free of legitimacy challenges. However in coming to this conclusion I am relying on the apparent lack of criticism rather than the presence of open support.²⁴⁹ There was occasional debate from Parties both within and outside the ATS surrounding the ATCPs control of the Antarctic however the issue was not pursued with any vigour.²⁵⁰ Internal legitimacy was at its peak because the Parties themselves were still under the influence of the spirit of consensus and cooperation from which the Treaty developed.²⁵¹ However this situation changed in the early eighties when the increase in the World's dependence on natural resources and the need for new sources of exploitable minerals drew the attention of the international community to the last earthly wilderness.

In 1982 Malaysia moved to have Antarctica put on the UN agenda for the 1983 session. Malaysia maintained that Antarctica and its resources should be either placed directly under UN control or that the ATCPs should be considered "trustees for mankind as a whole." Those parties supporting the Malaysian position further argued the resources of Antarctica should come under the 'common heritage of mankind'. The Malaysian action had potentially dire consequences for the ATS.

²⁴⁹ Prior to the drafting of the Antarctic Treaty both New Zealand (1950) and the US (1948) had made recommendations that the Antarctic be placed under UN Trusteeship. Harris, S "The Influence of the United Nations on the Antarctic Treaty System: A Source of Erosion or Cohesion?" in Jorgensen-Dahl, A and Ostreng, W (eds) *The Antarctic Treaty System in World Politics* (1991) 309.

In 1956 New Zealand Prime Minister, Walter Nash, again proposed the creation of Antarctica as a "world territory" under the trusteeship of the UN. This view was repeated during treaty negotiations however despite support from the UK the proposal was dropped when it became clear that it lacked the support of the other Claimant States. Beck, *supra* n 178 at 273.

²⁵⁰ Sri Lanka raised the issue of UN involvement in Antarctica in ESCSOC and UNGA in 1975.

Harris stated that there is evidence that in 1972 New Zealand raised the issue of Antarctica as a "world territory" at the 7th ATCM in Wellington, New Zealand. (Harris, *supra* n 238). There is however no mention of this event in the Final Report of the meeting.

²⁵¹ Review of the early meeting reports give no indication of any tensions between the Parties. Or at least any tensions that were reported.

Because for the first time the issue had been raised as the legitimacy of the ATS's exclusive control of Antarctic affairs.

Since the Malaysian event the legitimacy of the ATS has remained on the international agenda. In the following chapters I will address a range of issues I believe have the potential to raise questions as to the continued legitimacy of the ATS. Because some of these issues effect both the internal and external legitimacy of the ATS rather than divide the discussion into its internal and external components I have chosen to structure the analysis so as to begin with a description, with detailed supporting evidence, of each issue. This will be followed in each instance by the application of the facts to Stokke's categories of legitimacy. The issues addressed will be:

- a) The criticism that the ATS membership constitutes a closed club and exclusive club.
- b) Whether Article IX(2) of the 1959 Antarctic Treaty conflicts with the new principle of Antarctic conservation.
- c) The difficulties associated with the establishment of a permanent Secretariat.
- d) The inability of the ATCPs to develop a liability annex to the Environmental Protocol.
- e) The possible effects of the non-compliance of China with the recommendations of CCAMLR.
- f) The issue of jurisdiction and in particular the inability of the Treaty Parties to control tourism and other activities from non-party states.
- g) The UN relationship with the ATS.

CHAPTER SEVEN

THE ANTARCTIC TREATY SYSTEM: A CLOSED AND EXCLUSIVE CLUB OF RICH AND POWERFUL STATES?

In order for an international organisation to maintain its external legitimacy it is necessary that its “normative and structural components” comply with the major developments within the international community and that the rules of the organisation be recognised by actors outside the organisation.²⁵² The purpose of this chapter is to investigate the closed club criticism in order to assess whether the criticism is justified and if so does this prevent the ATS from complying with the normative structural requirements of the international community, thus raising questions as to the legitimacy of the organisation. The closed club criticism will also be investigated in regards to the effects it has on the acceptance of the ATS by outside actors.

7.1 Origins of the Closed Club Criticism

The 1982 Malaysia initiative in the UN²⁵³ has been considered by many to be the first major attack on the external legitimacy of the ATS. Part of that critique was the contention that the ATS is a closed and exclusive club of rich and powerful states.²⁵⁴ This issue is related both to the closed nature of the invitees to the Treaty drafting meetings and the apparent subsequent reluctance of the ATPs to expand their membership.²⁵⁵ During the decade 1981-91, with the addition of 19 new members²⁵⁶, the ATCPs did appear to be making a concerted effort to expand their membership in

²⁵² Stokke, *supra* n 40 at 24.

²⁵³ *Supra* 63 and 68.

²⁵⁴ Vidas, D “The Antarctic Treaty System in the International Community: An Overview” in Stokke, O and Vidas, D (eds) *Governing the Antarctic: The Effectiveness and Legitimacy of the Antarctic Treaty System* (1996) 51. Also see UN doc. A/37/PV.10.

²⁵⁵ In 1960 there were twelve original signatories to the Treaty. Five new members acceded in the decade 1961-71 with a further 6 in 71-81. Equating to 11 new members in 21 years.

²⁵⁶ SCAR, “Treaty Membership” (4/5/2001) <<http://www.scar.org/Treaty/Signatories>>.

an effort to address the Malaysian criticism. With the admission of Papua New Guinea, China and India this decade also saw the first admissions of developing countries to the Treaty System.²⁵⁷ However in the subsequent decade there were only four new signatories.²⁵⁸ Therefore while the drive for new members was apparent during the height of the closed club criticism it appears to have subsequently lost its momentum. As such the criticism has not been totally defused. As Stuart Prior stated in 1997;

the expanding Antarctic Treaty membership over the decade 1981-1991 did help to move it away from the appearance, or reality, of a small club of like-minded countries. But more was needed, and needs, to be achieved.²⁵⁹

7.2 The Modern Version of the Closed Club Criticism

The closed club criticism has however changed a little over the years and is currently concentrated more on the absence of developing countries from the decision making process rather than their absence from the ATS as a whole. The continued absence of developing countries from this group is largely due the very nature of the Antarctic Treaty.

Article XIII(1) of the Treaty states that accession to the Treaty is open to all Member States of the United Nations and any other State which may be invited to accede to the Treaty.²⁶⁰ However Article IX(2) restricts the representation of the Parties at Treaty Meetings.

Each Contracting Party ...shall be entitled to appoint representatives to participate in the meetings...during such times as that Contracting Party demonstrates an interest in Antarctica by conducting substantial research activity there, such as establishment of a scientific station or the dispatch of a scientific expedition.”²⁶¹

²⁵⁷ Ibid.

²⁵⁸ Ukraine 1992, Turkey 1996, Venezuela 1999 and Estonia 2001. Ibid.

²⁵⁹ Prior, *S Antarctica: View from a Gateway* (1997) 6.

²⁶⁰ Switzerland, the only non-UN Member who is party to the Treaty was invited to accede to it in 1990.

²⁶¹ Antarctic Treaty 1959, Article IX(2).

This article in effect establishes a two-tier membership system within the treaty. Firstly Consultative Parties, being those Contracting Parties who are active in substantial Antarctic research and therefore have the standing to make policy and vote in decision making matters. Secondly are those defined as non-consultative Parties, who have acceded to the Treaty but are not engaged in substantial Antarctic research.²⁶² Resolution I of the First Special Consultative Meeting held in 1977 defined ‘substantial research’ as the “establishment of a scientific station or the despatch of a scientific expedition.”²⁶³ However review of the reports from Special Consultative Meetings where new ATCPs were recognised indicates that the establishment of a scientific station is in fact a requirement for admission. This contention is supported by Resolution II of the First Consultative Meeting which granted Poland consultative status.

The Representatives of the Consultative Parties,...

Noting that the Polish People’s Republic established a permanent scientific station...and that the Polish People’s Republic thereby demonstrates its interest in Antarctica...

Record their acknowledgement that the Polish People’s Republic has fulfilled the requirements established in Article IX, paragraph 2 of the Antarctic Treaty and that, as a consequence has the right to appoint representatives in order to participate in Consultative Meetings...²⁶⁴

The Consultative Parties again discussed the issue of meeting participation at ATCM XVII held November 1992 in Venice, Italy.²⁶⁵ The result of the debate was a revised set of Rules of Procedure, which again stipulated that *only those parties who complied with the requirements of Article IX (2) of the Treaty could participate in decision making at Treaty meetings*. Rule one of the revised rules states:

*Meetings held pursuant to Article IX of the Antarctic Treaty shall be known as Antarctic Treaty Consultative Meetings. Contracting Parties entitled to participate in those meetings shall be referred to as “Consultative Parties”; other Contracting Parties which may have been invited to attend those meetings shall be referred to as “non-Consultative Parties”.*²⁶⁶

²⁶² Non-Consultative Parties were granted observer status at ATCM XII in 1983, this entitles them to take part in policy debates but not to participate in the vote. Antarctic Treaty System. *Final Report ATCM XII* para 39.

²⁶³ Antarctic Treaty System. *Final Report First Special Consultative Meeting* held 25-29 July in London, England 4.

²⁶⁴ Antarctic Treaty System. “Resolution II” *Final Report First Special Consultative Meeting* 5.

²⁶⁵ Antarctic Treaty System. *Final Report of ATCM XVII* held Nov 11-20 1992 in Venice, Italy para 61-64 at 26-27.

²⁶⁶ Antarctic Treaty System. “Revised Rules of Procedure” *Final Report of ATCM XVII* 419.

Rule 21 further states that:

Decisions of the Meeting on all matters of procedure shall be taken by a majority of the Representatives of Consultative Parties participating in the meeting, each of whom shall have one vote.²⁶⁷

Rule 28 removes any doubt as to the position of non-Consultative parties in relation to decision making:

Non-Consultative Parties are not entitled to participate in the taking of decisions.²⁶⁸

While the research requirement for admission to Consultative Status may have been legitimate when the purpose of the ATS was solely to advance scientific research it is not conducive with the current diverse interests in the region. The scientific research requirement of the Treaty essentially excludes from the decision making process any Party that is unable or unwilling to maintain an active scientific research program. This ATS opponents maintain is a violation of the rights they claim under 'common heritage of mankind' doctrine.

7.3 Common Heritage of Mankind

This principle is based on the belief that the common areas of the world are not owned by any person or sovereign. Regions that are defined as global commons are subject to five tenets:

1. Because the commons is beyond national jurisdiction, but is owned by all, it is not subject to national appropriation.
2. Common spaces must be used exclusively for peaceful purposes.
3. Scientific research must be free, open and non-damaging to the environment. The benefits of such research belong to mankind and not a particular government.
4. Economic benefits of common areas must be shared with all peoples. (This aspect of common heritage is the one most focused on by the developing countries)
5. Exploration and exploitation of the commons must benefit the present as well as the future generations. As such the commons is held on trust.²⁶⁹

²⁶⁷ Ibid. 424.

²⁶⁸ Ibid. 425.

Typically the management of a global commons would be performed by a supranational management and monitoring agency, such as the International Seabed Authority created under the 1982 UN Law of the Sea Convention.²⁷⁰ The paradigm of the commons is an unusual one in that it has “attained little international credibility through state practice” therefore it functions mainly as a principle of treaty law, yet as a philosophical and political, be it unpractised, concept it has within the past three decades had a incredible rise into mainstream international law.²⁷¹

Ambassador Shirley Hamilton Amerasinghe of Sri Lanka first raised the contention that Antarctica was a global commons in 1976 while serving as Chair of Third Conference on the Law of the Sea.

There are still areas of this planet where opportunities remain for constructive and peaceful cooperation on the part of the international community for the common good of all rather than for the benefit of a few. Such an area is the Antarctic continent... Antarctica is an area where the now widely accepted ideas and concepts relating to international economic cooperation, with their special stress on the principle of equitable sharing of the world's resources, can find ample scope for application, given the cooperation and goodwill of those who have so far been active in the area.²⁷²

It was six years later in 1982 that the Malaysian government, on behalf of the developing world, launched the first salvo of the attack on the right of the ATS to administer the commons of Antarctica. Prime Minister Mahathir-bin Mohammad in a speech to the UNGA proposed that Antarctica should either be brought under the administration of the UN or that the present management team should be considered trustees for mankind.

Uninhabited lands...the largest of which is the continent of Antarctica...do not legally belong to the discoverers as much as the colonial territories do not belong to the colonial powers.²⁷³

He then criticised the Antarctic Treaty as an agreement between select privileged states and demanded that a new international treaty be negotiated.²⁷⁴ In August 1983

²⁶⁹ Joyner, C *Governing the Frozen Commons: The Antarctic Regime and Environmental Protection* (1998) 32.

²⁷⁰ Ibid.

²⁷¹ Ibid, 32.

²⁷² U.N. Doc. A/30/PV 2380 (1975), 13-15.Reprinted in Joyner. Ibid at 236.

²⁷³ Mahathir Bin-Mohammad, *United Nations General Assembly Official Records*, 37th Session. U.N. Doc A./37/PV.10 (1982) 20. Reprinted in Joyner. supra n 228 at 236.

Antigua and Barbuda, and Malaysia sent a letter to the Secretary-General of the UN requesting that the question of Antarctica be placed on the UNGA agenda for the next session. The letter stated that there was,

a need to examine the possibility for a more positive and wider international concert to ensure that activities carried out in the Antarctic were for the benefit of mankind as a whole.²⁷⁵

This action resulted in the adoption of UNGA resolution 38/77:

*The General Assembly,
Having considered the item entitled "Question of Antarctica",
Conscious of the increasing international awareness of and interest in Antarctica,
Bearing in mind the Antarctic Treaty and the significance of the system it has developed...
Requests the Secretary-General to prepare a comprehensive, factual and objective study on all aspects of Antarctica, taking fully into account the Antarctic Treaty system and other relevant factors.*²⁷⁶

7.4 Expanding Antarctic Treaty Consultative Party Membership

The ATCPs have addressed the issue of the closed nature of the consultative membership by admitting more developing countries to Consultative Status.²⁷⁷ However, there remains questions as to whether these actions truly represent a desire by the ATCPs to extend their membership to the developing world or whether they are mere tokenism in order to quiet the criticism.

To this end one would have assumed that in view of to all the criticism levelled at them by the developing world that both sides would have made a great show of the admission of Brazil and India as Consultative Parties at ATCM XII in 1983. However the opposite appears to have been the case. Neither India nor Brazil mentioned anything about the developing world in their inaugural opening addresses²⁷⁸ and the references made by the other Parties were very low key, as is demonstrated by the response from Australia:

²⁷⁴ Joyner, *supra* n 256 at 236.

²⁷⁵ UNGA, "Antarctica" *Yearbook of the United Nations* Vol 37 (1983) 387.

²⁷⁶ UNGA, "Resolution 38/77" *Ibid*.

²⁷⁷ Brazil (1983) China (1985) Ecuador (199)) India (1983) South Korea (1985). *Final Report of ATCM XXII* held 25 May-5 June 1998 in Tromso, Norway, 224.

²⁷⁸ Antarctic Treaty System, *Final Report of ATCM XII* held 13-17 September 1983 at Canberra, Australia.

It is, of course, highly gratifying too that Brazil and India have taken their place amongst us as Consultative Parties..... The presence here of Delegations representing a wide range of countries with differing political and economic systems is a clear sign to the international community that the Antarctic Treaty System is alive and well and effectively carrying out its responsibilities in Antarctica.²⁷⁹

Argentina added:

Ladies and Gentleman, here in our midst we have developed and developing countries, capitalist and socialist countries of the North and South...a healthy combination, the result of which has been to strengthen unity within the System...which represents a model of democratic exchange at the international level.....²⁸⁰

France made a low key comment about the 'closed club criticism':

I should, first of all, like to express the particular satisfaction of my delegation at Brazil and India acquiring the status of Consultative Parties...Contrary to the opinion held by many, the members of the Washington Treaty do not form a 'closed club'... It was thus in a spirit of openness that the applications of these two States were received.²⁸¹

The situation was identical when China attended its first ATCM as an ATCP in 1985. While the Chinese delegation made only an inferred reference to the closed club issue.

The Chinese Government holds that the purposes and principles of the Antarctic Treaty are good....Nevertheless, the Antarctic Treaty System needs to be perfected with fresh ideas so as to meet the development requirements of the international community.²⁸²

The majority of the other opening address contained nothing more than the normal paragraph of welcome for the new ATCPs (Uruguay was admitted along with China). The exception to this was the representative from India who made a direct reference to developing countries.

It is a matter of great pleasure and honour for my Delegation to extend a very warm welcome to the great country of the People's Republic of China and the very important developing country, the Oriental Republic of Uruguay [sic] for achieving the Consultative Status and for joining this Meeting...the Treaty mechanism represents 32 states in the world and with the admission of China and India, a very significant portion of the world population stands represented by the Treaty. However, we hope that as time passes, there will be a still wider participation of many more states so as to make the Antarctic Treaty more open and effective.²⁸³

²⁷⁹ Antarctic Treaty System, Opening Address of Bill Hayden, Minister of Foreign Affairs for Australia. *Final Report of ATCM XII*, 49.

²⁸⁰ Antarctic Treaty System, "Opening Address of Carlos Blanco of Argentina" *Final Report of ATCM XII* 58.

