

PROTOCOL ON ENVIRONMENTAL PROTECTION TO THE ANTARCTIC TREATY—THE ANTARCTIC TREATY—ANTARCTIC MINERALS CONVENTION—WELLINGTON CONVENTION—CONVENTION ON THE REGULATION OF ANTARCTIC MINERAL RESOURCE ACTIVITIES

I. FACTS

On October 4, 1991, the United States, along with twenty-four other nations, signed the Protocol on Environmental Protection to the Antarctic Treaty.¹ This international agreement establishes a minimum 50-year ban on the exploitation of Antarctica's oil and mineral resources.² Environmental groups and governments have hailed this agreement, designating Antarctica as a "natural reserve, devoted to peace and science,"³ as a "victory,"⁴ and "a giant step toward a comprehensive approach to environmental protection in Antarctica."⁵ However, this unprecedented effort by environmental groups throughout the international community to protect the pristine environment of Antarctica has resulted in more than just the protection of the fragile Antarctic ecosystem. This international effort has also resulted in strategically avoiding potential international discord.

The Southern Ocean surrounding Antarctica has been the scene of large-scale ocean resource exploitation since the beginning of the mid-

¹ Protocol on Environmental Protection to the Antarctic Treaty, *opened for signature* Oct. 4, 1991, XI ATSCM/2/3/2 (*done at Madrid* Oct. 3, 1991), *reprinted in* 30 I.L.M. 1461 [hereinafter Protocol]. See Alan Riding, *Accord Bans Oil Exploration in the Antarctic for 50 Years*, N.Y. TIMES, Oct. 5, 1991, at 1, col. 5.

² Protocol, *supra* note 1. The Protocol also creates a Committee on Environmental Protection, as well as five legally binding Annexes governing Environmental Impact Assessment (EIA) procedures (Annex I), the conservation of Antarctic fauna and flora (Annex II), waste disposal and waste management (Annex III), prevention of marine pollution (Annex IV), and area protection and management (Annex V). *Id.* at 1473, 1476, 1479, 1483; *Annex to Recommendation XVI-10, Annex V to the Protocol on Environmental Protection to the Antarctic Treaty: Area Protection and Management*, Antarctic Treaty XVIth Consultative Meeting (Bonn, Oct. 7-18, 1991).

³ Protocol, *supra* note 1, at 1462.

⁴ *Victory for the Frozen Continent*, CALYPSO LOG (The Cousteau Society, Los Angeles, Cal.), Aug. 1991, at 17.

⁵ *A Critique of the Protocol to the Antarctic Treaty on Environmental Protection*, ASOC Info. Paper No. 1, XVI ATCM/INFO 21 (Oct. 8, 1991).

19th century.⁶ However, not until the early 1970s did there appear to be a growing interest in the possible exploitation of mineral resources in Antarctica.⁷ Following the 1973-74 oil embargo by OPEC (the Organization of Petroleum Exporting Countries) and the resulting increase in oil prices, the Antarctic Treaty Consultative Parties (ATCPs)⁸ began receiving inquiries and requests from various industrial concerns interested in Antarctica's petroleum potential.⁹ Fearful that mineral resource activity might cause serious damage to the Antarctic ecosystem¹⁰ and that a discovery of substantial mineral wealth in the Antarctic could lead to an unfreezing of claims on Antarctic territory,¹¹ thus destabilizing the entire Antarctic Treaty System (ATS),¹²

⁶ R. Tucker Scully & Lee A. Kimball, *Antarctica: Is There Life After Minerals?*, MARINE POLICY, Apr. 1989, at 87, 88. Early interest was primarily in the exploitation of marine mammals such as whales and seals, until the emergence of a commercial interest in fisheries in the late 1960s. *Id.*

⁷ See Andrew N. Davis, Note, *Protecting Antarctica: Will a Minerals Agreement Guard the Door or Open the Door to Commercial Exploitation?*, 23 GEO. WASH. J. INT'L L. & ECON. 733, 740 (1990).

⁸ The Antarctic Treaty of 1959 establishes a "2-tier" hierarchy for voting on Agreed Measures based on each nation's participation in scientific research. The Cousteau Society/Foundation Cousteau, *Antarctica in the 1990's: Challenge for a True Global Environmental Policy* 9 (1990) (Background Paper) [hereinafter *Antarctica in the 1990s*]. Of the current 39 countries who have ratified the Treaty, 25 are recognized as Consultative Parties based on their contribution to scientific research. *Id.* The other 14 nations have ratified the Treaty but do not maintain "substantial" scientific activity in Antarctica. *Id.* These countries are called Non-Consultative Parties. *Id.* For information on the Antarctic Treaty, see *infra* note 11.

⁹ Davis, *supra* note 7, at 740. British Petroleum, Gulf Oil Co., Japan National Oil Corp., and the French Petroleum Institute have all expressed an interest in searching for Antarctic oil. Waller, *infra* note 12, at 637 n.44. However, in the United States, neither petroleum nor hard minerals industries are enthusiastic about initiating work in Antarctica. Davis, *supra* note 7, at 764. The existence of minerals in Antarctica is still considered speculative, and mining activities in the harsh Antarctic environment would be very expensive compared to other alternatives still accessible in other regions of the world. *Id.* Furthermore, since giant icebergs up to three miles wide and 1,600 feet deep scour the seabed, storage tanks and other onshore facilities would have to be located on the two percent of the continent not covered by ice—the same coastal areas that serve as a breeding ground for wildlife. Margot Hornblower, *The Last Untouched Continent*, WASH. POST, Feb. 2, 1981, at A1, A14, col. 6.

¹⁰ *Antarctica in the 1990s*, *supra* note 8, at 17.

¹¹ Studies indicate that mineral exploration or exploitation activities could disrupt the fragile Antarctic ecosystem and threaten the stability of the present political and legal regime of Antarctica. Waller, *infra* note 12, at 633. Under the Antarctic Treaty, Article IV reads:

2. No acts or activities taking place while the present Treaty is in force

the Consultative Parties decided the best means to avoid a rush on Antarctic mineral resources was to develop a legal framework within the current ATS that could regulate such activities should mineral exploration and exploitation become feasible.¹³

Negotiations for a possible mineral resource regime began in June of 1982 in Wellington, New Zealand.¹⁴ Among the principal concerns were the protection of the Antarctic's unique environment, the con-

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.

Antarctic Treaty, *done at Washington*, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71 (*entered into force* June 23, 1961) [hereinafter Antarctic Treaty].