²⁸¹ Antarctic Treaty System, "Opening Address of Bernard Dorin of France" *Final Report of ATCM XII* 70.

²⁸² Antarctic Treaty System, "Opening Address: China, Mr Xu Guang Jian" *Final Report of ATCM XIII* held 7-18 October 1985 in Brussels, Belgium 132.

²⁸³ Antarctic Treaty System, "Opening Address: India, Dr S Qasim" *Final Report of ATCM XIII* 144.

The admission of India, Brazil and China as Consultative Parties has put a serious dent in the argument that maintains the ATS is a closed and exclusive club. However, if you compare the admission of India and Brazil with that of other ATCPs there appears to be a procedural anomaly present. Poland acceded to the Treaty 1961 and did not obtain Consultative Status until 1977 after it had established a research station as required by Article IX(2) of a Treaty. This constituted a lapsed time of 16 years. India on the other hand acceded to the Treaty in August 1983 and became a Consultative Party in September of that year. India and Brazil, although Brazil's wait was 7 years, were recognised as having achieved the requirements of Consultative Status not by establishing a base but by virtue of their plans to do so.

Noting that the Republic of India has firm plans during the 1983-84 season to establish the 'Dakshin Gangotri' permanent manned station at lat 70°45'S, long 11°38'E;

Noting that the Federative Republic of Brazil has firm plans during the 1983-84 season to establish the 'Commandante Ferraz' summer station on an island of the Palmer Archipelago east of the Neumayer Channel, and that the station will have the capacity to be expanded into a permanent station;

Recognizing that the Republic of India and the Federative Republic of Brazil on the Basis of scientific expeditions they have dispatched to Antarctica and of the stations they will establish during the forthcoming summer season, thereby demonstrate their interest in Antarctica in accordance with Article IX, paragraph 2 of the Treaty;...

Record their acknowledgement that the Republic of India and the Federative Republic of Brazil have fulfilled the requirements ...as a consequence they are entitled...to appoint representatives to participate in the Consultative Meetings...²⁸⁴

While it is a valid argument that the Consultative Parties are fully entitled to change the requirements for consultative status and it was simply a coincidence that the change coincided with the applications of India and Brazil. This does not explain why after the admission of India and Brazil to Consultative Status the ATCPs returned to the prior precedent. That is the establishment of a scientific station. In 1985 both China and Uruguay were admitted to Consultative Status only after establishing scientific stations.²⁸⁵ The establishment of a permanent station also

²⁸⁴ Antarctic Treaty System, *Final Report of the Fifth Special Antarctic Treaty Consultative Meeting* held 12 Sept 1983 in Canberra, Australia. Electronic version (11/07/01)
<<http://currentaspire.nvi.net/gendoc.plx?11=1987&db=3>>.

²⁸⁵ *Noting* that the People's Republic of China had established on 20 February 1985 'The Great Wall Station' on Fildes Peninsula, King George Island...
Noting that on 14 December 1984 the Oriental Republic of Uruguay had established the Scientific Antarctic Base 'Artigas' on Fildes Peninsula, King George Island...

allowed for the granting of Consultative Status to Germany and Italy in 1987²⁸⁶, Spain and Sweden in 1988²⁸⁷. Peru, Korea and Finland after establishing scientific stations were granted Consultative Status at the Special Consultative Meeting in 1989,²⁸⁸ however at the same meeting Ecuador and the Netherlands were denied Consultative Status because a consensus could not be reached as to whether their activities met the requirements of Article IX(2). Consensus could not be reached because neither of these countries provided documentation that showed the establishment of a research station.²⁸⁹

The conclusion to be drawn from this situation is that rather than representing a fundamental shift in ATCP philosophy towards the inclusion of developing countries there were in fact an ulterior motive behind the admission of Brazil and India to Consultative Status. This is particularly true of India who as one of the dominant members of the Non-Aligned Movement was one of the more outspoken critics of the ATS. As such India's admission to Consultative Status gagged one of the ATS's major critics and with the added advantage of the removal of Brazil from this group significantly weaken the alliance of developing countries.²⁹⁰

Recognising that the People's Republic of China and the Oriental Republic of Uruguay, on the basis of the scientific programmes they have undertaken, the stations they have established...thereby demonstrate their interest in Antarctica...

Antarctic Treaty System, *Final Report of the Sixth Special Antarctic Treaty Consultative Meeting* held 7 October 1985 in Brussels, Belgium. Electronic version, (11/07/01)

<<http://currentaspire.nvi.net/gendoc.plx?11+1987&db=3>>.

²⁸⁶ Antarctic Treaty System, *Report of the Seventh Special Antarctic Consultative Meeting* held 5 October 1987 in Rio de Janeiro, Brazil. Electronic version, (11/07/01)

<<http://currentaspire.nvi.net/gendoc.plx?11+1987&db=3>>.

²⁸⁷ Antarctic Treaty System, *Report of the Eighth Special Antarctic Consultative Meeting* held 20-21 Sept 1988 in Paris, France. Electronic version, (11/07/01)

<<http://currentaspire.nvi.net/gendoc.plx?11+1987&db=3>>.

²⁸⁸ Antarctic Treaty System, *Report of the Ninth Special Antarctic Consultative Meeting* held 9 October 1989 in Paris, France. Electronic version, (11/07/01)

<<http://currentaspire.nvi.net/gendoc.plx?11+1987&db=3>>.

²⁸⁹ Antarctic Treaty system, *Report of the Ninth Special Antarctic Consultative Meeting* held 9 October 1989 in Paris, France. Electronic version, (11/07/01)

<<http://currentaspire.nvi.net/gendoc.plx?11+1987&db=3>>.

²⁹⁰ For more information on India and the Non-aligned movement see 7.7 infra at 78.

7.5 Under-Representation of the Developing World

While the inclusion of India and China in the consultative membership has removed some of the previous inequities in the Treaty System there continues to be inadequate representation of the developing world in the Antarctic decision making process.²⁹¹ This contention is supported by an analysis of the ATS Consultative Membership. As of ATCM XXIV (Russia, 2001) the ATS consisted of 45 members, 27 of which had Consultative Status. This number represents the five Super Powers and 22 other UN Nation States.²⁹² The economic status of ATCPs fell into the following groupings. Fourteen have the World Bank classification of high income economies,²⁹³ four have a World Bank classification as upper-middle-income economies,²⁹⁴ five have a World Bank classification as lower-middle-income economies,²⁹⁵ two countries fell within the low-income economies category²⁹⁶ and two were unreported.²⁹⁷ These numbers equate to 66.6% of ATCPs being classified as upper-middle or high income while 33.4% could be classified lower-middle or low income countries. This represents a disproportionate over-representation of wealthy countries among the ATCPs. This ratio is the exact opposite to that represented by the UNGA membership, where 70% of members could be classified as low-middle/low income and 30% as upper-middle/high income.²⁹⁸

²⁹¹ In 1983 for the first time Contracting Parties were invited to attend ATCM as observers (Final Report ATCM XII held 13-27 September 1983 in Canberra) this situation was later formalized at the ATCM XIII in Brussels. They continue however to have non-voting status. The principle that only ATCP have decision-making authority is carried into the Environmental Protocol. Article 11(2) of the Protocol states that each member shall be entitled to appoint a representative to the Committee for Environmental Protection. However Article 12 states that the function of the Committee is to provide advice to the Parties and formulate recommendations for consideration at the ATCM. Therefore it is clear that the ATCP have retained the decision-making authority.

²⁹² The Super Powers are defined by their status as permanent members of the UN Security Council. United Kingdom, United States, China, France and Russia. <<http://www.un.org>>.

²⁹³ These are countries with GNP per capita above US\$6000. Thomas, *A Third World Atlas* (2nd ed) (1995) 15.

²⁹⁴ These are countries with GNP per capita between US\$2200 and US\$6000. Ibid.

²⁹⁵ These are countries with GNP per capita between US\$545 and US\$2200. Ibid.

²⁹⁶ These are countries with GNP per capita below US\$545. The two countries in this group were China and India. Which gives China a bit of a split personality as it classifies as both a Super Power and a Developing Nation. Ibid.

²⁹⁷ The two unreported countries were Bulgaria and Russia.

²⁹⁸ This is based on a rough calculation balancing the number of UN Members against the number of countries considered, using the World Bank 1990 figures, to be low-middle/low income economies. There are 189 UN Member States listed on the UN website and of those 83 can be subtracted because

Given the proportion of low-middle/low income countries in the United Nations in order for the ATS to totally remove the criticism that they are an exclusive club of rich and powerful nations they would need to amend the membership ratio of the ATCP to more accurately represent that in the international community at large. As was pointed out in a 1991 New Zealand working paper on Antarctica;

Parties are still vulnerable to the charge that Antarctica is governed under a regime determined by a self-selected and unrepresentative group of countries. Wider subscription to the Antarctic Treaty should add to its legitimacy...The concerns raised, first by Malaysia have, however not been allayed for all time.²⁹⁹

It could be claimed that given their current attitude toward environmental conservation in their own territories the inclusion the developing countries in the Antarctic may not necessarily be a good thing for the Antarctic environment. There are three responses to this criticism. Firstly this observation suggests that the developed countries are pure in their environmental attitudes. Japan for example is a developed nation and an ATCP but we are all aware of their current attitudes toward preservation of cetaceans. Their stance during negotiation of the Minerals Convention also makes it quite clear that for them Antarctic environmental issues run secondary to economic gain.

Japan views Antarctica as a potential reservoir of substantial amounts of minerals. Consequently, given the magnitude of Japanese interest in Antarctica, [i]f minerals or oil are discoverable in exploitable quantities, Japan will wish to be among the first generation of exploiters...³⁰⁰

Secondly if the developing countries did have undesirable intentions towards Antarctica then it would be much easier to control their behaviour if they were members of the ATS. As internal actors in the ATS the developing countries would be subject to a level of peer pressure that could not be exerted against external actors.

they were unreported, either because their governments do not provide the information or the World Bank dropped them because their populations were less than one million. Of the remaining 106 countries 70 (66%) could be classified as low-middle/low income economies.

²⁹⁹ Prior, *supra* n 246 at 7.

³⁰⁰ Gillespie, A "Antarctica: Environmentalist's Victory or Hidden Agendas?" (7/9/01) <<http://www.nottingham.ac.uk/~llzweb/TEXTAG.HTM>>.

Thirdly, democracy is the founding principle of international law and democracy demands equal representation.

7.6 Recognition of the Needs of Developing Countries

The ATCP's appear to have recognised that despite their attempts in the 1980s to develop a more adequate representation for the lower income economies an inequity still exists in the current system. They attempted to remove some of this inequity when they drafted the Convention on the Regulation of Antarctic Mineral Resource Activities in 1988. Article 29 of the Convention, which addresses the establishment of regulatory committees to control mineral activity, makes specific reference to the inclusion of the developing countries.

29(3) Upon identification of an area...the Chairman of the Commission shall...make a recommendation concerning the membership of the Regulatory Committee...Such recommendation shall comply with the requirements of paragraphs 2 and 4 and shall ensure:

29(3)(b) adequate and equitable representation of developing country members of the Commission, having regard to the overall balance between developed and developing country members of the Commission, including at least three developing country members of the Commission.³⁰¹

That the fact that the Convention never entered into force does detract from the ATCPs recognition of and attempt to deal with the inequity that existed within the ATS. Also while the recognition of the developing countries in the Minerals Convention fell short of what would be necessary to totally remove the closed club criticism, it is likely that the ATCPs have taken sufficient steps in this regard to remove any substantial threat to internal legitimacy on this count in the near future. This fact is highlighted by the address of Antonio Guerreiro, the Head of the Brazilian Delegation to the Minerals Meeting in Wellington:

...In many respects it falls short of what we believe should have been achieved. For instance in terms of reflecting the interests of a group of countries – in particular the developing countries... Yet for the first time within the Antarctic Treaty system the Convention we have just adopted recognizes that the developing countries have specific and legitimate interests which are to be taken into account...this is far from what we thought ideal. But, having entered these negotiations at a late stage...Brazil takes some pride in what it and other

³⁰¹ Antarctic Treaty System. *Final Report of the Fourth Special Antarctic Treaty Consultative Meeting on Antarctic Mineral Resources* held 2 June 1988 in Wellington, New Zealand, 72.

countries eventually achieved as far as having the interests of developing countries accommodated.³⁰²

The ATCPs during the drafting of the Minerals Convention acknowledged that an inequity existed within the current system. As a result of this recognition the ATS members from developing countries appear content to wait and give the ATCPs more time to deal with this problem. Unfortunately this is not true of the developing countries outside the ATS.

7.7 Continued External Criticism

The level of external criticism of the ATS decreased with the admission of China and India as Consultative Parties because this action divided what had up until then been a solid front of developing countries.³⁰³ However criticism continues to be expressed by some countries within the Non-Aligned Movement (NAM).³⁰⁴ The 1984 address of the representative from Antigua and Barbuda to the UN make it apparent that the ATCP's current policy of admitting developing countries to consultative status is not going to totally remove the criticism concerning the closed nature of the ATS.

The World has vastly changed since the Antarctic Treaty was signed in 1959. There are now 159 Member States of the United Nations, most of which are developing countries. In 1959 they had neither the opportunity nor the sovereign competence to participate in the events in Antarctica. It is not only unfair, it is unjust to suggest that we should abide by decisions made

³⁰² Antarctic Treaty system, *Final Report of the Fourth Special Antarctic Treaty Consultative Meeting on Antarctic Mineral Resources* held 2 June 1988 in Wellington, New Zealand, 26.

³⁰³ Vidas claims that the admission of India and China as Consultative Parties has prevented the use of the rich North v the poor South argument in relation to the legitimacy of the ATS. Vidas, D "The Antarctic Treaty System in the International Community: An Overview" in Stokke, O and Vidas, D (eds) *Governing the Antarctic* (1966) 55.

³⁰⁴ The Non-Aligned Movement is an organisation of predominantly Asian and African States, which was established in the 1960s with a focus of reducing the East-West conflict. However since the 1970s their focus has shifted to the restructuring of the global system in order to decrease the North-South inequities.

There is also potential for the organisation to have spill over effects on the internal legitimacy of the ATS as it counts among its current membership nine ATPs, four of whom are ATCPs. India, Chile, Peru, South Africa, Ecuador, Papua New Guinea, Korea-DPR, Guatemala, and Colombia. With a further 3 ATP's having observer status. Brazil, China and Uruguay. Non-aligned Movement "Membership" (15/12/01) <<http://www.nam.org>>.

India is a strong member of the non-aligned movement therefore since its admission as an ATCP has been able to defuse some of the criticism aimed at the ATS. India seems her position within the ATS as a more effective way of advancing Third World interests in Antarctica. Beck, P *The International Politics of Antarctica* (1986) 198.

without our involvement...It is in the interests of global peace and stability to address the democratization of Antarctica now.³⁰⁵

During the 1991 UN Session Malaysia, a driving force within the NAM, continued its criticism of the ATS by stating that the Protocol on Environmental Protection “[m]erely duplicated the flaws characteristic of the so-called restrictive, unequal, and discriminatory ATS.³⁰⁶

In a follow on from Malaysia’s comments Indonesia commentated that;

As a result a minority of states has continued to exclude the vast majority from decision-making processes, despite the fact that activities in Antarctica will have a world-wide impact.³⁰⁷

Malaysia’s address to the UN in 1993 indicates that their position on the ATS may be mellowing a little. However, while they commented in that address of the continued support of the developing and non-aligned countries for the ATS, they continued to maintain their desire to see the Antarctic under international control.

The entire international community acting under the auspices of the United Nations should be involved in efforts to consider and decide on the future of Antarctica. The international community must shoulder the main responsibility for safeguarding the environment of Antarctica.³⁰⁸

7.8 International Recognition of Needs of Developing Countries

It is accepted that a limitation on the membership of an international regime does not in itself detract from that regime’s legitimacy.³⁰⁹ However, the apparent acceptance by the ATCPs of the ATS’s limited representation from developing countries can be related directly to Stokke’s contention that to obtain external applicability and

³⁰⁵ UNGA A/C.1/39/PV.50, p6. 28 Nov 1984. As reprinted in Beck, P *The International Politics of Antarctica* (1986) 184.

³⁰⁶ Beck, P “The 1991 UN Session: the environmental protocol fails to satisfy the Antarctic Treaty System’s critics” 28 *Polar Record* 307, 309.

³⁰⁷ *Ibid.*

³⁰⁸ Address of Malaysian delegate to the 48th UN Session, United Nations General Assembly Records 48th session, 33rd meeting of the First Committee, AC.1/48/SR32, as reprinted in Beck, R “The United Nations and Antarctica 1993: continuing controversy about the UN’s role in Antarctica” 30 *Polar Record* 257,259.

³⁰⁹ Jorgensen-Dahl, *supra* n 34 at 291.

therefore legitimacy requires that the “normative and structural components of the regime” comply with major developments in the international community.³¹⁰

There has recently been an increased recognition by the international community of the importance of including the Developing Nations in international decision making. This has resulted from a realisation that any attempt at obtaining a global goal cannot be achieved without the support of a group of countries that represent 70% of the membership of the UN. As a result actors associated with numerous international instruments, particularly those in relation to environmental protection, have recognised the need for the inclusion of this sector of the international community.