¹² Scully & Kimball, *supra* note 6, at 88. The Treaty has frozen territorial claims from certain countries in the interest of allowing scientific research to continue free from international disputes over territory. *Id.* Among the Consultative Parties are the claimant nations of Argentina, Australia, Chile, France, Norway, New Zealand, and the United Kingdom. *Antarctica in the 1990s*, *supra* note 8, at 9. Non-claimant Consultative Parties consist of Japan, Poland, USSR, USA, FGR, Belgium, Brazil, India, South Africa, China, Uruguay, Italy, GDR, Spain, Sweden, South Korea, Peru, and Finland. *Id.*

Non-claimant parties neither claim territory in Antarctica, nor recognize any other territorial claims. Deborah C. Waller, Abstract, *Death of a Treaty: The Decline and Fall of the Antarctic Minerals Convention*, 22 VAND. J. TRANSNAT'L L. 631, 638 (1989). The Non-Consultative Parties are Austria, Bulgaria, Cuba, Denmark, Ecuador, Greece, Hungary, Papua New Guinea, Netherlands, North Korea, Rumania, Czechoslovakia, Canada, and Colombia. *Antarctica in the 1990s*, *supra* note 8, at 9.

Three treaties, along with the Antarctic Treaty of 1959, comprise the international legal regime typically referred to as the Antarctic Treaty System (ATS). Davis, *supra* note 7, at 737-39. These consist of the 1964 Agreed Measures for the Conservation of Antarctic Fauna and Flora, 1972 Convention for the Conservation of Antarctic Seals (CCAS), and the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR). *Id.* For a Timeline of Antarctic Agreements, see *Antarctic Update*, CALYPSO LOG (The Cousteau Society, Los Angeles, Cal.), Apr. 1990, at 5.

¹³ Waller, *supra* note 12, at 646. This mining issue is called the "most difficult challenge the Consultative Parties have ever faced under the Antarctic Treaty System." *Id.* at 659.

The parties also wanted to quickly generate an internal minerals regime before the United Nations established a competing regime. Ronald W. Scott, *Protecting United States Interests in Antarctica*, 26 SAN DIEGO L. REV. 575, 595 (1989). This urgency was detected in the United Nations by 1982, thus igniting debate on what was termed "the Question of Antarctica." *Id.* at 597. This debate was initiated by an address by Malaysian Prime Minister Mahathir Bin Mohamad stating that "Antarctica, having no indigenous population, was the *res* of the entire international community." *Id.*

¹⁴ Davis, *supra* note 7, at 740.

tinued existence of the original Antarctic Treaty, and the protection of interests embodied in Article IV¹⁵ of the Antarctic Treaty regarding territorial claims.¹⁶ On June 2, 1988, after six years and twelve special consultative meetings,¹⁷ the Consultative Parties of the Antarctic Treaty unanimously adopted the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA).¹⁸

However, CRAMRA would not go unchallenged. As early as 1972 environmental and other special interest groups were taking a serious interest in Antarctica¹⁹ and by 1988 were convinced that CRAMRA was not an environmentally sound measure.²⁰ From 1983 to 1988,

¹⁵ Antarctic Treaty, *supra* note 11.

¹⁶ Davis, *supra* note 7, at 741. Three of the seven claimant nations (Chile, Argentina, and the United Kingdom) claim overlapping territory. Waller, *supra* note 12, at 638.

¹⁷ Davis, *supra* note 7, at 741.

¹⁸ Convention on the Regulation of Antarctic Mineral Resource Activities, *opened for signature* Nov. 25, 1988, AMR/SCM/88/78, (*done at Wellington* June 2, 1988), *reprinted* in 27 I.L.M. 868 [hereinafter CRAMRA]. CRAMRA is also referred to as "The Wellington Convention" and the "Antarctic Minerals Convention." See also *Antarctica in the 1990s*, *supra* note 8, at 17.

The Antarctic Treaty members have established four foundational principles:

1. the Antarctic Treaty consultative parties will control the negotiation and implementation of a minerals regime;

2. the entire Antarctic Treaty will be preserved, and in particular, the provisions of article IV pertaining to territorial claims will not be affected by any activities undertaken in conformance with the regime;

3. protection of the Antarctic environment and ecosystem is a fundamental consideration of any proposed action under the regime; and

4. the activities of the regime should be acceptable to all states which are not Antarctic Treaty Consultative Parties. Activities should not otherwise prejudice the interests of all mankind in Antarctica.

Scott, *supra* note 13, at 596.

¹⁹ *Alerting the World to Save Antarctica*, CALYPSO LOG (The Cousteau Society, Los Angeles, Cal.), Feb. 1990, at 6 [hereinafter *Alerting the World*]. Captain Jacques-Yves Cousteau compares and remembers his 1972 voyage to Antarctica with his recent journey in January of 1990 stating:

the landscape is still as wonderful as in 1972, with glaciers and domes of snow pierced by black peaks, torn by volcanic rocks that are themselves in shreds. The Three Brothers Mountain still somberly dominates Fildes Bay. But there the resemblance to my memory ends. I fear that . . . the continent that the Antarctica Treaty tried to preserve, and . . . the four wooden crosses for the British men who died at their work as pioneer scientists in 1946, will be only a grimacing memory of a sinister drama that ends in oil spills.

Id.

²⁰ Davis, *supra* note 7, at 734. The Antarctic and Southern Ocean Coalition (ASOC), joined by Greenpeace believe that commercial exploitation of minerals will

the Antarctic and Southern Ocean Coalition (ASOC), a group representing an international consortium of over 175 environmental and conservation groups, joined with Greenpeace in engaging in various types of symbolic demonstrations aimed at derailing CRAMRA altogether.²¹ The mineral resources debate was quickly turning to a debate regarding the development of a new accord aimed at making Antarctica an international wilderness reserve.²²

Following an aggressive campaign in Europe by the French Explorer Jacques-Yves Cousteau²³ which focused on the *Bahia Paraíso* oil spill

damage the relatively pristine Antarctic ecosystem. *Id.*

In 1982, ASOC established The Antarctic Project (TAP) as a non-profit organization to serve as the secretariat and funding base for ASOC in the northern hemisphere. THE ANTARCTIC PROJECT, 1991 REPORT 2 (1991) [hereinafter TAP REPORT].

By June 1988, ASOC members were contacting governments and organizing symbolic demonstrations in an effort to find at least one government which would refuse to sign the agreement. *Id.* at 3.

Kelly Rigg, the Antarctica campaign director of Greenpeace International, called the treaty a "sellout of the environment to mining interests." Doerner, *Antarctica—How to Open up the Coldest Cache*, TIME, June 20, 1988, at 38.

²¹ TAP REPORT, *supra* note 20, at 2.

²² Davis, *supra* note 7, at 734.

Both the ASOC and Greenpeace argue that no international agreement allowing minerals activities in Antarctica could adequately protect the Antarctic environment. Waller, *supra* note 12, at 660.