We can say with certainty that no country on its own is able to pay the cost of environmental damage... Given this situation, contemporary international jurists have clearly realized that the settlement of environmental issues... must take into account the contributions and the needs of third-world countries. The participation of third-world countries in international environmental protection, legislation, and implementation of international environmental law is very relevant.³¹¹

There has also been an associated increase in the participation of developing countries in international affairs.

We, the Ministers of Foreign Affairs and Heads of Delegation of the countries of the Non-Aligned Movement... Reaffirm the unity and cohesion of the Non-Aligned Movement as the highest political forum of the developing world and the most effective mechanism of dialogue between NAM members with the industrialized countries and other actors of the international community in the face of the challenges of a changing world... with the end of the cold war the Movement has grown in stature and has come to play an increasingly important role in every forum in the world, in particular within the UN system and in the direct and frank dialogue initiated with the Group of Seven on economic issues.³¹²

The participation of the developing countries in international affairs through organisations such as NAM has placed them in the position of some influence. NAM currently has 113 members,³¹³ with the UN having a current membership of 189 that

³¹⁰ Vidas, *supra* n 288 at 55.

³¹¹ United Nations University, “The Status of Third World States in International Environmental Legislation and its Implementation” in *United Nations University Programme Report on Human Dimensions of Global Change* (2001) electronic version
<<http://www.unu.edu/unupress/unupbooks/uu25ee/un25ee0j.htm>>.

³¹² NAM Ministers, “A Message from Cartagena De Indias” *Press Release from 1998 NAM Meeting*, (20 May 1998) <<http://www.nam.gov.za/cartagena98.html>>.

³¹³ NAM Membership List, (20 May 2001) <<http://www.nam.org>>.

means that as a block NAM controls 60% of the UN voting power.³¹⁴ Opinions will vary as to whether this situation is beneficial or not in relation to environmental protection, however no matter what your opinion it is necessary to recognise that such numbers can not simply be ignored. The effect of this block of influence must be addressed in order to use it to the best advantage for all. The influence of NAM has already been seen in relation to Antarctic politics. It was due to support from the NAM countries that Malaysia originally succeed in having Antarctica placed on the UN Agenda in 1983.³¹⁵ Because of their growing level of influence in international affairs the continued criticism of the ATS by groups such as NAM has the potential to erode the external legitimacy of the organisation.

7.9 Assistance of Developing Countries Necessary to Ensure Environmental Protection in the Antarctic

The necessity for the inclusion of developing countries in the decision making process is already evident in relation to the Antarctic environment. It has become particularly obvious that any attempts to stop illegal fishing in the Treaty area cannot be successful without the assistance of the developing countries. While it is recognised that it is not only the developing countries that have a history of non-compliance with the fishing regime established by CCAMLR, having the support of NAM in combating non-compliance will go a long way to solving the current problem. In the CCAMLR report to ATCM XXII the Commission made specific reference to its attempts to get two problem countries (both members of NAM) to participate as observers at Commission meetings:

The Commission also decided to invite the Governments of Mauritius and Namibia to participate as observers at the Seventeenth Meeting of the Commission with a view to encouraging these States to accede to the Convention and also to cease providing port or landing facilities for vessels which carried out unregulated fishing in the Convention Area.³¹⁶

These two countries, along with Belize, Chile and China, are the ones most often associated with reports of illegal fishing in the Antarctic. With the exception of

³¹⁴ Background on NAM. (20 May 2001) <<http://nam.org>>. NAM states one of its principal goals as that of showing a unified front in the UN.

³¹⁵ Myhre, J *The Antarctic Treaty System: Politics, Law and Diplomacy* (1986) 113.

³¹⁶ Final Report ATCM XXII. 240.

China all these countries are members of the NAM.³¹⁷ This appeal by the CCAMLR Commission did in fact meet with great success as it resulted in both Mauritius and Namibia attending the 1998 and 1999 meetings of CCAMLR as observers.³¹⁸ Namibia subsequently acceded to CCAMLR in 2000³¹⁹ and although Mauritius as yet to do so their government has announced that they will implement the Catch Documentation Scheme.³²⁰ These events represent prime examples of what can be achieved when the developing countries are actively invited to participate.

The developing countries have also received recognition of their importance from the Antarctic and Southern Ocean Coalition (ASOC), an organisation of NGOs associated with Antarctic issues. In 2000 as part of their recognition of the importance of developing countries to the effective functioning of NGO's and Antarctic environmental protection, ASOC established new regional offices India and Chile.³²¹

All this evidence points to the inescapable conclusion that the international community is experiencing increased participation by the developing countries in international affairs and the decision making process. As such the inclusion of the developing countries in the decision making process could be deemed to have become part of the normative structure of the international community. As such in order for the ATS to maintain external legitimacy the structures and procedures of the organisation must change to reflect that norm.

³¹⁷ China, however while not been a member of NAM does have observer status and as such attends NAM meetings. Membership List (20 May 2001) <<http://www.nam.org>>.

Greenpeace, "Latest News", 5 April 2001 <[greenpeace.org/~oceans.htm](http://www.greenpeace.org/~oceans.htm)>.

³¹⁸ Secretariat of ASOC, *Antarctic Project Newsletter* Vol 8 Issue 3-4 Dec 1999. Electronic version <<http://www.asoc.org>>.

³¹⁹ Secretariat of ASOC, *Antarctic Project Newsletter* Vol 10 Issue 1 April 2001. Electronic version <<http://www.asoc.org>>.

³²⁰ Secretariat of ASOC, *Antarctic Project Newsletter* Vol 9 Issue 3-4 Dec 2000. Electronic version <<http://www.asoc.org>>.

The Catch Documentation Scheme is a CCAMLR programme adopted under Conservation Measure 170/XIX to help control illegal fishing in the Southern Ocean. The scheme establishes a method of tracking the source of toothfish that is harvested in the Southern Ocean.

³²¹ ASOC, "Report to Special Antarctic Consultative Meeting" 11-15 September 2000.

7.10 The Antarctic Treaty System Represents 80% of the World's Population

Aside from their attempts to include the developing countries in the decision making process the ATCP's have adopted a second defence to the closed club criticism. This approach is to point out that the present make-up of the ATCPs represents 80% of the world's population.³²² While this statement is true by virtue of the fact that the ATCPs count among their membership seven of the world's twelve most populous countries,³²³ in international law population size does not equate to the right to govern. This is based on the principle of sovereign equality that was developed by Vattel in 1758.

Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature – Nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom. By an necessary consequence of that equality, whatever is lawful for one nation is equally lawful for any other; and whatever is unjustifiable in the one is equally so in the other.³²⁴

Therefore it is clear that population size has no effect on a nations standing in international law. Indeed under the principle of sovereign equality China would have no more standing in an international forum than Nauru. As such the population of the ATS countries is irrelevant to the legitimacy of the ATS as the system of governance for the Antarctic.

7.11 Conclusion

The issue of the participation of developing countries in the Antarctic Treaty is at this time not an active assault on the internal legitimacy on the ATS. This is because at this point the developing countries that are Parties to the Treaty have recognised the procedural advances that the ATCPs have made to date and are willing to wait and

³²² Ministry of Foreign Affairs and Trade Bilateral and Regional Relationships. (1.7.01) <<http://www.mfat.gov.na/foreign/regions/Antarctica/treaty.html>>.

³²³ 1992 total world population was 5.4 billion (1) China 1,165,888,000 (2) India 889,700,000 (3) USA 255,414,000 (5) Brazil 151,381,000 (6) Russia 148,469,000 (8) Japan 124,330,000 (12) Germany 79,122,000. Thomas, supra n 252 at 157.

see what further steps develop. However the speech of Antonio Guerreiro makes it clear that they will not wait forever. If the ATCPs do not make a more concerted effort to remove the inequity that still exists within the ATS in relation to the involvement of developing countries in the decision-making process then the ATS could face an internal legitimacy crisis in the future. This is because if the developing countries who are party to the Treaty do not feel they are adequately represented in policy development they are not going to feel an obligation to comply with the procedures established by the ATS bodies. By refusing to comply with ATS policy the developing countries would be demonstrating that they believe they have no duty to “acknowledge and adhere to the rules and procedures”³²⁵ of the ATS, thus removing its internal legitimacy.

The continued criticism concerning the involvement of developing countries in the decision-making process from actors outside the Treaty system does however create doubts as to the external legitimacy of the ATS. This is particularly relevant in relation to what Stokke has termed the applicability of the regime. For an organisation to have applicability in relation to external legitimacy requires that the “normative and structural components of the regime”³²⁶ comply with the major developments in the international community. There is a trend in the within the international community toward the inclusion of developing nations in international decision-making. Therefore the inclusion of this group would be considered normative and structural components of the international community. As there continues to be a lack of involvement by the developing countries within the confines of the ATS the organisation is not complying with the normative and structural requirements of the international community. Therefore placing its external legitimacy in question.

The continued external criticism concerning of the level of participation by developing countries within the ATS also has the potential to adversely effect the

³²⁴ Vattel, *The Law of Nations* (1758) Preliminaries para 18-19.

³²⁵ Stokke, *supra* n 36 at 24.

³²⁶ *Ibid* 24.

external legitimacy of ATS in relation to acceptance. Acceptance relates to the extent to which third parties believe that an international instrument applies to them and is judged by the degree of criticism levelled at the organisation. In light of the level of external criticism surrounding non-participation of developing countries in the decision-making process of the ATS it is unlikely that the developing countries that are not party to the Treaty will feel that the Treaty applies to them. As a result not only will they feel no obligation to comply with the principles of the Treaty but also due to their lack of recognition the ATS runs the risk of losing its external legitimacy.

CHAPTER EIGHT

Article IX(2) Conflicts with the New Environmental Protection Role of the Antarctic Treaty System

There is another legitimacy issue, besides the non-participation of developing countries, that arises as a result of the exclusive nature of the consultative membership established under Article IX(2) of the Treaty. Article IX(2)³²⁷ restricts the representation of the acceding parties at Treaty meetings to those that are conducting substantial research in Antarctica, as demonstrated through the establishment of a research station. The purpose of this chapter will be to investigate the possibility that Article IX(2) conflicts with the environmental protection role of the ATS thereby effecting the ATS's legitimacy under the applicability category.

The research requirement for ATCP membership was not a problem, in relation to legitimacy, when the Treaty was first established because the purposes of the treaty were clearly stated in the preamble to the Treaty.

The Governments of...

Recognising that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord;

Acknowledging the substantial contributions to scientific knowledge resulting from international cooperation in scientific investigation in Antarctica;

Convinced that the establishment of a firm foundation for the continuation and development of such cooperation on the freedom of scientific investigation...accords with the interests of science and the progress of all mankind:...

Over the years however in response to international pressure³²⁹ the ATS has moved toward a policy of environmental protection, an issue that was never addressed in the initial Treaty. Article 3(1) of the Environmental Protocol states:

³²⁷ *Supra* at 65.

³²⁸ Preamble to Antarctic Treaty 1959.

³²⁹ In 1989 the UN First Committee, which debates Antarctic issues, recognised the importance of the Antarctic to the world environment. The Committee debate ended in the presentation to the UNGA of Resolution A44/124B which stated that the "General Assembly believes that Antarctica's significant

The protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica, including its wilderness and aesthetic values as an area for the conduct of scientific research, in particular research essential to understanding the global environment, shall be fundamental considerations in the planning and conduct of all activities in the Antarctic Treaty area.³³⁰

Therefore commentators have expressed the opinion that environmental protection has become an objective for which the ATS exists.

Since the end of the Cold War, in 1991, the issue of environment has emerged as the additional core value of the Treaty, as countries have grown to accept Antarctica provides uniquely important information for understanding the global environment.³³¹

The ATCPs in Article 22(4) of the Environmental Protocol have made ratification of the Protocol a requirement for consultative status. This action would tend to confirm the opinion of those commentators who maintain that environmental protection has become an aim of the ATS.

After the date on which this Protocol has entered into force, the Antarctic Treaty Consultative Parties shall not act upon a notification regarding the entitlement of a Contracting Party to the Antarctic Treaty to appoint representatives to participate in the Antarctic Consultative Meetings in accordance with Article IX(2) of the Antarctic Treaty unless that Contracting Party has first ratified, accepted, Approved or acceded to this Protocol.³³²

As such when it comes to policy decisions environmental protection should be on an equal footing with scientific research. However as the situation currently stands Article IX(2) of the Treaty is in direct conflict with this new environmental protection objective and as such places the internal legitimacy of the ATS in question. This is because in order to maintain internal legitimacy the rules and procedures of the

impact on the global environment means that a comprehensive environmental protection convention should only be negotiated with the full participation of the international community..." Beck, P "The UN Goes Green on Antarctica: the 1989 session" 26 Polar Record 323.

At this time the ATCPs refused to participate in First Committee debates on Antarctica because of their continued calls to have South Africa removed from the Treaty system. Antarctic Treaty System, *Final Report of ATCM XVII* held 11-20 November in Venice 45.

Hugh Wyndham in his opening address as Head of the Australian Delegation stated "The conclusion of the Protocol has been particularly valuable in sending a signal to the world that the Antarctic Treaty has been able to resolve a politically difficult issue and attune itself to meeting international concern for the environment." This sentiment was expressed in the majority of the opening statements in Bonn. Antarctic Treaty system, *Final Report of ATCM XVI* held 7-18 October 1991 in Bonn 152.

³³⁰ Protocol on Environmental Protection to the Antarctic Treaty, 1991.

³³¹ Prior, *supra* n 246 at 6.

³³² Article 22(4) Antarctic Treaty, *supra* n 24.

organisation must address the problems for which that organisation was established. Currently under Article XI(2) of the Treaty in order to be admitted to consultative status and participate in the decision-making process at Treaty meetings a Party to the Treaty must 'conduct substantial research activities'. This requirement not only specifically excludes from the decision making process any Party whose Antarctic interest is conservation rather than science based, but means that the ATS can not possibly be adequately addressing their environmental protection objective. This is because the definition of 'substantial research' necessitates the establishment of a permanent research facility in the Antarctic region,³³³ and it stands to reason that any increase in the number of research facilities cannot be consistent with environmental protection.

I believe that this current conflict between the scientific and environmental protection objectives of the ATS is due in part to the reluctance of the ATCPs to come to terms with their new environmental protection goal. This reluctance is apparent in the opening address of Brazil at ATCM XVI:

If on the one hand, Mr Chairman, the Antarctic Treaty has withstood the test of time, on the other, we have to acknowledge the fact that most of us have just signed in Madrid an instrument which will, when it becomes effective, as we believe will soon happen, alter in a fundamental way the functioning of the Antarctic Treaty system, *without tampering with its fundamental premises and objectives*. The Protocol on the Protection of the Antarctic Environment strengthens the Treaty and supplements it in fields where it was needed to put into legally binding language a number of measures....³³⁴ (my italics)

South Africa at ATCM XXI expressed the belief that environmental protection should not interfere with scientific investigation:

It is the view of my delegation that there can no longer be any doubt as to the importance of providing a mechanism that would help to ensure the comprehensive protection of that uniquely fragile yet hostile Antarctic environment. *At the same time we must also ensure that such a regime does not become an impediment to the conduct of scientific investigation...*³³⁵ (my italics)

³³³ Supra at 65.

³³⁴ Antarctic Treaty System. "Opening Address of Henrique Valle, Head of the Delegation of Brazil". *Final Report ATCM XVI* 156.

³³⁵ Antarctic Treaty system. "Opening Address of Dr F Hanekom, Head of the Delegation of the Republic of South Africa". *Final Report of ATCM XXII* held 25 May-5 June 1998 in Tromsø, Norway, 193.

8.1 Conclusion

The apparent conflict between Article IX(2) of the Treaty and new environmental protection objective of the ATS has ramifications for both the internal and external legitimacy of the organisation. In order to maintain internal legitimacy the rules and procedures of the organisation must adequately address its objectives. The ATS through the adoption of the Environmental Protocol now has an objective of environmental protection as well as scientific investigation. However, the ATS cannot be meeting its environmental protection objective when the rules for the admission of Parties to consultative status require them to establish a research facility, an activity that is in direct conflict with the goal of protecting the Antarctic environment.

The current conflict between the objectives of the ATS also has ramifications for the external legitimacy of the organisation. This is in relation to the level of acceptance of the organisation by the international community. While currently the international community is generally pleased with the environmental protection advances made with the adoption of the Environmental Protocol. This acceptance could soon fade if they perceive that the ATS, despite adoption of the Protocol, is continuing to advance scientific investigation to the detriment of environmental protection.

CHAPTER NINE

The Difficulties Surrounding the Establishment of a Permanent Secretariat

The difficulties that the ATCPs have had in establishing a permanent Secretariat has potential ramifications on the legitimacy of the ATS in three ways. Firstly during the debates on the establishment of a permanent Secretariat both Argentina and Britain made allegations that the principles and spirit of the Treaty had been violated. Therefore the first section of this chapter is to investigate these allegations and as the principles and spirit of the Treaty could be considered analogous with rules and procedures determine if their violation constitutes a loss of international legitimacy for the ATS. Following this will be a discussion as to whether the failure of the Parties to adequately address the Secretariat issue in a timely manner has had any adverse effects on the internal and external legitimacy of the organisation.