In early 1990, the Cousteau Society launched an aggressive petition drive to protect Antarctica in its bimonthly publication, *Calypso Log*. See *Victory for the Frozen Continent*, *supra* note 4, at 17. Then on May 1, 1990, Captain Cousteau delivered the keynote address to the Interparliamentary Conference on the Global Environment in Washington, D.C. *Captain Cousteau Continues the Campaign*, *Calypso Log* (The Cousteau Society, Los Angeles, Cal.), June 1990, at 11. In his visit with international parliamentarians and key administration officials from the U.S., Cousteau expressed the Cousteau Society's strong opposition to CRAMRA because it could open the door to mineral exploitation in the Antarctica, and instead recommended the declaration of Antarctica as an International Natural Reserve-Land of Science. *Id.* The following is illustrative of the environmental concerns if mineral exploitation were to be unleashed by CRAMRA:

A thin film of soot or ash—common industrial wastes—on the ice could reduce the reflectivity of the continent, thereby altering the planet's heat and cold exchange. An increase in temperature due to the greenhouse effect could lead to increased melting of Antarctica's glaciers with a consequent rise in sea levels near the world's coastal cities.

See *Alerting the World*, *supra* note 19, at 4.

²³ Waller, *supra* note 12, at 665. The Washington Post described Cousteau's remarkable success as follows:

Who can resist this guy? In France, his *Foundation Cousteau* gets a million signatures against the Convention [CRAMRA] and—voilà!—suddenly the government, naturally is no longer for it. He goes down to Australia

near the Antarctic Peninsula and its resulting damage to the environment,²⁴ France and Australia were the first nations to indicate that they had serious reservations about the Minerals Convention.²⁵ In an effort to placate a growing environmental lobby, France announced in April of 1989 its withdrawal of support from the Minerals Convention.²⁶ A few weeks later, Australian Prime Minister Bob Hawke announced his country's opposition to the agreement,²⁷ and with the support of the Australian Senate declared that his country would not sign the agreement.²⁸ This declaration sounded the death knell for CRAMRA since ratification by all claimant states was necessary for the Convention to enter into force, and both France and Australia are claimant states.²⁹

and talks with the prime minister there, Bob Hawke, and-viola!-Australia is no longer for it.

Phil McCombs, WASH. POST, Sept. 21, 1989, at C1, C15, col. 2.

²⁴ Malcolm W. Browne, *France and Australia Kill Pact on Limited Antarctic Mining and Oil Drilling*, N.Y. TIMES, Sept. 25, 1989, at A10, col. 4. On January 28, 1989, the Argentine Navy ship *Bahia Paraiso* went aground resulting in a spill of more than 250,000 gallons of poisonous diesel fuel. *Antarctic Update*, CALYPSO LOG (The Cousteau Society, Los Angeles, Cal.), Apr. 1990, at 5. The effects of an oil spill in the Antarctic are exacerbated by the severe Antarctic climate because ice and severe weather conditions can interfere with the traditional clean-up methods and low temperatures retard the biological decomposition of oil. Barbara E. Heim, Note, *Exploring the Last Frontiers for Mineral Resources: A Comparison of International Law Regarding the Deep Seabed, Outer Space, and Antarctica*, 23 VAND. J. TRANSNAT'L L. 819, 838 n.149 (1990).

²⁵ TAP REPORT, *supra* note 20, at 3. See also *Australia Rejects Proposed Antarctic Mining Treaty*, The Xinhua General Overseas News Service, May 22, 1989, available in LEXIS, Nexis Library, Wires File.

²⁶ Waller, *supra* note 12, at 662. French Prime Minister Michel Rocard did not completely abandon the notion of establishing an Antarctic minerals regime. *Id.* Instead, he expressed his belief that negotiations should be reopened in hopes of improving the treaty. *Id.*

²⁷ *Id.* See also *Australian PM Against Antarctic Mining*, Xinhua (New China) News Service, May 4, 1989, available in LEXIS, Nexis Library, Wires File.

²⁸ Waller, *supra* note 12, at 663. On May 3, 1989, the Australian Senate passed a motion, in opposition to the agreement. *Id.* Although Australian Foreign Minister Gareth Evans and Minister for the Environment Graham Richardson both believed CRAMRA was the only way to protect the environment, two weeks after the Senate's motion, Australia declared it would not sign, indicating its support for Greenpeace's notion of turning Antarctica into a world park. *Id.*

In a joint statement on August 18, 1989, Australian and French Prime Ministers declared "Mining in Antarctica is not compatible with protection of the fragile Antarctic environment." Browne, *supra* note 24, at A10, col. 1. See also Waller, *supra* note 12, at 664.

²⁹ Waller, *supra* note 12, at 663.

This announcement by France and Australia, signalling the collapse of six years of negotiations, received strong criticism by the New Zealand Deputy Secretary of External Relations and Trade, Chris Beeby.³⁰ Beeby claimed Australia was seeking an "unachievable utopia"³¹ and that mineral and oil exploitation in Antarctica was inevitable.³²

Nations not a party to the ATS also took an interest in the minerals debate, sometimes expressing resentment toward the Antarctic Treaty System (ATS) for giving the Consultative Party members exclusive decision making power over all matters concerning scientific research, environmental protection, and the possible exploitation of Antarctic minerals.³³ Likewise developing nations accused the United States, the Soviet Union, and several other ATS members of practicing "neo-colonialism" by trying to unilaterally restrict mineral exploitation throughout the continent.³⁴

In an effort to restore order to the ATS, a new proposal was drafted in November 1990 at the fall meeting of Antarctic Treaty Consultative Members (ATCMs) in Viña del Mar, Chile.³⁵ This new "Protocol to the Antarctic Treaty on Environmental Protection" called for prohibitions on mining activities and the establishment of Antarctica as a "natural reserve devoted to science."³⁶ However, the United States State Department continued to favor an agreement which would permit environmentally sound mining, something environmentalists maintain will never be possible due to the fragile

³⁰ *Id.* Beeby chaired the six-year negotiation of CRAMRA. *Id.*

³¹ *Id.* See also Davis, *supra* note 7, at 735.

³² Browne, *supra* note 24, at A10, col. 2. New Zealand and the United States, among others, also believed exploitation was inevitable. The U.S. State Department felt it would be better to have regulated exploitation rather than a legal vacuum in which no restraints of any kind would be imposed, even on the most environmentally hazardous exploitation. *Id.*

The United Kingdom and Soviet Union also joined in criticizing the "world park" notion at the Fifteenth Annual Meeting of the Consultative Parties to the Antarctic Treaty held in Paris in October of 1989. Waller, *supra* note 12, at 666.

³³ Waller, *supra* note 12, at 666. In a United Nations debate, several developing nations have expressed their desire for a broader international agreement that would allow Antarctic activities to be carried out for the benefit of all humanity. *Id.*

³⁴ Browne, *supra* note 24, at A10, col. 3. Malaysia has persistently insisted that any mineral resources found in Antarctica must be shared equally with the rest of the world. *Exploring the Last Frontiers*, *supra* note 24, at 844.

³⁵ *A New Phase*, CALYPSO LOG, (The Cousteau Society, Los Angeles, Cal.), Apr. 1991, at 11.

³⁶ *Id.* No agreement was reached regarding the duration of such a moratorium on mining or under what conditions it should be lifted. *Id.*

nature of the Antarctic ecosystem and the reality of human error.³⁷

In what has been called a "stunning reversal of policy," New Zealand's Prime Minister Geoffrey Palmer announced in late February of 1990 that the CRAMRA debate was "wasting energies which could be spent on achieving environmental protection for the Antarctic," and that his country would not ratify the Minerals Convention.³⁸ By the end of March, the United States was one of only a few remaining proponents of CRAMRA.³⁹

Negotiators from the United States were primarily concerned with the new Protocol's effect on foreclosing the possibility of mineral exploration and exploitation forever. This opposition to an outright permanent ban reflected the realistic acceptance of national energy appetites in the event of scarce energy resources and indicated the need for international regulation of mining should such mining become feasible or necessary, thus protecting the Antarctic environment through regulation.⁴⁰ Furthermore, the United States did not feel it was opening the door to mining due to the strict requirements under CRAMRA which made it nearly impossible to obtain consent to proceed with mineral exploitation.⁴¹ Rather, CRAMRA was viewed as providing a "framework to guide future decisions on whether Antarctic minerals should be developed, and if so, under what circumstances."⁴² According to this view, there was no presumption

³⁷ *Id.* Under CRAMRA, operators involved in mineral exploitation whose activities result in environmental damage have two defenses to strict liability: an exceptional natural disaster that could not have been reasonably foreseen; or armed conflict or an act of terrorism against which no reasonable precautionary measures could have been effective. Scully & Kimball, *supra* note 6, at 91. See also McCombs, *supra* note 23, at C15, col. 2 (Cousteau believes if mining took place in Antarctica, "[a]ccidents would be inevitable, and the consequences are frightful.")

³⁸ *Antarctic Update*, CALYPSO LOG, (The Cousteau Society, Los Angeles, Cal.), Apr. 1990, at 4. Equally surprising was Soviet Chairman Mikhail Gorbachev's announcement in January of 1990 that "[t]he USSR is ready to participate in the survival of the Antarctic, of this world reserve, which is our common natural laboratory." *Id.*

³⁹ *Id.* CRAMRA support in the U.S. was dying quickly with a growing number of legislators supporting bills to protect Antarctica. *Id.*

⁴⁰ For more information, see Browne, *infra* note 50.

⁴¹ U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, POLAR PROSPECTS: A MINERALS TREATY FOR ANTARCTICA, OTA-O-428, at 15 (Washington, DC: U.S. Government Printing Office, Sept. 1989) [hereinafter POLAR PROSPECTS]. This summary of Antarctic policy stresses that CRAMRA is not intended to, and does not, promote Antarctic minerals development; however, neither does it ban development altogether. *Id.* at 5.

⁴² *Id.* at 3.

built into CRAMRA that any exploitation or development would ever take place.⁴³

On March 25, 1991, sixteen U.S. Senators sent President Bush a letter encouraging him to instruct U.S. Representatives attending the April ATCM meeting⁴⁴ to work with other Treaty members to reach an agreement which would "effectively protect Antarctica's pristine environment."⁴⁵ In this letter, the President was reminded of two measures he signed into law⁴⁶ declaring it to be U.S. policy to "pursue an indefinite prohibition of commercial minerals development and related activities in Antarctica."⁴⁷

Still, the United States stood isolated internationally in its reluctance to sign what it considered a de facto permanent ban on mining.⁴⁸ Largely in an effort to overcome U.S. reluctance, members of the Treaty compromised on a new agreement allowing a nation to withdraw from the entire Protocol (not just the minerals prohibition) upon two years notice if the desired amendments or changes were not ratified at a review conference within three years of their adoption.⁴⁹ But, once again, on June 23, 1991 (the treaty's 30th anniversary), the United States failed to sign the Protocol at a meeting in Madrid with the thirty-nine nations presently represented in the agreement, stating that the U.S. was not in a position to accept the proposal, but would refer it to Washington for review.⁵⁰

Finally, on July 3, 1991, President Bush announced the United States would agree to sign the Protocol.⁵¹ In a statement made in

⁴³ *Id.*

⁴⁴ This meeting was held in Madrid, Spain from April 22-30, 1991. *A New Phase*, CALYPSO LOG, (The Cousteau Society, Los Angeles, Cal.), Apr. 1991, at 11.

⁴⁵ Letter from Senator Al Gore, *et al.*, to President George Bush (March 25, 1991) [hereinafter Letter from Gore to President Bush].

⁴⁶ Antarctic Protection Act of 1990, Pub. L. No. 101-594, 104 STAT. 2975, 2977 (1990); and S.J. Res. 206, 101st Cong., 2d Sess. (1990) (calling for immediate negotiations toward an agreement for full protection of Antarctica as a global ecological commons).

⁴⁷ Letter from Gore to President Bush, *supra* note 45.

⁴⁸ See *Victory for the Frozen Continent*, *supra* note 4, at 17.

⁴⁹ *Id.* Article 25(5)(b) of the Protocol, termed the "walk-out provision," reads:

(b) If any such modification or amendment has not entered into force within 3 years of the date of its adoption, any Party may at any time thereafter notify to the Depositary of its withdrawal from this Protocol, and such withdrawal shall take effect 2 years after receipt of the notification by the Depositary.

Protocol, *supra* note 1, at 1470.

⁵⁰ Malcolm W. Browne, *U.S. Agrees to Back Accord Protecting Antarctic Minerals*, N.Y. TIMES, July 6, 1991, at 6, col. 1.

⁵¹ *Id.*

Rapid City, South Dakota, President Bush affirmed that "the protection of the Antarctic environment is an important international responsibility."⁵² After only four negotiation sessions and one year of debate, the new Protocol was signed on October 4, 1991,⁵³ effectively changing the course of history from what had started as a proposal to create a minerals regime to regulate commercial exploration and exploitation of mineral resources in Antarctica, to an effective ban on minerals activity for a minimum of fifty years.⁵⁴

II. LEGAL BACKGROUND

Some scientists believe Antarctica holds one of the most valuable mineral resource reserves in the world,⁵⁵ yet it is arguably owned by no one. Hence, this status, sometimes referred to as "*terra nullius*,"⁵⁶ often places this mineral rich continent in the spotlight of international interest, and at times, international discord. Members of the Antarctic Treaty System (ATS), non-members of the ATS, and non-governmental organizations (NGOs) in the international community all want to have a voice in the future of Antarctica; however, the present

⁵² See *Victory for the Frozen Continent*, *supra* note 4, at 17.

⁵³ Riding, *supra* note 1, at 28, col. 1. The Protocol was signed in Madrid, Spain by 24 out of the 27 members of the Antarctic Treaty, including the Soviet Union, China, Germany, Canada, Britain, and France. *Id.* On February 14, 1992, President Bush sent the Protocol to the Senate for ratification. *Congressional and Presidential Activity*, Daily Rep. for Executives (BNA) No. 32, at F-4 (Feb. 18 1992).

⁵⁴ Article 7 of the Protocol, Prohibition of Mineral Resource Activities, states that "any activity relating to mineral resources, other than scientific research, shall be prohibited." Protocol, *supra* note 1, at 1464.