9.1 Background

There is no provision in the Antarctic Treaty for the establishment of a permanent Secretariat.³³⁶ This is because when the Treaty was drafted the Parties did not feel one was necessary. However, over the years the Parties have recognised that a permanent Secretariat is necessary both to remove the secrecy criticism that the ATS faces and to allow for improved functioning of the ATS as a whole.³³⁷

A new element in the international scene is pressing for changes in the Antarctic Treaty System...Although based on erroneous assumptions, we must admit that this criticism has been caused, to a large extent, by the attitudes of the Consultative Parties themselves who, until recently, had not realised fully the importance of explaining to others the nature and scope of the Antarctic Treaty System. The Antarctic Treaty and its related instruments give expression to principles universally recognised to be in the interest of mankind. Thus, there seems to be no fundamental reason for secrecy in our deliberations...the lack of public information on the Treaty during the first twenty years of its existence was due mainly to the

³³⁶ Currently it is the role of the host country to arrange and fund the ATCM. Watts, *A International Law and the Antarctic Treaty System* (1992) 35.

³³⁷ Vidas, *supra* n 288 at 58.

absence of interest of the international community at large. Now that such an interest has become manifest, we must respond effectively.³³⁸

To meet these objectives in 1987 the Parties began debating the possibility of establishing some type of permanent infrastructure for information dissemination.

The meeting...examined the possibility of sharing the costs of Consultative Meetings, the possible need for some more permanent infrastructure and the possibility of holding regular Consultative Meetings with greater frequency...emphasis was placed upon the question of a possible permanent infrastructure, with a diversity of views expressed as to the need for such infrastructure.³³⁹

However little progress was made until 1991 when the development of the Environmental Protocol made the establishment of a Secretariat a matter of grave importance. Luis Porras, Head of the Delegation from Peru at ATCM XVI in 1991, during his opening address expressed the importance of the establishment of a Secretariat.

...the increasing complexity of the system and the exponential growth in the amount of data to be handled and circulated make it advisable to set up an administrative body responsible for the information and co-ordination. This had already been discussed at earlier Meetings and even at the Preparatory Meeting in April, but approval of the Protocol on the Environment now makes it imperative. Whether it is called a Secretariat or whatever is of no importance: what is needed is a body that handles, centralizes and circulates information....³⁴⁰

The issue of the establishment of a permanent Secretariat was on the agenda for that meeting and during the debate it was established that:

[t]here was widespread support for the establishment of a small, modern, cost-effective Secretariat, responsible to and under the authority of the Consultative Meetings...Most delegates felt its creation as urgent...The question of location was mentioned by several delegation. Some delegations were of the view that this question should remain open for the time being. Others stated that no aspect should be isolated...Nonetheless, there was no consensus on the immediate establishment of a Secretariat...The meeting agreed this question should be further considered at the next meeting.³⁴¹

The issue was subsequently debated at each successive ATCM³⁴² with the Parties unable to consensus³⁴³ concerning the issue until ATCM XXIV in 2001. However it

³³⁸ Antarctic Treaty system. "Opening Address of David Silveira Da Mota, Ambassador from Brazil", *Final Report ATCM XIII* (1985) 126.

³³⁹ Antarctic Treaty System, *Final Report ATCM XIV* (1987) para. 24.

³⁴⁰ Antarctic Treaty System, "Opening address of Luis Porras Head of the Delegation from Peru" *Final Report of ATCM XVI* held 7-18 October 1991 in Bonn, Germany 184.

³⁴¹ Antarctic Treaty System, *Final Report of ATCM XVI* held 7-18 October 1991 in Bonn, Germany 12.

³⁴² Antarctic Treaty System, *Final Report of ATCM XVII* held 11-20 November 1992 in Venice, Italy.

is not the lack of consensus itself that has resulted in a possible loss of legitimacy but the allegations that during the debates certain Parties violated the principles and Spirit of the Treaty.

9.2 Violation of the Spirit of the Treaty

While all the Parties agreed that a permanent Secretariat was necessary there was disagreement as to the location. All of the Parties with the exception of Britain supported Argentina as the host country.³⁴⁴ This was despite concerns raised by some Parties that the Secretariat might be more legitimate if placed in a non-Claimant State.³⁴⁵ What resulted from this situation was a bi-partisan conflict between Britain and Argentina in which both Parties accused the other of violating the ‘spirit of the Treaty’, by refusing to apply the procedural requirements of consensus decision-making. The undercurrents of the debates also indicate that both Britain and Argentina may have violated the convention that Antarctic decisions were not to be influenced by factors from outside the Antarctic region.

Antarctic Treaty System, *Final Report ATCM XVIII* held 11-22 April 1994 in Kyoto, Japan.

Antarctic Treaty System, *Final Report of ATCM XIX* held 8-19 May 1995 in Seoul, Korea.

Antarctic Treaty System, *Final Report of ATCM XX* held 29 April-10 May 1996 in Utrecht, Netherlands.

Antarctic Treaty System, *Final Report of ATCM XXI* held 19-30 May 1997 in Christchurch, New Zealand.

Antarctic Treaty System, *Final Report of ATCM XXII* held 25 May-5 June 1998 in Tromsø, Norway.

³⁴³ Rule 24 of the Rules of Procedure for Consultative Meetings requires consensus in these matters. “Without prejudice to Rule 21, Measures, Decisions and Resolutions... shall be adopted by the Representatives of all Consultative Parties present...” Antarctic treaty system, “Rules of Procedure” <<http://currentaspire.nvi.net/engine/research/new584.htm>>.

³⁴⁴ “I would like to express the deep satisfaction and gratitude of the Argentinean Government for the almost unanimous support the offer of Buenos Aires as headquarters for the Secretariat has received.” Antarctic Treaty System, “Opening address of Orlando Rebagliati the Head of the Delegation of Argentina” *Final Report of ATCM XVIII* held 11-22 April 1994 in Kyoto, Japan 57.

³⁴⁵ “a decision on the location should be taken in such a way that there will not be the remotest possibility of its giving rise to any doubt or suspicion and that there will likewise be no duplication with the location of the Depository Government or of any other organisation or body of the Antarctic Treaty system. Accordingly, as an initial indication, I think that consideration should be given to the idea that the host country of such a body ought not to be one of the major powers or a country with sovereignty claims...”. Antarctic Treaty System, “Opening Address of Luis Porras Head of the Delegation from Peru” *Final Report of ATCM XVI* held 7-18 October 1991 in Bonn, Germany 184.

In an address to ATCM XXI in 1997 Argentina asserted that Britain's continued refusal to support Argentina as the site for the Secretariat, showed an unwillingness to reconcile themselves to the view of all the other Parties and was both a violation of the spirit of co-operation encased in the Treaty and the convention that political activities outside the auspices of the ATS will not effect nations policies within the confines of the treaty.

Let me underline...the almost unanimous support to the proposal that Buenos Aires be designated as headquarters of the Secretariat...This overwhelming support has persisted over the years. It is therefore not at all appropriate for the consolidation of the spirit of cooperation which has always prevailed in our meetings, that in this specific case, the will of such an overwhelming majority be thwarted. Non interference of matters alien to the Antarctic has been a common and necessary practice for over 35 years and it is...one of the essential elements of the success of the Antarctic Treaty System....This healthy practice must therefore be preserved.³⁴⁶

Britain responded the following year by arguing that it was Argentina who was violating these principles by refusing to withdraw their candidacy in the face of Britain's opposition.

The UK had very much welcomed the agreement at ATCM XVIII that there should be a permanent Secretariat. The UK had always supported the idea, and remained firmly of the view that a permanent Secretariat was essential. In contrast, until 1992 Argentina had been opposed even to the principle of a permanent Secretariat. In 1991 the UK Government decided that it would not be appropriate for the UK, as one of the three counter-claimants, to be a candidate for host country of the Secretariat. We indicated very strongly to Argentina that if she were to offer herself as a candidate this would inevitably result in tension. Unfortunately, Argentina did not heed this warning. UK has already made it clear that it is prepared to join a consensus in favour [of] any of the other 24 ATCPs being the host country. In contrast, Argentina has made it clear on a number of occasions that it will not consider any other candidate. *This inflexible position is quite contrary to the spirit of the ATCM; if consensus on a proposal cannot be reached, efforts are [sic] should be made to achieve consensus on an alternative.* (my italics)³⁴⁷

In an attempt to resolve the impasse developed over the location of the Secretariat in 1998 the Australian Government offered Hobart as a possible alternative.³⁴⁸

³⁴⁶ Antarctic Treaty System, "Opening Address of Horacio Solari, Head of the Delegation of Argentina" *Final Report of ATCM XXI* held 19-30 May 1997 in Christchurch, New Zealand 142.

³⁴⁷ Antarctic Treaty System, *Final Report of ATCM XXII* held 25 May-5 June 1998 in Tromsø, Norway, 27.

³⁴⁸ "Australia noted that in offering Hobart as a possible location, it was conscious of the generous offer of Buenos Aires which has been on the table since 1992. Australia also noted, however, that it was equally conscious that unfortunately, and despite widespread support for Buenos Aires, Treaty Parties were no closer to agreement on the location of the Secretariat than they had been in 1992.

However, in a move that furthered Britain's claim concerning Argentina's lack of consideration for the spirit of co-operation incorporated into the Treaty Argentina made it very clear that they would not support any alternative location.

Argentina stated:

- That it considers that Buenos Aires continues to be the quickest lane to a solution and that alternative sites would introduce unnecessary delays.
- That the support of the vast majority of the Consultative Parties, which time has consolidated, is an important aspect which must be considered.
- That it does not seem a healthy practice for the Antarctic Treaty System that the reservation on one single State, which has not gathered support, be allowed to prevail over the will of the rest of the Consultative Parties...
- That Argentina is not in a position to accept consideration of alternative solutions in relation to the geographical location of the Antarctic Treaty Secretariat whilst it firmly reiterated its most ample disposition and flexibility in relation to all other aspects pertaining to the establishment of the Secretariat in Argentina...
- ...Argentina expressed that independently of its intrinsic merits, Hobart's candidacy is not consistent with the prevailing opinion that Antarctic bodies should have a balanced geographical distribution.³⁴⁹

The preceding statements from both countries indicate that in fact both of them have probably violated both the spirit of the Treaty and the convention that political issues outside the Antarctic should not colour Antarctic governance. While this situation could be considered analogous to a violation of the rules and procedures of the organisation the evidence in this case is not sufficient to support a loss of legitimacy. However the 'schoolboy' behaviour of the two countries, in delaying the formation of the Secretariat, could still have ramifications for the legitimacy of the ATS.

9.3 Frustration of the Members and NGOs with delay

The delay in the formation of a Secretariat caused by Britain and Argentina's little squabble has resulted in some of the ATCPs questioning the effectiveness of the current system which could have repercussions for the internal legitimacy of the ATS.

Australia was keen to do what it could to assist Treaty Parties each early agreement on this issue." Antarctic Treaty System. "Presentation by the Delegation of Australia" *Final Report of ATCM XXII* held 25 May –5 June 1998 in Tromsø, Norway 26.

³⁴⁹ Antarctic Treaty System. "Presentation by the Delegation of Argentina" *Final Report of ATCM XXII* (1989) 26.

The geographic balance mentioned in the Argentinean presentation is reference to the fact that the Secretariat for CCAMLR is located in Hobart.

The Opening Address of Georges Duquin of the French Delegation at ATCM XIX in 1995 gives voice to these concerns.

The French Delegation insists in this respect on underscoring two concerns which are shared by other delegations: The efficiency of the Consultative Meeting proceedings... The decline in the efficiency of the Consultative Meeting proceedings is to be deplored, this is mainly due to the lack of adequate instruments and, primarily, the lack of a Treaty Secretariat. ...France would like to express its wish that the Secretariat be set up at the earliest opportunity.... France hopes this attitude will prevail for, without it, the Antarctic System will be missing an altogether essential operating mechanism...³⁵⁰

The NGOs also expressed frustration with the delay in establishing a permanent Secretariat because they saw it as essential for the effective implementation of the Madrid Protocol. This concern has been voiced by the ASOC³⁵¹ on a number of occasions:

ASOC is concerned that another year has gone by without discernible progress in setting up the Secretariat for the Treaty, which is crucial to the proper implementation of the Protocol.³⁵²

We note with disappointment the continuing failure to establish a Secretariat, which could greatly contribute to the implementation of the Protocol and assist with other aspects of the Treaty's work.³⁵³

The IUCN³⁵⁴ has also stressed the importance of the establishment of a Secretariat in its 1996 report to ATCM XX.

A small permanent Secretariat for the Antarctic Treaty is essential for the efficient operation of the mechanisms established under the Protocol...In addition, IUCN believes that many aspects of the management of Antarctica...would benefit from a more integrated, international approach. Establishing a permanent Secretariat to provide the necessary administrative support would greatly facilitate the development of a more integrated approach to these uses of Antarctica.³⁵⁵

Because these two groups represent a high percentage of the NGO activity in the Antarctic region if they elevate their remarks from reported comments of concern to

³⁵⁰ Antarctic Treaty System, *Final Report of ATCM XIX* (1995) 155.

³⁵¹ The Antarctic and Southern Coalition is an association of 230 NGO's from 49 countries who are concerned with the environment of Antarctica and the Southern Ocean. Membership includes Greenpeace, World Wildlife Fund and New Zealand's Fish and Bird Society

³⁵² ASOC, "ASOC Report to ATCM" *Final Report of ATCM XIX* 278.

³⁵³ ASOC, "ASOC Report to ATCM" *Final Report of ATCM XXII* 210. The statement was repeated in the ASOC Report to ATCM XXII, *Final Report of ATCM XXII* 276.

³⁵⁴ The World Conservation Union is a partnership of States, government agencies and NGO's established in 1948. As of 1996 it had 800 members including 160 state and government agencies from 130 countries. IUCN, "Report of IUCN to ATCM XX" *Final Report ATCM XX* 213.

³⁵⁵ IUCN, "IUCN Report to ATCM XX" *Final Report of ATCM XX* 215.

open criticism this could have negative repercussions for the external legitimacy of the ATS.

While the apparent frustrations of the ATCPs and the NGOs could have had potential ramifications for both the internal and external legitimacy of the ATS this issue appears to have resolved itself. On July 17 2001 at ATCM XXIV Britain announced that they had reached an agreement with Argentina and were ready to support Buenos Aires as the location for the Secretariat.³⁵⁶

9.4 The Secretiveness Criticism

There is another area where the lack of a permanent Secretariat has had the potential to threaten the external legitimacy of the ATS. This is because according to Stokke the degree of acceptance of an organisation by external actors can be assessed by the level and persistence of the criticism levelled by them.³⁵⁷ The ATS has for some time been subject to criticisms of secretiveness³⁵⁸ and the ATCPs saw the establishment of a permanent Secretariat as a means of silencing some of this criticism by making information more readily available to both Parties and non-Parties to the Treaty.

Australia mentioned this need for openness and transparency during their opening address to ATCM XVI in 1991.

Another major emphasis falls in the category of public perception of the Treaty itself, in view of increased international and public interest in Antarctica and the fact that the Treaty continues to attract criticism from some quarters. While the Treaty recently received international commendation for its success in negotiating the environmental Protection Protocol, there is still a need to show the broader community that it can live up to its responsibilities by demonstrating increased competence, efficiency and importantly,

³⁵⁶ Antarctic Treaty System, *Final Report ATCM XXIV*, held 9-20 July 2001 at St Petersburg, Russian Federation. Para 20-24.

³⁵⁷ Stokke 25.

³⁵⁸ To a certain extent the secrecy argument goes hand in hand with the "exclusive club debate" in so far as the information developed within the ATS was available only to the limited class of ATS members. Therefore the roots of the argument lie in the prior exclusion of non-ATCPs from ATCMs. Also in stating this argument it must be noted that there is a fine line between secrecy and confidentiality and to establish whether the ATS has crossed the line between the two is a subjective rather than an objective assessment, however the ATS has attempted to address the criticism by making its procedures more transparent. Jorgensen-Dahl, A "The legitimacy of the ATS in Jorgensen-Dahl, A and Ostreng, W (eds) (1991) 293.

transparency in management. It is important that Treaty Parties continue to make available to the public documents relating to Treaty decisions and operations.³⁵⁹

This sentiment was repeated by France at ATCM XIX in 1995.

The need to keep up an increasing exchange of information not only between the parties but, henceforth, with the rest of the international community and with public opinion leaders, should also be taken into account. A Treaty secretariat is therefore becoming a dire necessity.³⁶⁰

And again by Korea at ATCM XX in 1996.

A Secretariat will enhance exchange of information among the Parties, and improve the awareness of the global community with regard to the measures taken in the Antarctic to preserve its unique ecosystem.³⁶¹

To a certain extent the secrecy criticism has been weakened by three earlier actions of the ATCPs, that is the inclusion of non-Consultative Parties³⁶² and NGOs³⁶³ at ATCMs, and a concerted attempt by the Parties to make information more readily available to external actors.³⁶⁴ However, the lack of a permanent Secretariat makes the dissemination of this material to interested parties difficult. Under the present system any entity/individual requiring information must make a request to either the

³⁵⁹ Antarctic Treaty, "Opening Address of Hugh Wyndham, Head of the Australian Delegation" *Final Report ATCM XVI* 153.

³⁶⁰ Antarctic Treaty, "Opening Address of Georges Duguin, Head of the Delegation of France" *Final Report ATCM XIX* 155.

³⁶¹ Antarctic Treaty, "Opening Address of Chun Yong-Duc, Head of the Delegation from the Republic of Korea" *Final Report ATCM XX* 124.