⁵⁵ Antarctica is believed to have once been part of "Godwanaland," a land mass separated years ago forming India, Africa, Australia, South America, and Antarctica. Waller, *supra* note 12, at 632 n.4. Therefore, scientists believe the same valuable mineral resources found in these other continents will be found in Antarctica. *Id.* U.S. geological surveys indicate as much as 45 billion barrels of oil and 115 trillion cubic feet of gas could exist off Antarctic's coast, amounting to five times the amount estimated to be in Alaska's reserves. McCombs, *supra* note 23, at C15, col. 5; Heim, *supra* note 24, at 837 n.135. Furthermore, because fresh water is fast becoming an increasingly valuable resource in arid regions, icebergs, each of which contain approximately one billion tons of fresh water, have the potential to become a commercially exploitable resource. Davis, *supra* note 7, at 747 n.97. For a detailed look at the potential for mineral resources in Antarctica, see POLAR PROSPECTS, *supra* note 41, at 90. The U.S. claims that there are no known mineral deposits of commercial interest in Antarctica. *Id.* at 93.

⁵⁶ "Territory of no one." Scott, *supra* note 13, at 581; see also Frank C. Alexander, Jr., *Legal Aspects: Exploitation of Antarctica Resources*, 33 U. MIAMI L. REV. 371, 387 (1978).

regime⁵⁷ governing Antarctica appears to be proceeding cautiously in opening Antarctica up to public scrutiny in the international community.

As early as 1908, nations began to lay claims over the ice-covered land of Antarctica.⁵⁸ By 1942, seven nations had claimed territory in Antarctica, leaving approximately fifteen percent of the continent unclaimed still today.⁵⁹ Claims by Argentina, Chile, and the United Kingdom largely overlap and are at times violently disputed.⁶⁰ Most other members of the Antarctic Treaty, such as the United States,⁶¹ vigorously oppose all claims.⁶²

There are several theories upon which nations can base territorial claims to land. Australia, France, and the United Kingdom base their claims primarily on the discovery theory which follows the assumption that prior to discovering Antarctica, it was essentially *terra nullius*. However, in the 1928 *Island of Palmas* case,⁶³ discovery alone was held to be an insufficient basis to support a claim to territorial sovereignty.⁶⁴ Discovery can, however, give rise to an exclusive right to occupy the territory without actual displays of sovereignty, such as occupation of the territory, if for some reason a territorial claim cannot be perfected.⁶⁵ Therefore, it is apparent that discovery must be accompanied by some exercise of control or occupation for the

⁵⁷ The Antarctic Treaty System is composed of all Consultative and Non-consultative members to the Antarctic Treaty of 1959.

⁵⁸ Scott, *supra* note 13, at 581. The United Kingdom was first to claim sovereignty over Antarctica in 1908, followed by New Zealand (1923), France (1924), Australia (1933), Norway (1939), Chile (1940), and Argentina (1940). *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* Several times in recent decades, Chile and Argentina have been on the brink of war regarding these disputed claims. Browne, *supra* note 24, at A10, col. 4.

⁶¹ The United States have never made a formal claim to territory in Antarctica, even though it has the most extensive history of activity on the continent of all the interested and claimant nations. Scott, *supra* note 13, at 583. However, the United States and the Soviet Union have effectively neutralized the entire range of preexisting territorial claims by strategically placing their bases around the Antarctic coastal circumference and at the point of convergence of all sector and continuity-based claims. *Id.* at 602.

⁶² *Id.* at 581. No claims are currently recognized under Art. IV of the Treaty. See Antarctic Treaty, *supra* note 11.

⁶³ *Island of Palmas* (U.S. v. Neth.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928).

⁶⁴ Judge Max Huber of Switzerland, the sole arbitrator, also rejected the contiguity theory as a legitimate basis for a claim to sovereignty. JEFFREY D. MYHRE, *THE ANTARCTIC TREATY SYSTEM: POLITICS, LAW, AND DIPLOMACY* 8-9 (1986).

⁶⁵ *Id.*

discovery principle to apply, but the amount of control required remains at issue.

In the *Clipperton Island Award* case,⁶⁶ the requirement of occupation was relaxed to a certain extent, with the arbitrator holding that a state could fulfill its requirement for effective occupation simply by proving a will to act as sovereign when claiming an unpopulated or largely uninhabitable area.⁶⁷ Traditional acts of sovereignty, such as setting up a police force or a postal service, were not required.

Likewise, in the *Legal Status of Eastern Greenland* case,⁶⁸ the Permanent Court of International Justice held that because of the relatively inaccessible nature of Greenland due to its severe climate, Denmark's will to act as sovereign over all of Greenland, even though it did not occupy all the land, was sufficient to establish sovereignty over the entire territory.⁶⁹ Therefore, actual occupation may not be necessary in Antarctica's case so long as a nation continuously expresses its will or intent to permanently occupy its sector, but has found it unrealistic or impossible to do so as a result of the severe climate.

Sometimes a nation will invoke alternative bases for claims, such as exploration,⁷⁰ continuity,⁷¹ contiguity,⁷² *uti possidetis*,⁷³ propinquity,⁷⁴ and the sector theory⁷⁵ to supplement the discovery prin-

⁶⁶ *Clipperton Island Arbitration* (Mex. v. Fr.), 2 R.I.A.A. 1105 (1931) (arbitrated under the auspices of King Victor Emmanuel III of Italy).

⁶⁷ MYHRE, *supra* note 64, at 10.

⁶⁸ *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 22 (Apr. 5).

⁶⁹ MYHRE, *supra* note 64, at 10.

⁷⁰ Scott, *supra* note 13, at 582.

⁷¹ Continuity refers to the inward extension of spheres of influence from coastal settlements. *Id.* at 582 n.39, citing J. KISH, *THE LAW OF INTERNATIONAL SPACES* 53, 73-74 (1973).

⁷² An extension of sovereignty from coastal settlements to islands. Scott, *supra* note 13, at 582 n.40. Generally, continuity is not believed to be applicable in Antarctica due to Antarctica's great distance from any other land mass. *Id.* See also WILLIAM E. WESTERMEYER, *THE POLITICS OF MINERAL RESOURCE DEVELOPMENT IN ANTARCTICA* 32 and app. C (1984).

⁷³ This is an argument Chile or Argentina might make based on the rights inherited by South American claimant nations from Spain in 1493. Scott, *supra* note 13, at 582 n.42.