³⁶² Non-Consultative Parties were for the first time invited to attend the ATCM as observers. Draft Rules of Procedure were prepared in order to allow this practice to continue. Antarctic Treaty, *Final Report of ATCM XII* held 13-27 1983 November in Canberra, Australia 14.

³⁶³ NGO's were granted very limited status by the 1987 Rules of Procedure. Antarctic Treaty, *Final Report of ATCM XIV* 5 and 239.

The rules of procedure were amended in 1992 to give experts from international organisations an extended role. Antarctic Treaty, *Final Report ATCM XVII* 428.

³⁶⁴ Recommendation XII(6) resolved that copies of the Final Report of each ATCM be submitted to all Contracting Parties and the UN Secretary-General. Resolution XII(6) also calls for the ATCPs to make meeting information available to the "public relevant to the scientific or technical interest which that agency or organization has in Antarctica. Antarctic Treaty, *Final Report of ATCM XII* held 13-27 1983 November in Canberra, Australia.

The Final Report of ATCM XVII contained a list of national contact points from which ATS information could be obtained.

At ATCM XIX the ATCPs agreed to make all meeting documents available to the public without exception. Antarctic Treaty, *Final Report of ATCM XIX*.

Host Government of each ATCM or their national contact point. However due to a variety of factors the information is not always forthcoming.³⁶⁵

With the establishment of a permanent Secretariat given the go ahead at ATCM XXIV it is likely that the ATCPs have adequately address the secrecy issue. However it is to soon to access whether the new Secretariat will totally remove criticism on this point. This is because to date the ATCPs have yet to release information as to the structure and function of the Secretariat.

9.5 Conclusion

Although the legitimacy issues that existed in relation to the lack of a permanent Secretariat have not all been permanently removed by the actions of the Parties at ATCM XXIV they have effectively been suspended. In order for this threat to legitimacy to become permanent the Parties must establish the planned Secretariat and make its structure both accessible and transparent.

³⁶⁵ Access to information is therefore currently governed by the degree of cooperation/ ability to cooperate given by individual governments. The availability of information is also limited by the extent to which the national contact point has the resources necessary to make all information readily available to the public.

CHAPTER TEN

The Inability of the ATCPs to Develop a Liability Annex to the Environmental Protocol

The purpose of this chapter is to investigate whether the inability of the ATCPs to adopt a liability annex to the Environmental Protocol has had any adverse effects on the legitimacy of the ATS. This issue will be approached from three different aspects of legitimacy. The first section will evaluate whether the lack of a liability annex implies that the ATS is failing to meet its environmental protection objective. This will be followed by an assessment of whether the failure of the ATCPs to develop a liability means that the ATS does not comply with the normative structure of the international community. The third section will investigate the extent to which the absence of a liability annex has effected the acceptance of the ATS by the international community.

10.1 Background

Article 16 of the Protocol on Environmental Protection to the Antarctic Treaty requires the Parties to establish a liability annex to enhance the protection of the Antarctic Environment:

Consistent with the objectives of this Protocol for comprehensive protection of the Antarctic environment and dependent and associated ecosystems, the Parties undertake to elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by this Protocol. Those rules and procedures shall be included in one or more Annexes to be adopted in accordance with Article 9(2).³⁶⁶

The ATCPs have been debating the question of liability since the drafting of the Protocol in 1991.³⁶⁷ During Special Consultative Meeting XI held in Madrid for the purpose of drafting the Environmental Protocol,

³⁶⁶ Protocol on Environmental Protection to the Antarctic Treaty, Article 16.

³⁶⁷ Antarctic Treaty System, *Final Report of ATCM XVII* held 11-20 November 1992 in Venice, Italy. Antarctic Treaty System, *Final Report ATCM XVIII* held 11-22 April 1994 in Kyoto, Japan.

the meeting underlined the commitment of the Parties to the Protocol in its Article 16 to elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by the Protocol, with a view to their inclusion in one or more Annexes and expressed the wish that work on their elaboration could begin at an early stage.³⁶⁸

Despite this commitment by the Parties they have yet to draft a liability annex that is acceptable to all Parties. This inability to draft a liability annex has specific ramifications for the internal and external legitimacy of the ATS, under both the applicability and acceptance categories.

10.2 Internal Legitimacy

An essential component of internal legitimacy requires that the rules and procedures of the organisation address the objectives for which the organisation was designed. We have established earlier that one of the primary objectives of the ATS is environmental protection.³⁶⁹ The Environmental Protocol was drafted specifically to meet this objective.

...it was necessary to establish a legal framework as soon as possible which would serve to guarantee the protection of the Antarctic environment. The instrument which we are contemplating, together with its annexes, is without doubt the keystone of this legal framework...³⁷⁰

While the drafting of the Protocol was considered a giant step toward ensuring the protection of the Antarctic environment the Parties stated at its signing that the subsequent drafting of a liability annex was an integral part of the level of environmental protection desired from the Protocol.

The objective of comprehensive protection of the Antarctic environment will only be achieved by actual application of the Protocol... provisionally apply the Protocol from now on

Antarctic Treaty System, *Final Report of ATCM XIX* held 8-19 May 1995 in Seoul, Korea.

Antarctic Treaty System, *Final Report of ATCM XX* held 29 April-10 May 1996 in Utrecht, Netherlands.

Antarctic Treaty System, *Final Report of ATCM XXI* held 19-30 May 1997 in Christchurch, New Zealand.

Antarctic Treaty System, *Final Report of ATCM XXII* held 25 May-5 June 1998 in Tromsø, Norway.

³⁶⁸ Antarctic Treaty System, *Final Report of Special Consultative Meeting XI*, final session held 3-4 October 1991 in Madrid, Spain, 109.

³⁶⁹ *Supra* at 86.

³⁷⁰ Antarctic Treaty System, "Address of Palacio De Santa Cruz" *Final Report of SATCM XI*, held 1991 in Madrid, Spain, 105.

and that we maintain momentum by the development of additional annexes, especially on liability as required by Article 16 of the Protocol...³⁷¹

The Head of the Danish Delegation added:

The comprehensive regime, however, has not yet been completed. My delegation has at several occasions emphasized the importance of a liability regime, which unfortunately could not be included in the Protocol. These rules and procedures should be elaborated at the earliest possible date.³⁷²

However despite the recognition by the Parties of the importance of the liability annex, ten years after the drafting of the Protocol and three years after its entry into force the Parties appear to be are no closer to finalising a liability annex than they were in 1991. Several delegations noted the need to continue the important work on the liability annex at ATCM XVIII in 1994.

The Chinese Delegation notices that the Liability Annex to the Protocol on Environmental Protection has been listed as an important subject of this meeting. We appreciate the effort made...and other legal experts... to develop a draft annex. We understand that they encountered unexpected difficulties...The Chinese Delegation believes that the establishment of a liability regime is very significant for the comprehensive protection of the Antarctic environment and dependent and associated ecosystems. There is no doubt that further exchange of views is necessary.³⁷³

Dietrich Granow, Head of the German Delegation added:

[T]he signing of the Protocol on Environmental Protection to the Antarctic Treaty...undoubtedly one of the greatest successes since the Antarctic Treaty system came into being, should be no reason for us to relax our efforts to improve the system...*Whilst the Protocol...was in preparation all contracting parties were aware that full protection for the Antarctic could not be achieved without a sensible liability regime regarding environmental damage, and that we would forfeit our credibility if we did not immediately start to create one...We feel that this aim should now be vigorously pursued in order to obtain tangible results as soon as possible which will prove that the Antarctic Treaty States are determined to follow a consistent line in securing protection for the Antarctic.*³⁷⁴ (my italics)

Similar comments have been made by the delegations at all the successive ATCMs. The drafting of the annex was once again the subject of extensive debate at ATCM XXIV in 2001, however all the delegates managed to agree on was a decision to continue the discussions.

Taking into account Decision 3 (1998), which called on Working Group I to elaborate draft texts for an annex or annexes on liability for environmental damage;

³⁷¹ "Statement of John McCarthy (Australia)" Ibid. 165.

³⁷² "Statement of J.R. Lilje-Jensen (Denmark)" Ibid. 197.

³⁷³ Antarctic Treaty System. "Opening Address by Ambassador Xu Guangjian, Head of Delegation of China" *Final Report ATCM XVIII held 11-22 April in Kyoto Japan* 65.

³⁷⁴ "Opening Address by Ambassador Dietrich Granow, Head of Delegation of Germany", Ibid 71.

Encouraged by the progress made in the meetings of Working Group I and in informal consultations on a liability annex to the Environmental Protocol;

Conscious of the need to continue the negotiations on this issue, which were mandated in Article 16 of the environmental Protocol;

Decide:

1. To invite the Chairman of Working Group I to elaborate a draft text of an annex...
2. To further invite the Chairman...to explore the possibility of holding intersessional consultations in 2002...
3. To continue and conclude the negotiations on a draft annex on the liability aspects of environmental emergencies as soon as possible...³⁷⁵

The continued inability of the ATCPs to draft a liability annex raises questions as to the legitimacy of the Protocol and by association the internal legitimacy of the ATS. The ATCPs have stated that the Environmental Protocol cannot be expected to function adequately without a liability annex. If the Environmental Protocol is not functioning adequately then this raises questions as to whether the ATS is meeting one of its primary objectives. As such while congratulating the ATCPs on their great work in establishing the Protocol the continued absence of a liability annex must raise questions as to its legitimacy.

10.3 External Legitimacy

10.3.1 Applicability

There is also a question as to whether the external legitimacy of the ATS is threatened under the applicability category of legitimacy. This requires that the rules and procedures of the organisation comply with the normative structure of the international community. It would appear from a review of other international environmental instruments that the application of liability for environmental damage has become part of the normative structure of the international environmental regimes. Currently, in relation to liability, the international environmental agreements appeared to be divided into two distinct groups. Those that are concerned primarily with the preservation of wildlife³⁷⁶ which appear not to subject the Parties

³⁷⁵ Antarctic Treaty System. "Decision 3" *Final Report ATCM XXIV, Annex B* held 2001 in St Petersburg, Russia.

³⁷⁶ This group includes; The Convention on Biological Diversity 1992 ATS 1993 No 32. Convention on Wetlands of International Importance Especially as Waterfowl Habitat 1971 (RAMSAR) ATS 1975 No 48. Convention on the Trade in Endangered Species of Fauna and Flora 1973 (CITES) ATS 1976

to any form of liability while those that are concerned with activities that could cause damage to the physical environment generally appear to carry some form of liability³⁷⁷. Indeed the ATCPs when they drafted the Convention on the Regulation of Antarctic Mineral Resource Activities in 1988 established a strict liability regime in order to protect the environment. Article 8 of the Convention states:

1. An operator undertaking any Antarctic mineral resource activity shall take necessary and timely response action, including prevention, containment, clean up and removal measures, if the activity results in or threatens to result in damage to the Antarctic environment or dependent or associated ecosystems....
2. An Operator shall be strictly liable for:
 - (a) damage to the Antarctic environment...arising from its Antarctic mineral resource activities, including payment in the event that there has been no restoration to the status quo ante;
 - (d) reimbursement of reasonable costs by whomsoever incurred relating to necessary response action...
3. (a) Damage of the kind referred to in paragraph 2 above which would not have occurred or continued if the Sponsoring State had carried out its obligations under this Convention with respect to its Operator shall, in accordance with international law, entail liability of that Sponsoring State. Such liability shall not be limited to that portion of liability not satisfied by the Operator or otherwise.³⁷⁸

This evidence suggests that the establishment of liability regimes in relation to environmental protection may have become part of the normative structure of international environmental law. If this is the case then the ATCPs in failing to draft a liability annex to the Environment Protocol are not complying the normative structure of the international community, thus raising questions as to the external legitimacy of the ATS.

10.3.2 Acceptance

The inability of the Parties to establish a liability annex to the Environmental Protocol is also likely to have consequences for the external legitimacy of the ATS

No 29. Convention on Migratory Species of Wild Animals 1979 ATS 1991 No 32. The International Convention for the Regulation of Whaling 1946 161 UNTS 72.

³⁷⁷ This group includes: The Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 ATS 1992 No 7. International Convention on Civil Liability for Bunker Oil Pollution Damage 2001(Bunkers Convention) International Conference on Liability and Compensation for Bunker Oil Pollution Damage, March 2001 LEG/CONF 12/20. International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances 1996 35 ILM 1406.

under the acceptance category. NGO's such as ASOC and IUCN have been addressing the lack of a liability annex at each successive ATCM since 1995.

ASOC has focused substantial attention and resources on the question of a liability annex to the Protocol. This is a key gap in the overall system of "comprehensive" protection that we all desire, and is of course a commitment contained in the Protocol.³⁷⁹

ASOC is extremely concerned about the slow rate of progress Parties are making towards a completed annex and by several Parties' support for a very weak final instrument, which we believe would undermine the comprehensive nature of the Protocol.³⁸⁰

This annex will be an essential part of the Protocol, ensuring that clear legally binding obligations on liability are elaborated for Parties conducting activities in the Antarctic. Negotiations for the completion of this annex need to be pursued by the Parties with considerably more urgency.³⁸¹

ASOC continues to direct substantial attention and resources to the question of a liability annex to the Protocol. An effective liability regime is an essential component of the comprehensive commitment to environmental protection called for in the Protocol. Existence of that annex will help to ensure compliance with the provisions of the Protocol. Without it, the mandate of Article 16 is being ignored.³⁸²

While the comments made in these reports could not be considered strong criticism it has however been persistent.³⁸³ The tone of the ASOC report to the Special Antarctic Treaty Consultative Meeting in 2000 however was sterner and could be considered an indication that the NGOs are tired of waiting for the development of a liability annex.

Regretfully, we observe that nine years after the adoption of the Protocol, and more than two and a half years after its entry into force, Parties have yet to honour their commitment to elaborate rules and procedures relating to liability for damage in Antarctica...this meeting commences without any evident agreement on the form of a liability regime, far less a time line for its negotiation.

From outside this system, it must look like the discussion of liability has failed. ASOC hopes that Parties to the Antarctic Treaty are not awaiting the occurrence of a serious, high profile incident causing damage to the Antarctic environment before they are persuaded to put in place this regime.³⁸⁴

³⁷⁸ Convention on the Regulation of Antarctic Mineral Resource Activities 1988, Article 8. Not entered into force.

³⁷⁹ ASOC. "Report of The Antarctic and Southern Ocean Coalition" *Final Report of ATCM XIX* 278.

³⁸⁰ ASOC. "Report of The Antarctic and Southern Ocean Coalition" *Final Report of ATCM XX* 210.

³⁸¹ IUCN. "Report of The World Conservation Union" *Final Report ATCM XX* 214.

³⁸² ASOC. "Report of The Antarctic and Southern Ocean Coalition" *Final Report of ATCMXXII* 276.

³⁸³ It should be noted when accessing the strength of these criticisms that the above references are from reports submitted to ATCMs and the presence of NGOs at ATCMs is solely at the discretion of the ATCPs.

³⁸⁴ ASOC. "Report of the Antarctic and Southern Ocean Coalition" *Special Antarctic Treaty Consultative Meeting Report* 11-15 September 200 in The Hague, Netherlands.

The tone of the NGO's ECO³⁸⁵ newspaper is much more critical than that displayed in ASOC's reports to the ATCMs.

Eight years after signing the Protocol; Seven years after discussions on liability began...the week-long negotiating session in Working Group I here at XXIII ATCM in Lima has achieved...well, nothing actually... has been reduced to a sterile annual ritual with no conclusion in sight...The report of the liability discussions last week must rank as one of the most threadbare documents to emerge from any session of an ATCM... The conclusions that the ECO – and presumably outside observers- must draw are that the ATCPs are not taking liability seriously; that the “specialness” of Antarctic does not as we all thought warrant additional protection; that narrow self-interest prevails over concern to protect the Antarctic environment; and that the legally binding commitment to complete a liability regime is insincere. As a result the Protocol is rendered less effective and the credibility of the Antarctic Treaty system as the appropriate forum for the governance of Antarctica is further undermined...³⁸⁶

While these NGO reports contain constant criticism of the ATS in regards to the absence of a liability annex it is very low level criticism and as such has probably not reached the point where it currently threatens the legitimacy of the ATS. The ATCPs should however heed the warning that is contained within these reports because it is clear that while the NGOs are currently content to wait for ATCP action they will not wait forever.

³⁸⁵ ECO is an NGO newspaper published to coincide with each ATCM and SATCM.

³⁸⁶ “The Good, The Bad and The Ugly” (1999) 197 ECO (24 May-4 June) Lima, Peru Number 1. (14.8.01) <<http://www.asoc.org/currentpress/eco11999.htm>>.

CHAPTER ELEVEN

Non-compliance of China with the Convention on the Conservation of Antarctic Marine Living Resources

Some readers may be thinking that China's refusal to comply with the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) is irrelevant to the legitimacy of the ATS because CCAMLR is a separate legal entity. This to a certain extent is true however, I believe there is sufficient evidence linking the two organisations to support my belief that non-compliance with the first directly reflects by association on the legitimacy of the later. Because China is an ATCP their Antarctic activities will always reflect on the ATS.

The relationship between the ATCPs and CCAMLR is unusual in that it was not created intentionally and probably has no legally binding effect never the less a relationship does exist that intertwines the reputations of the two groups. The nature of this relationship was discussed in a paper presented by Dietrich Granow at the International Symposium on the Future of the Antarctic Treaty System in 1995:

The CCAMLR Commission has [its] own legal personality (see Article VIII)...But despite this authority of the Commission, privileges which the Consultative Parties have reserved for themselves block further institutionalisation...Even though CCAMLR is open for accession to any state interested in research and exploitation of the marine living resources falling under this convention, such a state that is not party to the Antarctic Treaty is specially obligated to recognise...the "special obligations and responsibilities" of the ATCPs (Article V)...This means that the ATCPs can act outside the purposes of the Convention and can assume a higher status by taking from the other parties to CCAMLR the authority for decisions for which are in the realm of the ATCM. As a consequence the ATCPs can decide which states will be admitted and, to some extent, the substance of decisions...Because all ATCPs are members of the Commission they can effectively prevent deviation from their policy by exercising a veto.³⁸⁷

³⁸⁷ Dietrich Granow, "A paper by Ambassador Granow" in Australian Antarctic Foundation (ed) *On the Antarctic Horizon: Proceedings of the International Symposium on the Future of the Antarctic Treaty System* (1995) 67.

This special relation is also evident if you analyse the membership of both CCAMLR and the Commission, which sets policy and regulates fishing activity in the Convention area.³⁸⁸ While all signatories to the Convention are entitled to sit on the Commission³⁸⁹ currently of the 31 signatories only 25 sit on the Commission. Of the 25 Commission members 22 are ATCPs³⁹⁰ and one is an ATP.³⁹¹ There are six signatories who choose not to sit on the Commission, four are ATCPs³⁹² and 2 are ATPs.³⁹³ At present there are two Parties to the Convention who are not Parties to the Antarctic Treaty.³⁹⁴ There are currently 27 ATCPs in the ATS of which only two are not parties to CCAMLR.³⁹⁵

This evidence points conclusively to the fact that although CCAMLR was established as a separate entity the CCAMLR Commission is never the less under the direct control of the ATCPs, as such any illegitimacy of this organisation must reflect on the legitimacy of the ATS.

Further, comments made at ATCM XIII provide evidence that the ATCPs believe that CCAMLR is a component part of the Antarctic Treaty.

The meeting agreed that, with the increase in the components comprising the Antarctic Treaty System, it would be appropriate for consultative Meetings to be made formally aware of developments throughout the system, duly taking into account the relationships between its various components. With this object in mind, the meeting reached consensus on

³⁸⁸ CCAMLR applies to an area larger than that covered by the Antarctic Treaty. Article VI of the Antarctic Treaty states that the Treaty applies to all areas south of 60° South Latitude. While Article 1(1) of the Convention extends this coverage to the area south of 60° South Latitude and all marine living resources between that area and the Antarctic Convergence.

In scientific terms the Convergence is a transition zone that circumvents the Antarctic and is created where the cold Antarctic waters meet and sink beneath the warmer northern waters. Due to its nature the Antarctic Convergence does not have a scientifically defined boundary, however a legal definition of the area is defined in Article 1(4) of CCAMLR. Elliott, L *International Environmental Politics: Protecting the Antarctic* (1994) 94.

³⁸⁹ Convention on the Conservation of Antarctic Marine Living Resources 1980, Article VII.

³⁹⁰ This consists of 21 ATCPs: Argentina, Australia, Belgium, Brazil, Chile, France, Germany, India, New Zealand, Norway, Poland, Russian Federation, South Africa, Spain, Sweden, Italy, Japan, Korea, UK, USA and Uruguay. CCAMLR, "Membership" (1.6.01)

<http://www.ccamlr.org/English/e_m_ship/e_membership.htm>.

³⁹¹ Ukraine. CCAMLR, "Membership" (1.6.01)

<http://www.ccamlr.org/English/e_m_ship/e_membership.htm>.

³⁹² Bulgaria, Finland, Netherlands and Peru.

³⁹³ Canada and Greece.

³⁹⁴ Namibia and the European Community.

³⁹⁵ China and Ecuador.

Recommendation XIII-2, which provides for reports to be made to future Consultative Meetings covering developments in the respective areas of competence of the various components of the system.

These reports will contribute to there being a clear overview of the operation of the Antarctic Treaty system at each consultative Meeting. Recommendation XIII-2 invites the Commission for the Conservation of Antarctic Marine Living Resources to appoint its Chairman...to represent the Commission as an observer for the specific purpose of presenting such a report.³⁹⁶

This association between the two entities has been made even stronger relation to the efforts to control illegal fishing. This association was established in a resolution proposed by Australia and adopted at ATCM XXIV in 2001.

...*Recalling* also that the Preamble to the Protocol on Environmental Protection to the Antarctic Treaty (the Madrid Protocol) reaffirms the conservation principles of the Convention on the conservation of Antarctic Marine Living Resources.

Recognising that the Objective of the Protocol (Article 2) is for Parties to commit themselves to the comprehensive protection of the Antarctic Environment and dependant and associated ecosystems:...

Recommend that: All Parties to the Antarctic Treaty which are not Contracting Parties to the Convention or Members of the Commission, and whose flag vessels fish for toothfish or who are involved in the trade of toothfish, implement the CCAMLR Catch Documentation Scheme for *Dissostichus spp.*³⁹⁷

11.1 Development of The Convention on the Conservation of Antarctic Marine Living Resources

The Convention on the Conservation of Antarctic Marine Living Resources was developed as part of the Antarctic Treaty System in 1980.³⁹⁸ CCAMLR resulted from a realisation on the part of the ATCPs that if something was not done the historic pattern of over-exploitation of the Antarctic resources was likely to continue.

Just 200 years ago Captain Cook confidently forecast that the Antarctic was useless to man. But twice since then man has over-exploited Antarctic waters and virtually wiped out first the population of fur

³⁹⁶ Antarctic Treaty System. *Final Report ATCM XIII* held 8-18 October 1985 in Brussels, Belgium. Electronic version. (11/07/01) <<http://currentaspire.nvi.net/gendoc.plx?11=1985&db=3>>.

³⁹⁷ Antarctic Treaty System. "Resolution 1(2001) *Final Report ATCM XXIV* Annex B.

³⁹⁸ CCAMLR. "General Information" (25 May 2000) <http://www.ccamlr.org/English/e_general_intro.htm>.

seals and then the stocks of Antarctic baleen whales. Are those sad stories to be repeated or can we be wiser than our forefathers?³⁹⁹

At the time the Convention was drafted the Parties were mainly concerned with the possible over-exploitation of the krill fisheries.⁴⁰⁰

Fisheries activities have already begun in the southern Ocean; operations to explore the practical problems of krill exploitation are under way. And several countries, including some from outside the Treaty forum; have become active in this field. If we delay, we risk allowing the development of the same situation that occurred with the rapid expansion of whaling operations between the Wars, where massive investment had already been made before anyone devised a regulatory framework in which rational exploitation could take place. I need not, I think, here refer to the consequences of that order of events.⁴⁰¹

The ATCPs at ATCM VIII expressed concern over the possibility of over-exploitation due to unregulated fishing in 1975.⁴⁰² However, the issue became urgent when commercial harvesting of krill commenced in the 1976/77 season⁴⁰³ with no mechanism in place to prevent over-exploitation. At ATCM IX in 1977 the ATCPs adopted Resolution IX-2 which called for the adoption of a conservation regime.⁴⁰⁴

³⁹⁹ Antarctic Treaty System, "Opening Address of Ted Rowlands, United Kingdom Minister of State for Foreign and Commonwealth Affairs" *Final Report of ATCM IX* held 19 September-7 October 1977 in London, England 23.

⁴⁰⁰ Krill is the major source of energy in the Antarctic marine food chain, as such it is recognised that any reduction in the stock numbers could have a disastrous effect on the entire Antarctic marine ecosystem. CCAMLR, "General Information" (25 May 2000) <http://www.ccamlr.org/English/e_general_intro.htm>.

⁴⁰¹ Antarctic Treaty, "Statement by Dr J Heap, Australian Delegation" *Final Report of ATCM IX* 40.

⁴⁰² The Representatives... 4. They urge the Scientific Committee on Antarctic Research (SCAR), through their National Antarctic Committees, to continue its scientific work...and to consider convening, as soon as practicable, a meeting to discuss current work and report on programmes for the study and conservation of Antarctic marine living resources. Antarctic Treaty System, *Final Report of ATCM VIII* held 9-20 June 1975 in Oslo, Norway 40.

⁴⁰³ The peak catch for krill was during the 1981/82 when 528,000 tonnes were harvested, since then due to economic issues the harvest has dropped. However even with the reduced catch in 1998 krill fishing was the principle economic activity in the Southern Ocean. Billen, G and Lancelot, C "The Functioning of the Antarctic Marine Ecosystem a Fragile Equilibrium" in Verhoeven, J Sands, P and Bruce, M *The Antarctic Environment and International Law* 42.

⁴⁰⁴ The Representatives, *Recalling* the special responsibilities conferred upon the Consultative Parties in respect of the preservation and conservation of living resources in the Antarctic by virtue of Article IX paragraph 1(f) of the Antarctic Treaty: ... III Establishment of a Definitive Conservation Regime 1. A definitive regime for the Conservation of Antarctic Marine Living Resources should be concluded before the end of 1978. 2. A Special Consultative Meeting be convened in order to elaborate a draft definitive regime... 3. (a) the regime should explicitly recognize the prime responsibility of the Consultative Parties in relation to the protection and conservation of the environment in the Antarctic Treaty area and the importance of the measures recommended by the

The series meetings⁴⁰⁵ held under the auspices of Resolution IX-2 lead to the establishment of the Convention for the Conservation of Antarctic Marine Living Resources which was signed in 1980. The principles governing the Convention are set out in Article II:

- (1) The objective of this Convention is the conservation of Antarctic marine living resources.
- (2) For the purposes of this Convention, the term “conservation” includes rational use.
- (3) Any harvesting and associated activities in the area to which this Convention applies shall be conducted in accordance with the provisions of this Convention and with the following principles of conservation:
 - (a) Prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment. For this purpose its size should not be allowed to fall below a level close to that which ensures the greatest net annual increment;
 - (b) Maintenance of the ecological relationships between harvested, dependent and related populations of Antarctic marine living resources and the restoration of depleted populations to the level defined in sub-paragraph (a) above;
 and
 - (c) prevention of changes or minimization of the risk of changes in the marine ecosystem which are not potentially reversible over two or three decades, taking into account the state of available knowledge of the direct and indirect impact of harvesting, the effect of the introduction of alien species, the effects of associated activities on the marine ecosystem and the effects of environmental changes, with the aim of making possible the sustained conservation of Antarctic marine living resources.⁴⁰⁶

11.2 Illegal Fishing

In 1999, in response to the increasing incidents of illegal catches⁴⁰⁷ in the toothfish fisheries, the Commission adopted Conservation Measure 170/XIX.⁴⁰⁸ The measure established a catch documentation scheme for *Dissostichus* spp (toothfish) in the Southern Ocean. The scheme requires each Contracting Party to identify the origins

Consultative Parties to this end... Antarctic Treaty System, Resolution IX-2 *Final Report of ATCM IX* held 19 Sept-7 Oct 1977 in London England 13.

⁴⁰⁵ Antarctic Treaty System. *Final Report Second Special Consultative Meeting* held 1978 in Canberra, Australia; 1978 in Buenos Aires, Argentina and 1980 in Canberra, Australia.

⁴⁰⁶ Convention for the Conservation of Antarctic Marine Living Resources 1980, Article II.

⁴⁰⁷ More than 50% of the total toothfish catch (AUD\$760 million) is caught illegally, in some areas the illegal catch may be as high as 90% of the total catch. In one year illegal fishing reduced the toothfish population around Crozet by 25%. Catches in the area are estimated to be 12 times the legal limit. In 1998 the fishery had reached the point of commercial extinction. Scientists believe that as a result of illegal fishing toothfish could be commercially extinct in two years (2001). ASOC. “ECO 2, CCAMLR XVIII, 27 October 1999 Hobart, Australia” (27 Oct 1999) <<http://www.asoc.org/currentpress/eco299.htm>>.

⁴⁰⁸ CCAMLR Commission, Conservation Measure 170/XIX <http://ccamlr.org/English/e_cds_1999/e_cds2k_p1.htm>.

of all toothfish imported into or exported from its territory in order to determine whether fish caught within the Convention Area was harvested in a manner consistent with CCAMLR.⁴⁰⁹ Subsequent to the adoption of the documentation scheme, which is open for non-CCAMLR countries to participate in, China informed CCAMLR that it would not participate in the documentation program. China's refusal to participate has been interpreted as "laying out the mat for pirate fishers".⁴¹⁰ While China as a non-party to CCAMLR is under no legal obligation to participate in the scheme, resolution 1 of ATCM XXIV⁴¹¹ means that their non-participation has ramifications for the ATS as a whole.

China's involvement in the toothfish trade has been slowly increasing over the years with the majority of the exports going to Japan and the USA.⁴¹² While the documentation scheme will to some extent hamper China's export activities as the situation currently exists they have not been totally closed down. This is because while the United States has adopted the documentation scheme Japan has announced that while it will require the necessary documentation from CCAMLR parties, non-parties to CCAMLR will not have to verify the source of their catch.⁴¹³

While it does not appear that China has given any official reason for its present behaviour there is anecdotal evidence that may suggest a reason. As has already been stated China has been increasing its activities in relation to toothfish harvesting in recent years, this combined with the rumour that China is building a new 200 vessel fishing fleet for the Southern Ocean gives a fairly good indication of what their reason could be.⁴¹⁴ However due to China's position as an ATCP, whatever the

⁴⁰⁹ Conservation Measure 170/XIX (1).

⁴¹⁰ ASOC, "Southern Ocean Fisheries Campaign Update" Antarctic Project Newsletter Vol 9 Issue 2 Aug 2000. Electronic version, <<http://www.asoc.org/currentpress/augnewlet.htm>>.

⁴¹¹ *Supra* at 103.

⁴¹² In 1998 the USA and Japan, both of whom are parties to CCAMLR, were reported to be the recipients of 90% of the illegal toothfish catch.

⁴¹³ ASOC, Antarctic Project Newsletter Vol 9 Issue 2 Aug 2000. Electronic version, <<http://www.asoc.org/currentpress/augnewlet.htm>>.

⁴¹⁴ ASOC, "Crisis for Patagonian Toothfish" Current Issues (2.8.01) <<http://www.asoc.org/campaign/marine.htm>>.

reason, its refusal to both become a party to and to comply with the recommendations of CCAMLR raises questions in relation to the internal legitimacy of the ATS.

11.3 Conclusion

The acceptance arm of internal legitimacy requires that the Parties acknowledge, implement and adhere to the rules and procedures of the organisation.⁴¹⁵ While it is accepted that CCAMLR is a free standing and essentially independent organisation⁴¹⁶ the debate and resolutions surrounding its drafting and signing indicate clearly that the ATCPs strongly believed that its existence was essential for the prevention of the over-exploitation of Antarctic marine resources. The comments of the delegates at the Antarctic Treaty Second Special Consultative Meeting in 1978, which was convened to commence drafting of CCAMLR, clearly indicate that the Parties fully intended the preservation of the marine ecosystems to be directly related to the ATS and the Consultative Parties. The Chilean Delegate stated that:

The international community has tacitly accepted the administration of Antarctica by the Consultative Parties over those two decades...The -explicitly- their competence in ecological matters. Accordingly, we must not operate outside the Treaty, separate from its regime fundamental aspects of Antarctica, and internationalize the Antarctic problem piecemeal.⁴¹⁷

The French Delegation added

I, for my part, see this Special Consultative Meeting as a sign of the vitality of the Treaty signed at Washington in 1959...My country considers that the consultative Parties, faithful to the spirit as well as to the text of that Treaty, must clearly and openly exercise the responsibilities they assume in Antarctica.⁴¹⁸

New Zealand also stressed the special responsibilities of ATPs in relation to Antarctic conservation;

The Antarctic Treaty places special responsibilities upon its parties in respect of preservation and conservation of living resources in Antarctica.⁴¹⁹

⁴¹⁵ Stokke, *supra* n 36 at 24.

⁴¹⁶ As referenced by the establishment of its own Commission (Article VII) Scientific Committee (Article XV) and Secretariat (Article XVII).

⁴¹⁷ Antarctic Treaty System, "Opening Statement by the Leader of the Chilean Delegation, His Excellency Sr Fernando Zegers" *Interim Report of the Second Special Consultative Meeting* held 27 February-16 March 1978 in Canberra, Australia 12.

⁴¹⁸ Antarctic Treaty System, "Opening Statement by Patrick Henault, Leader of the French Delegation" *Interim Report of the Second Special Consultative Meeting* 13.

While China did not become an ATCP until 1985, and therefore was not present at the 1978 meeting, by accepting ATCP status they have implied acceptance of prior consensus decisions of the group. Resolution 1 of ATCM XXIV⁴²⁰ clearly indicates that the ATCPs intended for all ATS members to comply with the CCAMLR Catch Documentation Scheme therefore by refusing adhere to the scheme China is failing to adhere to the rules and procedures of the organisation. It is likely that such a failure could have direct ramifications for the internal legitimacy of the ATS. The potential challenge to legitimacy is given more significance by the fact that China is an ATCP.