⁷⁴ The propinquity theory provides that when a state acquires sovereignty over part of a geographical unit, it acquires sovereignty over the entire unit. Thus, a research base could be used to support a claim to an entire geographic unit within

ciple.⁷⁶ Chile has even created a settlement of over 100 families on King George Island⁷⁷ in an attempt to perfect title by effectively occupying their territory.⁷⁸

Fortunately, negotiators of the Antarctic Treaty were wise enough to devise a scheme, in Article IV of the Antarctic Treaty of 1959, whereby scientific research could proceed unmolested while claims on territory were in effect stayed, until the Treaty ended or the Consultative Party members could reach a consensus on how to deal with the conflicting positions on sovereignty.⁷⁹

A. *Interests from Outside the Regime*

On December 9, 1982, the United Nations began debate on what is referred to as "the Question of Antarctica."⁸⁰ This debate was prompted by the developing nations' concern that the Antarctic Treaty Consultative Members (ATCMs) were about to reach agreement on a minerals regime which could effectively prevent the developing countries of the world from sharing in the wealth resulting from mineral exploitation.⁸¹

At the opening of "the Question of Antarctica" debate, Malaysian Prime Minister Mahathir Bin Mohamad asserted that Antarctica, having no indigenous population, is the *res* of the entire

which the base is situated. Douglas M. Zang, Note, *Frozen in Time: The Antarctic Mineral Resource Convention*, 76 CORNELL L. REV. 722, 743 (1991).

⁷⁵ Generally, the sector theory holds that states whose territory extends above the Arctic Circle acquire sovereignty over the triangular sector extending from the country's northern coastline to the apex at the north pole. *Id.* This theory was first applied to the Arctic Ocean in 1907 by Canada and the Soviet Union to justify claims to lands and islands lying between their northern borders and the North Pole. Alexander, *supra* note 56, at 388.

⁷⁶ *Legal Aspects*, *supra* note 56, at 388.

⁷⁷ Scott, *supra* note 13, at 604. Chile has even included support facilities such as schools, telephone, radio, and television service, along with a hotel to accommodate tourists. *Id.*

⁷⁸ The doctrine of effective occupation requires state-sanctioned, permanent occupation and settlement in order to perfect title. Zang, *supra* note 74, at 741. The question remaining is just how much activity is required to establish an effective occupation. *Id.* For more information on Chile's claim, see LUIS H. MERICO, *ANTARCTICA: CHILE'S CLAIM* (1987).

⁷⁹ Zang, *supra* note 74, at 729-30. This compromise is embodied in article IV of the Antarctic Treaty and states that no new claims may be asserted while the Treaty is in force, and that acts occurring during such time may not constitute a basis for asserting, supporting, or denying any further claim. *Id.* at 729. See Antarctic Treaty, *supra* note 11.

⁸⁰ Scott, *supra* note 13, at 597.

⁸¹ Zang, *supra* note 74, at 760.

international community, and therefore the riches of Antarctica should be shared with the rest of the nations of the world.⁸² This view, known as the common heritage principle,⁸³ supports the proposition that Antarctica, like the sea and space, is an area deemed part of the common heritage of mankind and is not subject to national jurisdiction; any benefits derived therefrom must inure to the international community.⁸⁴

A number of public interest non-governmental organizations (NGOs) are also demanding a voice in Antarctic affairs, such as the Antarctic and Southern Ocean Coalition (ASOC),⁸⁵ Greenpeace, and the Cousteau Society. Up until 1983,⁸⁶ the Antarctic Treaty System (ATS) was virtually closed to public scrutiny; not even the United Nations was granted observer opportunities.⁸⁷ However, NGOs are now playing an important role in generating public interest in protecting the Antarctic environment and helping to formulate and implement policies governing Antarctica.⁸⁸

In an effort to inform the international community of what was going on in Antarctica, NGOs began serving as "private sector advisors" on national delegations.⁸⁹ In 1982, ASOC established the Antarctica Project as a non-profit organization to serve as the sec-

⁸² Scott, *supra* note 13, at 597.

⁸³ The common heritage principle has five common elements:

1. the area under consideration cannot be subject to appropriation;
2. all countries must share in management of the resources;
3. there must be an active sharing of the benefits derived from the exploitation of the resources;
4. the area must be dedicated exclusively to peaceful purposes; and
5. the area must be preserved for future generations.

Heim, *supra* note 24, at 827.

⁸⁴ Zang, *supra* note 74, at 765. A group of more than 100 Third World countries, known as the "Group of 77," has become increasingly aware of the feasibility of including Antarctica in the area to be regulated by the international authority for the seabed. Alexander, *supra* note 56, at 402. This would allow Third World countries to share in the minerals found in Antarctica. *Id.*

⁸⁵ ASOC was formed in 1977-78 and represents over 175 environmental and conservation groups throughout the world on such issues as ozone depletion, ocean protection, and the polar regions. TAP REPORT, *supra* note 20, at 1.

⁸⁶ In 1983, the ATS began de-classifying documents, including documents from Antarctic Treaty Consultative Meetings VIII to XIV. Lee A. Kimball, WORLD RESOURCES INST., *Report on Antarctica* 10 (Nov. 1989) (photocopy on file with author).

⁸⁷ For a history of NGO involvement, see Lee Kimball, *The Role of Non-Governmental Organizations in Antarctic Affairs in THE ANTARCTIC LEGAL REGIME* 33, 34-63 (Christopher C. Joyner & Sudhir K. Chopra eds., 1988).

⁸⁸ *Id.*

⁸⁹ TAP REPORT, *supra* note 20, at 1.

retariat and funding base for ASOC in the northern hemisphere.⁹⁰ A year later, ASOC joined in the United Nations debate over Antarctica by providing detailed information to the United Nations in the form of regular reports and documents written for use by the U.N. General Assembly.⁹¹ Finally, after many published critiques of the Minerals Convention in 1988 and 1989, a new protocol was signed which reflects some practical provisions found in ASOC documents.⁹² Even more remarkable, in 1991 ASOC was accredited observer status at a regular Antarctic Treaty meeting,⁹³ something unheard of less than a decade ago.

III. ANALYSIS

The Antarctic Treaty System represents a unique international regime which has experienced great success in maintaining a careful balance between international interests (such as scientific research and environmental protection) and national interests (such as unfettered research, unrecognized territorial claims, and the pursuit of limited commercial uses by sovereign nations) in Antarctica.⁹⁴ The negotiations leading to the signing of the new Protocol to the Antarctic Treaty raised many unprecedented and interesting legal issues that are likely to arise again in the future as the world continues to improve its mineral prospecting and exploitation technology. Among these are: 1) the status of territorial claims in Antarctica; 2) the nature and validity of the legal rights held by the United Nations and the international community in Antarctica and its resources; and 3) the growing role non-governmental or international organizations are playing in the making of international law and policy.

A. *Territorial Claims By Treaty Members*

The new Protocol on Environmental Protection to the Antarctic Treaty has once again postponed the question of territorial claims to Antarctica.⁹⁵ Although commentators argue that a permanent mor-

⁹⁰ *Id.* at 2.

⁹¹ *Id.*

⁹² *Id.* at 3.

⁹³ *Id.* at 3-4 (1991 ATCM in Bonn, Germany).

⁹⁴ 137 CONG. REC. E3266-67 (daily ed. Oct. 3, 1991) (letter of Rep. William S. Broomfield in support of the Protocol on Environmental Protection to the Antarctic Treaty).