⁴¹⁹ Antarctic Treaty System. "Opening Statement by Leader of the New Zealand Delegation. Mr G Hensley" *Interim Report of the Second Special Consultative Meeting* 16.

⁴²⁰ *Supra* at 108.

CHAPTER TWELVE

Jurisdiction and Tourism in Antarctica

Jurisdiction is a contentious issue within the ATS because it is associated so closely with sovereignty. The subject of who has jurisdiction over individuals who travel to the Antarctic has been discussed unsuccessfully by the Parties since the Treaty was first ratified. Jurisdiction is addressed in Article VIII of the Treaty, but only relates to scientific personal.

In order to facilitate the exercise of their functions under the present Treaty, and without prejudice to the respective positions of the Contracting Parties relating to jurisdiction over all other persons in Antarctica, observers...and scientific personal exchanged...and members of staffs accompanying any such persons, shall be subject only to the jurisdiction of the Contracting Party of which they are nationals in respect of all acts or omissions occurring while they are in Antarctica for the purposes of exercising their functions.⁴²¹

The provisions of Article VIII(1) were sufficient for the early years of Antarctic exploration because visitors to the ice were there as either employees or guests of the contracting Parties. Today the improvements in science and technology have allowed not only for the development of a flourishing tourist industry but also an increase in the number of private expeditions to the ice. Although tourism and private expeditions were not a problem in the early days of the Treaty the Parties did recognise that there was a potential for non-scientific activity to interfere with the conduct of science in the area. As such the issue of Antarctic tourism has been raised at almost every ATCM since the initial meeting in 1961.⁴²² These discussions in each case usually resulted in a similarly worded resolution.

The Representatives,

Recognising that tourists and other persons not sponsored by Consultative Parties are visiting the Antarctic Treaty Area in increasing numbers;...

Recommend to their Governments that:

1. They use their best endeavors to ensure that all those who enter the Antarctic Treaty Area...are aware of the Statement of Accepted Practices and the Relevant Provisions of the Antarctic Treaty...
2. They *request* (my emphasis) all organizers of tourist groups...
 - a. visit only those Antarctic stations for which permission has been sought and granted...

⁴²¹ Antarctic Treaty 1959, Article VIII(1).

⁴²² Conclusion established following review of meeting reports from 1961-2000.

- b. land only with the Areas of special Tourist Interest listed or defined in Annex B...⁴²³

The Treaty Parties made it quite clear that they expected each Contracting Government to control the activities of their own nationals, primarily through control at their point of departure. However, despite continued debate the Parties have been unable to develop a plan that adequately controls tourist activity from non-Treaty countries. As is the case with many facets of the ATS the current control mechanisms are recommendations and lack the means of enforcement and while controlling the access of tourist to the research stations they do little to regulate their activities in other areas of the continent.

In 1979 the Parties established a working group to discuss the issue of tourism in the Treaty Area and the result was the development of the *Guidelines for Antarctic Visitors*.⁴²⁴ Once again however these were just recommendations and had no way of been binding on the non-governmental visitors to the Antarctic. In 1983 the ATCPs attempted to draft a resolution concerning the jurisdiction over tourists and non-governmental parties in Antarctica but the draft recommendation was dropped due to an inability to reach consensus.⁴²⁵

The ATCPs addressed the issue of increased tourism again at ATCM XIV in 1987 but once again could come to no agreement as to how to deal with the problem. They agreed instead to continue the debate at the next meeting and to meantime renew their efforts to promote compliance with the existing measures.⁴²⁶ In 1992 the Parties

⁴²³ Antarctic Treaty System, "Recommendation VIII-9" *Final Report ATCM VIII* held 9-20 June 1975 in Oslo, Norway 38.

⁴²⁴ Antarctic Treaty System, "Resolution X-8" *Final Report ATCM X* held 17 Sept-5 Oct 1979 in Washington DC, USA 22.

⁴²⁵ A view was also expressed that responsibility for compliance by non-governmental expeditions with the provisions of the Antarctic Treaty and Recommendations adopted at the Consultative Meetings should be placed upon those States whose physical or juridical persons organize such expeditions or participate in them. Since there was no agreement as to where responsibility for non-governmental expeditions should lie, the draft Recommendation which had been tabled was withdrawn. Antarctic Treaty System, *Final Report of ATCM XII* 12.

⁴²⁶ Antarctic Treaty System, *Final Report ATCM XIV* held 5-16 October 1987 in Rio de Janeiro, Brazil 53.

stated the opinion that the provisions of the Environment Protocol and its annexes would apply to all activities in Antarctica, including tourism and non-governmental activities.⁴²⁷ However they did not address the issue of how to enforce compliance on those groups not associated in any way with a Treaty Party, in this light some Parties suggested that legally binding regulation was necessary to control these activities.⁴²⁸ They proposed this be done through the establishment of a tourism annex to the Environment Protocol. However even if consensus on the conclusion of an annex could have been reached such an instrument would still not have clarified the issue of jurisdiction over groups that failed to comply with the annex.⁴²⁹

The proceedings of ATCM XVIII in 1994 show that the Parties are very reluctant to address the issue of jurisdiction primarily because they perceive this may be an issue that could upset the current delicate balance within the system. The Head of the Delegation from Switzerland observed that:

The Uruguayan delegation has suggested that the issue of jurisdiction be placed on the Agenda of the ATCMs. We know that this problem has only been solved under Article VIII, paragraph 1 of the Antarctic Treaty, for two categories of individuals: the scientific personnel associated with the stations or expeditions and the observers in charge of carrying out inspections, for which the jurisdiction of the national State prevails. However, the array of people undertaking activities in the Antarctic is much larger. It includes fisherman, hunters, tourists, tour operators, film makers, to mention a few. The issue put forward by Uruguay is therefore increasingly important and should be discussed without delay, despite any controversy it may provoke between the Contracting States and the others. In fact, there is no reason why a community of States which has succeeded in overcoming such antagonism on several occasions... could not do so again.⁴³⁰

However, despite the recognition of the need to resolve the jurisdiction problem the delegates declined the opportunity to debate it.

Item 16 – Questions related to the Exercise of Jurisdiction in Antarctica

The Meeting recognised the importance of this question, the solution of which was left deliberately open in Article IX(1) of the Antarctic Treaty. But it was also understood that the question raises some delicate and sensitive problems which need more, and careful, deliberations.

⁴²⁷ Antarctic Treaty System, *Final Report of ATCM XVII* 41.

⁴²⁸ Antarctic Treaty System, *Final Report of ATCM XVII* 41.

⁴²⁹ Antarctic Treaty System, *Final Report of ATCM XVII* 41.

⁴³⁰ Antarctic Treaty System, "Opening Address by Ambassador Lucius Callisch, Head of the Delegation of Switzerland" *Final Report of ATCM XVIII* 111.

The Meeting therefore agreed to leave the item out of the Agenda of the XIXth ATCM and put it again on the Agenda of the XXth ATCM in order to give all Parties sufficient time to elaborate ways and means of how to approach the question again in order to find an agreeable solution.⁴³¹

The question of jurisdiction was placed on the Agenda for ATCM XX however it was not discussed. The delegates agreed that they had not yet had sufficient time to consider the matter and decided to omit it from this meeting and all subsequent meetings until they were requested by a Consultative Party to reinstate it.⁴³² Subsequent meeting agendas contain no indication that this issue has to date been readmitted for discussion at Consultative Meetings.⁴³³

12.1 Tourist Numbers

The failure of the ATCPs to address this issue given the current status of tourism in the Antarctic region is a matter of some concern and has associated effects on the external legitimacy of the ATS. An analysis of tourism statistics for Antarctica clearly show that this is an issue that must be dealt with and soon. In the 1999-2000 tourist year 14,762 people travelled to the Antarctic in private expeditions, an increase of 46% over the previous year.⁴³⁴ 14,402 travelled on commercially organised tours. In that season there were 20 Commercial Tour Vessels operating in the region. Eight of those vessels were registered in non-Treaty countries⁴³⁵, therefore the Treaty Parties had no control over their activities. Sixteen of them were however members of IAATO⁴³⁶, a voluntary association of Antarctic tour operators. There were two vessels making regular visits to the Treaty area that were neither registered in a Treaty country or members of IAATO. These two vessels had a combined passenger

⁴³¹ Antarctic Treaty System, *Final Report of ATCM XVIII* 29.

⁴³² Antarctic Treaty System, *Final Report of ATCM XX* 15.

⁴³³ Antarctic Treaty System, Meeting Agendas for ATCMs XXI, XXII, XXIII and XIV.

⁴³⁴ International Association of Antarctica Tour Operators, *Overview of Antarctic Tourism 2000* (2000) electronic version, <http://www.iaato.org/xxii_iaato_over2000.html>. IAATO however predicted and 11% decrease in tourist numbers for the 2000-01 season.

⁴³⁵ Bahamas and Panama.

⁴³⁶ IAATO members voluntarily comply with the requirements of the Antarctic Treaty and the Association provides the ATCM with an annual report under Article II(2) of the Treaty and provides environmental assessments of tourism activities. <<http://www.iaato.org>>.

capacity of 1650 people.⁴³⁷ This means that at any given time during that year from commercial tours alone there was a potential for the presence of 1650 persons over whom nobody had legal jurisdiction. There are also a significant number of people travelling to Antarctica by private yacht. IAATO had reports of visits from 23 yachts carrying a total of 221 passengers.⁴³⁸ IAATO predicts that with the increase in the size of the vessels travelling to the Antarctic tourist numbers will continue to grow over time but was unable to predict how many of these visitors will actually land on the continent. Their best estimate is that by 2005 there will be 16,000 people making multiple landings in the region.⁴³⁹

The ASOC as the representative of environmental NGOs in the Antarctic region appears particularly concerned about the lack of jurisdiction over tourists to the Antarctic.

As many national programmes are looking to demonstrate their commercial relevance at home domestic economic pressures have increasingly driven Antarctic policy in a number of member states. Additionally, the unresolved sovereignty – and consequential complex juridical situation – means that the emergence of an ever larger and more powerful tourism industry poses real risks. There exists a temptation for states to attempt to strengthen their sovereignty claims as they consider the two major Antarctic industries – fishing and tourism.... The thin juridical environment in Antarctica means that Environmental Impact Assessment (EIA) has been left as the sole gatekeeper for Antarctic access... Other mechanisms apply in the case of activities supported by national programmes – ethical committee approvals...logistic and funding processes...administratively and/or politically accountable....But this is not the case with tourist industry proposals in Antarctica. Unless constrained by the EIA process (and, significantly, not one tourist EIA has resulted in a decision to substantially modify – far less cancel –proposed activities), tourist proposals proceed without further ado.⁴⁴⁰

12.2 Conclusion

The legitimacy of the ATS in relation to the jurisdiction is at best questionable, especially when discussed within the context of tourism regulation. As Vidas stated;

⁴³⁷ International Association of Antarctica Tour Operators, *Overview of Antarctic Tourism 2000* (2000) electronic version, <http://www.iaato.org/xxii_iaato_over2000.html>.

⁴³⁸ International Association of Antarctica Tour Operators, *Overview of Antarctic Tourism 2000* (2000) electronic version, <http://www.iaato.org/xxii_iaato_over2000.html>.

⁴³⁹ International Association of Antarctica Tour Operators, *Overview of Antarctic Tourism 2000* (2000) electronic version, <http://www.iaato.org/xxii_iaato_over2000.html>.

⁴⁴⁰ ASOC. "Antarctic Tourism ASOC Information Paper" tabled at ATCM XXIV, St Petersburg, Russia, July 2001. Electronic version, (14.8.01) <<http://www.asoc.org/currentpress/IP40tourism.hun>>.

wide acceptance was actually made possible only at considerable expense to the thorough regulation of Antarctic tourism in an ATS tourism regime. This has been the factor legitimising the most recent ATS regulatory solution on Antarctic tourism, as adopted at the 1994 Kyoto Consultative Meeting; and this is in fact not much more than a restatement on already existing ATS regulation. This was the only solution acceptable to all the Consultative Parties and at the same time welcomed by interested Antarctic tour operators.⁴⁴¹

Therefore the ATCPs have attempted to ensure the external legitimacy of the ATS by not regulating tourism thereby gaining the support and acknowledgement of the majority of Antarctic tour operators⁴⁴² however in doing so they have overlooked the other equally important aspects of legitimacy. That is that the rules and procedures must be compatible with the major developments in the international community.⁴⁴³ I believe we have already shown that the international community is extremely concerned with environmental protection in the Antarctic region and that they see the inability to resolve the issue of jurisdiction over individuals who travel to the region as a threat to that environmental protection. This is particularly true in light of the assertion made by *ECO* that IAATO has eased its membership obligations and is now granting membership to tour operators who use very large vessels and adventure tour operators who are noted for using new ports of entry into Antarctica.⁴⁴⁴ In the past the NGO's have felt that IAATO was setting acceptable standards for transportation to and activities in the Antarctic. However they now fear that with these changes this is not the case.⁴⁴⁵ IAATO in response to the NGO criticism claims that it made the changes in response to pressure from the states.⁴⁴⁶ These events could be an indication that the voluntary system for the control of tourism in the Antarctic could be breaking down. As such the inability of the ATCPs to resolve the jurisdiction issues and adequately control tourism in a manner that will adequately ensure continued environmental protection in the region must have a negative effect on the external legitimacy of the organisation. This is because if the ATCPs cannot adequately control tourism and the industry starts to have adverse effects on the

⁴⁴¹ Vidas, *supra* n 241 at 318.

⁴⁴² This support is evidenced by IAATO's presence at ATCMs as an observer since ATCM XX in 1996.

⁴⁴³ Stokke *supra* n 36 at 23.

⁴⁴⁴ ECO, "Tourism" ECO Number 2, July 9-20 2001, St Petersburg, Russia. (14.8.01) <<http://www.asoc.org/currentpress/ECO2StPete.htm>>.

⁴⁴⁵ *Ibid.*

Antarctic environment these is likely to be a increase in the international criticism of the ATS's ability to effectively govern the region.

There is also potential for the jurisdictional issues and the non-regulation of tourism to have an adverse effect on the internal legitimacy of the ATS. This is because a necessary component of internal legitimacy is that the rules and procedures of the organisation address the problem for which the organisation exists.⁴⁴⁷ Therefore as environmental protection is one of the objectives of the ATS if it can be shown that the non-resolution of the jurisdiction issue particularly as it relates to tourism has had an adverse effect on the Antarctic environment then the ATS loses legitimacy. This is currently only a potential problem because to date there is no convincing evidence that tourism has adversely effected the Antarctic environment, however as the level of non-regulated tourism rises in the future this could indeed become an issue of major concern.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ Stokke *supra* n 36 at 23.

CHAPTER THIRTEEN

THE ANTARCTIC TREATY SYSTEM AND THE UNITED NATIONS

The modern era of UN interest in Antarctica began in 1983 when the Secretary-General received a letter dated 11 August from Antigua and Barbuda, and Malaysia. The letter stated there was a need to examine the possibility of a “more positive and wider international concert to ensure the activities carried out in Antarctica were for the benefit of mankind as a whole” and therefore requested that the question of Antarctica be placed on the agenda for the 1983 General Assembly session.⁴⁴⁸ On 5 October 1983 Australia, on behalf of the ATCPs, responded. Australia stated the “Treaty which was open to all countries and was of unlimited duration, served the international community well and had averted international strife and sovereignty disputes over Antarctica”. The ATCPs therefore had reservations about the initiative and any attempt to revise or replace the Treaty.⁴⁴⁹ The question was subsequently placed on the agenda and resulted in the adoption of resolution 38/77, which was passed without vote in a session of the First Committee. Resolution 38/77 called upon the Secretary-General to prepare a report on all aspects of Antarctica for presentation to the 39th session.⁴⁵⁰

In October of the following year (1984) the Secretary-General received a copy of a final communiqué adopted at the Meeting of Ministers for Foreign Affairs and Heads of Delegations of Non-Aligned Countries. The document stated the Meeting welcomed UNGA Resolution 38/77 and hoped it would “contribute to widening international co-operation on that continent. In response the Secretary-General received communiqués from three ATCPs⁴⁵¹ reaffirming their intention to abide by

⁴⁴⁸United Nations, “Antarctica” *Yearbook of the United Nations Vol 37* (1983) 387.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ United Nations, “Antarctica” *Yearbook of the United Nations Vol 39* (1984) 369.