⁹⁵ Riding, *supra* note 1, at 1, col. 5. Under Article 4 of the Protocol, the Antarctic Treaty is neither modified nor amended, thus preserving the current rights and obligations of the Parties under the international instruments in force within the Antarctic Treaty System. Protocol, *supra* note 1, at 1463.

atorium is not legally enforceable and ignores the needs of the future,⁹⁶ studies indicate that mineral exploration or exploitation activities could cause irreversible environmental damage to the fragile Antarctic ecosystem, and threaten the stability of the present political and legal regime now in place.⁹⁷

With the signing of the new Protocol comes a restoration of the friendly relations and cooperation which led to the signing of the Antarctic Treaty in 1959. By agreeing in Article 4 of the Protocol to preserve the current status of territorial claims, in effect ignoring the issue again, the ATS was able to compromise and reach an agreement which will avoid an issue which could create great international discord between claimant and nonclaimant nations (possibly resulting in an environmental disaster) and which will also allow scientific operations to continue into the future, uninterrupted by debate over territorial claims.

Some commentators even suggest that a *de facto* condominium could arise out of this continued co-existence.⁹⁸ This pooling of independent claims would not require that existing claims be resolved, but rather would create a larger and stronger consolidated claim that would be able to stand up against any outside state or group of nations.⁹⁹ This position would be supported by customary international law, wherein if nations recognize a general principle or agreement, and act in acquiescence over a period of time as though it is

⁹⁶ Heim, *supra* note 24, at 846. The United States Department of State feels that a ban on mineral activities will be difficult to enforce, and that "it is better to have regulated exploitation than a legal vacuum in which no restraints of any kind are imposed on even the most environmentally hazardous exploitation." Waller, *supra* note 12, at 666-67.

⁹⁷ Waller, *supra* note 12, at 633. See also McCombs, *supra* note 23, at C15, col. 1 ("If claimants and nonclaimants cannot agree . . . the treaty could collapse and, along with it, a unique experiment in international harmony.")

⁹⁸ Defined as a territory "under the joint tenancy of two or more States" for purposes of jurisdiction, a condominium is considered to be a single state. Zang, *supra* note 74, at 739 n.136. For a brief summary of some of the theories relied upon by claimant nations, see generally MEXICO, *supra* note 78; and *Antarctica After 1991: The Legal and Policy Options*, ASOLP OCC. PAPER 2 at 13 (Antarctic & Southern Oceans L. & Pol'y, Faculty of Law, University of Tasmania, 1989) [hereinafter *Policy Options*].

⁹⁹ Zang, *supra* note 74, at 739. A similar concept would be one in which Antarctica is held by all the nations of the world, thus internationalizing Antarctica and electing an international body such as the United Nations to govern the territory. However, it is unlikely the current Consultative Members would voluntarily relinquish control so easily.

legally binding,¹⁰⁰ the general principle can become accepted as binding customary international law. However, this arrangement would effectively eliminate non-Treaty states from participating in control of Antarctica.¹⁰¹

B. *International Recognition Under Customary Law*

The present legal regime in Antarctica has had remarkable success in governing the conduct of Treaty members and maintaining peace on the disputed continent, giving it the aura of a valid legal system with recognized authority. Although under international law, treaties are not binding on nations not a party to the treaty, the existence of a valid legal regime, such as the Antarctica Treaty System, which is recognized internationally for its success, creates an enormous hurdle for any non-Treaty party to overcome if it wants to act contrary to the rules of "the Club."¹⁰² For example, during negotiations of CRAMRA, an Australian Government spokesman warned that "[a]nyone who jumped the gun by attempting to extract minerals or oil would be subjected to the full weight of international opprobrium."¹⁰³ Furthermore, all major military powers in the world are members to the Treaty. The United States has even stationed a U.S. military support force in Antarctica.¹⁰⁴

However, this brute force presence does not mean developing countries are without an argument under customary international law. A fairly new principle, which has gained recent recognition in the 1982 United Nations Convention on the Law of the Sea,¹⁰⁵ is the "common heritage principle" which recognizes that areas deemed part of the common heritage of mankind are not subject to traditional territorial

¹⁰⁰ Initially, widespread acquiescence to the operation of the Antarctic Treaty existed. *Id.* at 748.

¹⁰¹ *Policy Options*, *supra* note 98, at 15. For a discussion on the general internationalization model, see FRANCISCO O. VICUÑA, *ANTARCTIC MINERAL EXPLOITATION* 469 (1988).

¹⁰² "The Club" refers to the ATCMs. See also McCombs, *supra* note 23, at C15, col. 1 (ATCMs are referred to as the "Antarctic Club").

¹⁰³ Browne, *supra* note 24, at A10, col. 4. See also Waller, *supra* note 12, at 667.

¹⁰⁴ Scott, *supra* note 13, at 605. Even though the Treaty prohibits purely military operations, the United States has used Antarctica as a training ground while providing support for the National Science Foundation. *Id.* at 606.

¹⁰⁵ United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), U.N. Pub. No. E.83.V.5 (1983), *reprinted in* 21 I.L.M. 1261 [hereinafter *Law of the Sea Convention*]. The Law of the Sea Convention declared the deep seabed to be "the common heritage of mankind," not to be subject to territorial sovereignty. Zang, *supra* note 74, at 763.

sovereignty or national jurisdiction, and the benefits derived therefrom must be shared with the entire international community.¹⁰⁶ Under this theory, many developing countries are calling for a broader international agreement for Antarctica: one that would allow for the participation of all the nations of the world and guarantee that activities in Antarctica are carried out for the benefit of all humanity.¹⁰⁷

Ironically, industrialized nations can rely on the Law of the Sea Convention as well, not to suggest that the common heritage principle is a viable theory, but as evidence of its nonviability due to the failure of the Convention to receive the support of the industrialized nations.¹⁰⁸ Whether or not this principle is sound, however, will likely not affect the current regime that has received new life under the Protocol. The current ATCMs are experienced experts regarding the fragile Antarctic ecosystem. Therefore, even if all interested nations were given a voice in determining policy matters for Antarctica, it is unlikely they would have sufficient experience in or understanding of Antarctica to demand acknowledgement by the "Antarctic Club."¹⁰⁹

Furthermore, with the new Protocol in effect ensuring the survival of the Antarctic Treaty System for another 50 years, the ATS regime will likely be able to assert the customary international law argument that norms first articulated in international agreements (such as the Antarctic Treaty) can develop into binding customary international law.¹¹⁰ Perhaps in retrospect, the nations of the world have already conformed to the Antarctic Treaty by either signing it or abiding by its rules;¹¹¹ therefore, adopting it as a legally valid principle governing the South Pole.¹¹² Consequently, any nation caught participating in

¹⁰⁶ Zang, *supra* note 74, at 765. See also Exploring the Last Frontiers, *supra* note 24, at 827.

¹⁰⁷ Waller, *supra* note 12, at 660.

¹⁰⁸ Zang, *supra* note 74, at 765.

¹⁰⁹ B. Simma, *The Antarctic Treaty as a Treaty Providing For an "Objective Regime,"* 19 CORNELL INT'L L.J. 189, 191 (1986).