⁴⁵¹ France, Belgium and Norway.

the terms of the Antarctic Treaty.⁴⁵² As a result of the tabling of the Secretary-General's report the First Committee adopted resolution 39/152:

The General Assembly,
Having considered the item entitled 'Question of Antarctica',
Taking note of the study on the question of Antarctica,
Conscious of the increasing international awareness of and interest in Antarctica,
Bearing in mind the Antarctic Treaty and the significance of the system it has developed,
Taking into account the debate on this item at its thirty-ninth session,
Convinced of the advantages of better knowledge of Antarctica,
Affirming the conviction that, in the interest of all mankind, Antarctica should continue forever to be used exclusively for peaceful purposes and that it should not become the scene or object of international discord,
Recalling the relevant passages of the Economic Declaration adopted at the Seventh Conference of Heads of State or Government of Non-Aligned Countries, held at New Delhi from 7 to 12 March 1983,
 1. *Expresses its appreciation* to the Secretary-General for the study on the question of Antarctica;
 2. *Decides* to include in the provisional agenda for the fortieth session the item entitled "Question of Antarctica".⁴⁵³

In 1985 the Secretary-General received a communiqué from the Council of Ministers of the Organisation of African Unity which declared Antarctica to be the common heritage of mankind and calling on all OAU members to take steps at the 1985 UNGA to seek its recognition as such. This resulted in the adoption of resolution 40/156B, which called on the Consultative Parties to inform the Secretary-General on the progress of their minerals negotiations. Resolution 40/156B passed by an overwhelming margin for two reasons; due to extensive support of the developing countries and because the ATPs chose to register their dissatisfaction with the issue through non-participation in the vote rather than register adverse votes.⁴⁵⁴

It soon became apparent that a pattern was evolving in the UN that involved the UN passing resolutions, sponsored by the developing countries, concerning the involvement of the international community in the Antarctic along with complaints surrounding the ATCPs exclusive management of the continent.⁴⁵⁵ As Beck stated in 1989:

⁴⁵² United Nations, *supra* n 443 at 369.

⁴⁵³ *Ibid.*

⁴⁵⁴ Beck, P "Antarctica at the United Nations. 1985: The End of Consensus?" 23 *Polar Record* (1986)159, 162.

⁴⁵⁵ Beck, P "The United Nations and Antarctica 1986" 23 *Polar Record* (1987) 683.

Annual discussion at the United Nations since 1983 on the "Question of Antarctica", had by 1989 become somewhat routine, exerting only a slight impact upon the Antarctic scene. The Antarctic Treaty Parties...refused either to participate in the UN discussions or to implement successive UN resolutions calling for wider participation in the Antarctic mineral regime....⁴⁵⁶

This situation continued unchanged until 1994 when with the UNGA adopted Resolution 49/80.⁴⁵⁷

The General Assembly,
 Having considered the item entitled "Question of Antarctica...
 Welcoming the provision by the Antarctic Treaty Consultative Parties to the Secretary-General of the final Report of the Eighteenth Antarctic Treaty Consultative Meeting...
 Recognising the Antarctic Treaty, which provides, inter alia for...
 Taking into account the Protocol on Environmental Protection to the Antarctic Treaty...
 Welcoming the designation in the Protocol, of Antarctica as a natural reserve...
 Commending the prohibition on mineral resource activities...
 Welcoming the continued cooperation among countries...to minimize human impacts on the Antarctic environment...
 Welcomes the practice whereby the Antarctic Treaty Consultative Parties regularly provide the Secretary-General with information on their consultative meetings and their activities in Antarctica...
 Requests the Antarctic Treaty Parties to continue to make available information on Antarctica...
 Urges the Antarctic Treaty Parties to consider becoming parties as soon as possible to the Protocol...
 Urges countries whose nationals undertake activities in Antarctica to ensure that all such activities are carried out in a manner consistent with the principles of the Protocol...⁴⁵⁸

This was also the point at which for the first time the ATCPs were pleased with the outcome of the annual UN debate on Antarctica.

I am pleased to be here today to report on the developments of the "Question of Antarctica" in the United Nation...The consensus resolution 49/80...which resulted in reasonable contents, is the product of the dialogue and cooperation between the contracting parties and those countries who cast doubts on the Antarctic Treaty System. Taking this opportunity, I'd like to thank other State Parties for their constructive attitude in elaborating this resolution together with Malaysia...The main points of the resolution are as follows:...Secondly, the resolution shows the Antarctic Treaty System as the key actor to manage and to be responsible for Antarctica...Thirdly, the item "Question of Antarctica" is not to be included in the provisional agenda for the next session, instead it will be included in the 51st session...The

Beck, P "Another sterile annual ritual? The United Nations and Antarctica 1987" 24 Polar Record (1988) 207.

Beck, P "Antarctica at the UN 1988: seeking a bridge of understanding" 25 Polar Record (1989) 329.

⁴⁵⁶ Beck, P "The UN goes green on Antarctica: the 1989 session" 26 Polar Record (1990) 323,323.

⁴⁵⁷ Beck, P "Antarctica, Vina del Mar and the 1990 UN Debate" 27 Polar Record (1991) 211.

Beck, P "The 1991 UN session: the environmental protocol fails to satisfy the Antarctic Treaty System's critics" 28 Polar Record (1992) 307.

⁴⁵⁸ United Nations General Assembly, Resolution 49/80, 15 December 1994.

resolution properly reflects the positive benefits which the Antarctic Treaty provides for the maintenance of international peace and security and promotion of international co-operation.⁴⁵⁹

It is evident from the UN debates that the ATS is gaining favour with the UN and is currently recognised by that institution as the principle organ of governance for the Antarctic. But continued activity by some UN member countries at the same time indicates that this acceptance is not absolute. However, despite the continued presence of dissenters in the UN ranks the ATS appears to have established its legitimacy in the eyes of the international community.

⁴⁵⁹ Antarctic Treaty. "Report of the Convenor of the Informal Group of Treaty Parties in the United Nations" *Final Report ATCM XIX* 238.

CONCLUSION

I think it will be agreed by most that it is common knowledge that the Antarctic is a unique wilderness whose environment needs protection from the encroachment of humanity. There is however a great deal of debate in the international arena as to which organisation is the best qualified to provide this protection. Currently that is a role maintained by the ATS. The purpose of this paper was to establish whether the ATS had the level of legitimacy necessary to ensure adequate environmental protection for the Antarctic region. I started my research with the preconceived notion that the present problems that exist within the ATS would provide sufficient evidence to support a conclusion that the ATS lacked legitimacy. This to my surprise has not been the case. While there are a few areas of concern that the ATS will need to address in the near future, at this point I believe that the ATS has retained the level of legitimacy necessary to protect the Antarctic environment. However, in order to maintain this level of legitimacy the ATS needs to address the following issues.

In order to solidify their legitimacy in the region the ATCP need to resolve the sovereignty issue. The legitimacy of the territorial claims upon with the Antarctic Treaty was initially based have very little standing in international law and therefore, are at best questionable. While until recently Article IV of the Treaty had dealt with sovereignty in a non-confrontational manner with the emergence of the issue of Antarctic resources as the 'common heritage of mankind' it is likely that Article VI will no longer be adequate to prevent conflict in this arena. This contention is evidenced by the recent emergence of the sovereignty issue as a major factor in the drafting of the Convention on the Regulation of Antarctic Mineral Resource Activities. It is therefore necessary for the ATCPs to recognise that the question of sovereignty is a potential flash point area that needs to be dealt with. In this light in order to ensure the continued legitimacy of the organisation, particularly in relation to external legitimacy as gauged by the acceptance of the organisation by the international community, the ATS needs to adapt to the modern era of international

relations and adjust its current system of governance. This could be achieved by adapting the current system so that it does not give preferential standing to the Claimant States. It is possible that such a change would have no major ramifications for the position of the Claimant States within Antarctic politics. This is because they have behind them a history of successful Antarctic governance that should ensure they maintain their prominent positions within the System. However, by removing their privileged position these states would in the future be required to work diligently on Antarctic issues to ensure the maintenance of their position, rather than relying on the certainty of their position because of their territorial claims. Such a situation could only enhance environmental protection in the region.

The ATCPs also need to address the continued under-representation of developing countries in the Antarctic decision-making processes. While it is acknowledged that the ATCPs have made significant progress toward wider participation and as such have removed any threat to the internal legitimacy of the System for the time being, their progress to date is not sufficient to hold off criticism on this count forever. The countries of the developing world desire a higher level of participation in the decision-making process and if the ATCPs are not forthcoming this issue could quickly become a threat to the continued internal and external legitimacy of the ATS. The ATCPs must be aware that in a system where the decision-making process is based on sovereign equality, propounding the fact that the Consultative Membership currently represents 80% of the world's population is not enough to remove continued criticism. In order to fully remove the criticism concerning under-representation the ATS needs to ensure that their decision-making group conforms to the normative structure of the international community and better reflects the percentage of developing countries in both the ATS itself and the international community as a whole.

Another area where the ATS needs to concentrate efforts in order to remove continued criticism is their environmental protection policy. The concept of environmental protection is relatively new to the ATS, having only developed as a

principle of the organisation with the adoption of the Environmental Protocol in 1991. However, in order to ensure the continued legitimacy of the system the ATCPs must ensure that this new objective is adequately represented in the rules and procedures of the organisation. As such the current conflict that exists between Article IX(2) of the Treaty and the new environmental protection objective of the ATS if not resolved will have ramifications for both the internal and external legitimacy of the organisation. The current wording of Article IX(2) of the Antarctic Treaty effectively excludes those Parties that are interested solely in environmental protection from membership in the consultative group. This is totally contradictory to the environmental protection objective. This oversight is due to the fact that despite the emergence of environmental protection as an objective of the ATS, the Parties to the Treaty continue to place emphases on their scientific objective. This is an area of major concern because the continued exclusion of those Parties interested primarily in environmental protection from the decision-making process places the legitimacy of the ATS in question under three out of the four legitimacy categories.

In order to maintain internal legitimacy the rules of the organisation must address the problem for which the organisation exists. It is difficult to see how the ATS can achieve this goal when those Parties who are concerned with environmental protection are excluded from the decision making process. The maintenance of internal legitimacy also requires that the internal actors acknowledge and adhere to the rules of the organisation. These Parties are less likely to adhere to and acknowledge rules and procedures in which they had no part in drafting. It could be argued that if these Parties are truly interested in environmental protection they will adhere to the rules regardless of who drafts them. This is a good point but only holds true if the objectives of the two groups are identical. External legitimacy is related to the degree of acceptance of the organisation by outside actors. In the present situation those Parties outside the ATS, who are concerned with environmental protection, will be less likely to accept the system as legitimate if they perceive that those internal actors who are concerned with environmental protection have been excluded from the decision-making process.

There is a second aspect of the conflict between Article IX(2) and the environmental objective of the ATS that has ramifications for the internal legitimacy of the organisation. The current policy for compliance with Article IX(2) requires that in order to obtain Consultative Status a Party to the Treaty must establish a scientific station in the region. This directly conflicts with the environmental protection objective of the organisation because the expansion of the number of scientific stations on the continent is not necessarily conducive with environmental protection.

While the conflict between Article IX(2) and the environmental objective of the ATS is not currently causing any legitimacy issue if not resolved it could do so in the future. Currently both the international community and the non-Consultative Parties to the ATS are pleased with the environmental policies initiated with the introduction of the Environmental Protocol but this acceptance could soon fade if they perceive that the environment policy decisions were been driven by the ATCP's continued preference for scientific activities.

The potential for loss of legitimacy due to the conflict over the establishment of the permanent Secretariat appears to have resolved itself as a result of the ATCPs actions at ATCM XXIV. Although the Parties appear to have resolved this problem it is not possible at this point to state with certainty that this threat to legitimacy has been removed for all time. This is because resolution of the issues of transparency and access to information are going to depend on the structure and functioning of the Secretariat. To date these details have not been finalised by the ATCPs.

In order to maintain the legitimacy of their role in Antarctic governance the ATCPs need to address their inability to establish a liability annex to the Environmental Protocol. This issue is currently the most persuasive argument supporting the contention that the ATS has lost or is losing its legitimacy. The continued inability of the ATCPs to establish a liability annex has consequences for both the internal and external legitimacy of the ATS. It has been fully recognised by parties both inside

and outside the ATS that the Antarctic environment can not be adequately protected without the liability annex to the Protocol. Therefore, because the Protocol was drafted to meet the environmental protection objective of the ATS the lack of a liability annex means that the rules and procedures of the organisation do not reflect the objectives of the organisation, as such it lacks internal legitimacy. The inability to establish a liability annex also has consequences for the external legitimacy of the ATS, through both acceptance and applicability. Applicability requires that the rules and procedures of an organisation comply with the normative structure of the international community. The majority of international environmental instruments appear to have a liability component, therefore the lack of a liability annex to the Protocol makes it non-compliant with international norms, this casting doubts on the external legitimacy of the ATS. The inability to draft a liability has also drawn a great deal of criticism from those aspects of the international community outside the ATS, thereby also raising questions as to the external legitimacy of the organisation.

While Parties both inside and outside the ATS are expressing concerns regarding the continued absence of a liability annex to the Environmental Protocol these concerns have not yet reached the point where they threaten the legitimacy of the organisation. However, if this issue is not resolved quickly through the drafting of a liability annex acceptable to all Parties this situation could soon develop into a direct threat to the legitimacy of the entire Antarctic Treaty System.

Whether the non-compliance of China with CCAMLR is an issue that can effect the legitimacy of the ATS is itself matter that is subject to debate. However, no matter how you feel about the position of the issue within the legitimacy debate it must be recognised that at the very least it makes the ATS look bad and in some situations looking bad could in fact have more far reaching ramifications than a loss of legitimacy.⁴⁶⁰ China is not a Party to CCAMLR and therefore has no legal obligation to comply with the Convention, but as an ATCP it has a moral obligation

⁴⁶⁰ This would be true in relation to the perception of the general public, who may have no idea about the legitimacy issue but would question the behaviour of China, as a Treaty Party, in relation to Antarctic resources.

to comply with the recommendations of CCAMLR. During the course of this investigation I have established the unusual nature of the relationship between CCAMLR and the ATS. This has shown that though there is no legal connection between the two enough of a connection exists for me to make the proposition that as an ATCP China's refusal to comply with CCAMLR directly reflects on the legitimacy of the ATS. By failing to comply with CCAMLR China is not acknowledging, implementing or adhering to the rules of the ATS, therefore placing the internal legitimacy of the organisation in question.

China's behaviour also raises questions in relation to the external legitimacy of the ATS. One of the gauges of external legitimacy is the degree and persistence of criticism levelled at the organisation. There has been quite extensive criticism levelled at CCAMLR and the ATS over the China situation. While it has not yet reached the level where it could be considered to be eroding the legitimacy of the organisation, it may be getting close to that point. In this regard the legitimacy of the ATS and CCAMLR is being preserved by their critics acknowledgements of the incredible advances already made in the conservation of Antarctic marine resources. Although they currently have acceptance the tolerance of their critics will only stretch so far and in order to maintain legitimacy on this count the other ATCPs need to find some way to bring China into compliance with the CCAMLR directives.

Jurisdiction on the Antarctic continent is another issue that reflects on the legitimacy of the ATS. While it is currently not an issue of major concern with the expected increase in the numbers of tourists heading to the continent it could be of significance in the near future. As the number of visitor increase, if their activities are not controlled, it is likely that their presence will begin to have adverse effects on the Antarctic environment. As such this will adversely reflect on the internal legitimacy of the ATS. This is because by not establishing policies to prevent tourists from harming the Antarctic environment the ATS has failed to adopt rules and procedures that will meet their environmental protection objective. The failure to adopt procedures to control tourist activity has already resulted in criticism from

environmental NGOs but the level of criticism is currently not sufficient to have adverse effects on the legitimacy of the ATS. This is largely due to two factors; the NGOs have been assured by the ATCPs that they will be able to adequately control tourist activities through the implication of the Environmental Protocol and the fact that to date no conclusive evidence exists to indicate that tourist activity in Antarctica is causing environmental harm. This situation could change rapidly as tourist numbers climb therefore if the ATS wishes to maintain its legitimacy they need to ensure that their procedures prevent tourist activity from causing environmental harm.

The final component the ATS needs to be aware of to retain their legitimacy is their position within the international community. This is particularly true in regards their relationship with the UN. In the past the ATS has not had a good relationship with the UN. This has mainly been due to the fact that the ATCPs were unwilling to acknowledge that the UN has any standing in the affairs of the Antarctic region. Recent events within the UN indicate that this situation may be changing. Both groups appear to be acknowledging the significance of the other in the governance of Antarctica. In this regard the ATS has managed to some extent to solidify its position as the legitimate organ of Antarctic governance. However, they must be aware that this situation will only continue if the UN believes that the ATCPs are governing the Antarctic for the benefit of humanity and not to advance their own political agendas.

In summary the ATS has made many advances over the past years and as a result has retained a degree of legitimacy sufficient to maintain a level of governance effective enough to ensure the adequate protection of the Antarctic environment. In saying this the ATCPs must be aware that their legitimacy is not absolute and they still have many issues that need to be dealt with if they wish to maintain their legitimacy. Because if left unattended like small drops of water can erode a great mountain these small dents in legitimacy can erode a formally great Treaty System. I think the current situation in which the ATS finds itself is summed up best by the words of a

delegate to the International Symposium on the Future of the Antarctic Treaty System in 1995.

It is true that the Antarctic Treaty System has made many great achievements, and it is also true that the system has dealt successfully with a number of challenges. But implicit in this successful chain of achievements and challenges there is a danger of falling into some sort of self-congratulatory assessment of what the system has been.

I think that the interesting point is that the system is being confronted with many questions about its effectiveness. There are instruments, treaties and recommendations that were quite appropriate at the time they were devised, but whose effectiveness became questioned at a later point.⁴⁶¹

In closing let me say that I believe the only conclusion that can be reached based on the existing evidence is that the ATS is currently the legitimate organ of governance for the Antarctic. However, it must continue to adapt and resolve the potential legitimacy problems that effect the preservation of the Antarctic environment or be prepared to hand management of the continent over to a new organisation that can.

⁴⁶¹ Australian Antarctic Foundation, *supra* n 231 at 17.

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