¹¹⁰ Colin Deihl, *Antarctica: An International Laboratory*, 18 B.C. ENVTL. AFF. L. REV. 423, 455 (1991).

¹¹¹ Francioni, an Italian expert on Antarctica, calls the ATS a "remarkable success . . . in preserving the continent from nationalistic aims and unilateral assertion of claims that evidences the Consultative Parties' sense of obligation and responsibility, not only *inter se*, but toward the international community as a whole." F. Francioni, *Legal Aspects of Mineral Exploitation in Antarctica*, 19 CORNELL INT'L L.J. 163, 173 (1986).

¹¹² Deihl, *supra* note 110, at 456.

mining activities in violation of the Protocol would be violating international law.¹¹³

In a broad sense, international law already embodies a number of specific agreements designed to protect the environment. Even if the ATS were to be disrupted, customary international law imposes a duty on each nation to prevent environmental degradation outside its national boundaries.¹¹⁴ Since mineral exploitation would be potentially devastating to the fragile Antarctic ecosystem, no mining activities can take place without violating international law.

Developing countries at the outset of CRAMRA negotiations expressed an interest in participating in the evolving mining regime. It now appears the Protocol will not only prevent the depletion of a valuable energy source before the developing countries have a chance to share in the exploitation, but also that there is no fear that a discovery of oil in Antarctica could drive prices down in a market which is vital to many of these countries. Therefore, due to the sedative affect the new Protocol has had on the debate over minerals, "the Question of Antarctica" will likely lose interest, and the ATS will be able to continue without incident well into the 20th century.¹¹⁵

C. *The Environmental Victory*

Probably the most obvious and most important result arising from the signing of the Protocol is the environmental protection guaranteed Antarctica for the next 50 years, and the solid voice environmental and conservation groups are gaining in the international law and negotiations forum. Up until 1983, the Antarctic Treaty System was basically closed to public scrutiny.¹¹⁶ However, with the signing of the new Protocol comes the ringing in of a new openness in which the ATS is inviting international organizations to participate in regular committee meetings.¹¹⁷

¹¹³ *Id.*

¹¹⁴ Deihl, *supra* note 110, at 455; cf. *World Charter for Nature*, G.A. Res. 37/7, U.N. GAOR, 37th Sess., art. 21(d), U.N. Doc. A/RES/37/7 (1982), reprinted in 22 I.L.M. 455, 466 (1983) (stating that States and international organizations should ensure that activities within their control do not damage natural systems within other states or in areas beyond the limits of national jurisdiction. The United States was the only nation to vote against the World Charter).

¹¹⁵ Thus making for a strong customary international law argument based on the proposition that an international agreement may create customary law that binds third parties, if deemed a general practice and accepted as binding law (*opinio juris*). Zang, *supra* note 74, at 748.

¹¹⁶ TAP REPORT, *supra* note 20, at 1.

¹¹⁷ ASOC was accredited observer status to attend regular meetings for the first

Recognizing that these organizations can provide valuable advice and assistance, the Protocol specifically invites organizations to work with the Committee for Environmental Protection¹¹⁸ in carrying out its functions. The purpose of building these relationships between the ATS and the broader system of non-governmental organizations throughout the world is to exchange technical information and expertise, increase communication and coordination in the system, and to inform the wider international community of Antarctic affairs.¹¹⁹

However, even though Article 11 of the Protocol invites the views of NGOs,¹²⁰ it still remains limited in that ATCMs must approve their participation. This in effect could limit participation by NGOs to those organizations who are more likely to support a policy in line with the ATCM's agenda. Furthermore, only ATCMs have a vote, making an NGO's role simply advisory. As one commentator has noted, "it is strange that a treaty system which seemingly places such a high emphasis on environmental and scientific values does not welcome the involvement of people who place a high priority on precisely those same values."¹²¹

Another reality sometimes overlooked when speaking of NGOs is that such organizations are not immune from political pressures.¹²² Problems frequently arise when countries and environmental organizations—such as Greenpeace—debate issues concerning the environment because oftentimes the environmental interest groups aggressively pursue their own agenda, demanding absolutes, and showing little concern for the reality of international politics and the process of negotiations.¹²³ Some Consultative Party Members felt this "rail-

time in 1991 and will be represented by skilled public interest lawyers, scientists, and other NGOs from ASOC member organizations. TAP REPORT, *supra* note 20, at 7.

¹¹⁸ Article 11 of the Protocol reads in part:

The Committee may also, with the approval of the Antarctic Treaty Consultative Meeting, invite such other relevant scientific, environmental and technical organizations which can contribute to its work to participate as observers at its sessions.

Protocol, *supra* note 1, at 1465.

¹¹⁹ Kimball, *supra* note 86, at 9.

¹²⁰ See *supra* note 118.

¹²¹ James N. Barnes, *Legal Aspects of Environmental Protection in Antarctica in THE ANTARCTIC LEGAL REGIME* 265 (Christopher C. Joyner & Sudhir K. Chopra eds., 1988).

¹²² *Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1484, 1533 (1991)

¹²³ *Id.*

roading" of the world park issue took place in the recent negotiations of the new Protocol because what had been carefully drafted and negotiated was quickly abandoned overnight by some countries due to the intense pressure at home from politically powerful environmental organizations.

However, NGOs have also proven to be an asset in reminding states in the international community of their obligations under international law.¹²⁴ Likewise, if it were not for the intervention of NGOs in the ATS, the seventh continent might have become the subject of violent territorial disputes, possibly leading to irreversible damage to the world's environment.

This new "openness" in the ATS is good in that developing countries throughout the international community who are concerned about the future of Antarctica, but cannot afford financially to undertake the scientific commitment required to become a Consultative Party to the regime, will be able to voice their views through organizations such as ASOC. This participation through observer status can act as an objective and effective check on the ATS. ASOC and the Cousteau Society have already displayed their ability to change the course of events in the recent Protocol negotiations, turning the debate from mineral resource exploration to comprehensive environmental protection.

IV. CONCLUSION

The new Protocol on Environmental Protection to the Antarctic Treaty is no less than an extraordinary achievement in international diplomacy. What was once called an "unachievable utopia" is now a reality. Through the efforts of environmental organizations worldwide, the seemingly unresolvable minerals debate has been turned into an international commitment to protect the Antarctic environment well into the future. The Antarctic Treaty System has had an unprecedented history of success in governing a body of land often called the disputed continent. Perhaps out of the example set by the Antarctic Regime in negotiating the new Protocol, other international

¹²⁴ For example, NGOs have played important mediatory, humanitarian, and peace-keeping roles during the Israeli occupation of captured territories. Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 101 (1990). The Red Cross has engaged in observing prison conditions, arranging prisoner transfers, issuing statements regarding international legal provisions, and making private representations to the Israeli government. *Id.*

problems can similarly be resolved through compromises between nations and the acceptance of input by independent organizations expressing the interests of individuals and developing countries throughout the international community.

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