

Some Questions about Responsibility in relation to Recent Claims of Extended Continental Platform in Antarctica*

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Introduction

In October 2007, the United Kingdom of Great Britain informed that it would submit a claim of extended continental platform in Antarctica, in conformity with the United Nations Convention on the Law of the Sea (UNCLOS).¹ Great Britain and Argentina plan to submit overlapping claims to the United Nations to have their Antarctic territory extended to up to one million square kilometers.² British preparations of its claim were confirmed by the Office of Foreign Affairs in London. The Argentinian Minister of Foreign Affairs, Jorge

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The United Nations Convention on the Law of the Sea governs these claims. Once the treaty is ratified, there is a ten-year deadline for the submission of claims over new extended areas of the sea as jurisdictional waters. The continental shelf is the sea bed and subsoil of submarine areas that extend beyond the territorial sea throughout the natural prolongation of the land territory to the outer edge of the continental margin or to a distance of 200 M from the baseline. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding. (See Art. 76 UNCLOS).

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Between 1908 and 1943, seven States submitted territorial claims in the Antarctica. Each claimed territory has a triangular shape, with its base in the 60° South parallel, except Great Britain's, which starts in the 50° South latitude, and Chile, whose sector is joined to the continent and does not have base line. The Treaty covers the Southern area of 60° South latitude. While some authors state that no sovereign rights have been recognized in Antarctica, all claimant States - except for Argentina and Chile - have recognized British rights over the claimed territory, though Argentina and Chile mutually recognized their rights regardless the overlap existing between their territories. Pleamar, Buenos Aires, 1998, pp. 3-16.

Taiana, declared that Argentina³ will also file a claim for an extended area of the Antarctic seabed as soon as the necessary studies had been completed.⁴⁻⁵

At this point, one could raise a question as to whether such requests for extended continental platforms in Antarctica may entail international norms violations.

Does a claim of extended continental platform constitute a violation of international norms applicable to Antarctica?

The Antarctic Treaty and other conventions under the Antarctic System, specially, Article IV of the Antarctic Treaty (1959),⁶ and Article IV of the Convention on the Conservation of

³ Argentina claimed for extended territory on the basis of *i.a.* rights of discovery, occupation, contiguity. Thomas Willing Ballch recalls that, according to the Declaration dated on June 4th 1790, issued by Count de Florida Blancas in relation to a dispute over Nootka Sound, the King of Spain said that he limited his claim to: “The continent, islands and seas which belong to His Majesty, so far as discoveries have been made secured to him by treaties and immemorial possession, and uniformly acquiesced in (...).” Cf. BALLCH, Thomas Willing “The Arctic and Antarctic and the Law of Nations”, *4 American Journal of International Law*, (1910), p. 267.

⁴ *Buenos Aires Herald*, October 18, 2007.

⁵ In August 2007, the Russians planted their flag in the marine bed of the North Pole, claiming rights of sovereignty over the area. In October, a group of geologists claimed to have found new evidences that would support a Russian claim over a vast part of the Arctic region beyond the 230-mile maritime economic zone belonging to Russia and the four other nations bordering the Arctic Ocean: Canada, Denmark (through its possession of Greenland), Norway and the United States. They identified a geological link between the continental shelf abutting Russia’s Far North and the North Pole by way of a sea-floor feature called the Lomonosov Ridge (more or less 460,000 square miles of ocean as jurisdictional waters). Canada and Denmark are trying to assert that, contrary to the Russian claim, the Lomonosov Ridge belongs not to the Siberian continental shelf but to the Canadian-Greenland shelf.

⁶ Art. IV:1. ***Nothing contained in the present Treaty shall be interpreted as: a). a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica; b). a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise; c). prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State’s 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*** [Emphasis added].

Antarctic Marine Living Resources (1980)⁷⁻⁸, regulate sovereignty rights in Antarctica, giving rise to different interpretations. Considering that Article 77 of the UNCLOS states that: “(t)he costal States exercise over the continental shelf **sovereign rights for the purpose of exploring and exploiting its natural resources,**”⁹ one can also wonder if the claim of extended continental platform constitutes a violation of the Madrid Protocol, which states the prohibition of mineral resource activities: “*Any activity relating to mineral resources, other than scientific research, shall be prohibited*” (Article 7). In addition, Article 2 of the Madrid Protocol on Environmental Protection to the Antarctic Treaty (1991) states that the Parties “*designate Antarctica as a natural reserve, devoted to peace and science.*” Moreover, the first paragraph of the Antarctic Treaty Preamble states that: “*(...) it is in the interest of all mankind that Antarctica shall continue **for ever** to be used exclusively for peaceful purposes and shall not become the scene or object of international discord.*” [Emphasis added].

Conforti doubts whether, at paragraph 2, Article IV of the Antarctic Treaty covers all potential claims or sovereignty rights pertaining to costal States, such as the rights stated under the Exclusive Economic Zone (EEZ), that were recognized after the entry in force of the Antarctic Treaty in 1961. Conforti wonders: “*Is the claim to the EEZ [or the extended continental shelf in this case], then, among forbidden claims?*”. He adds that a number of distinguished scholars assert that this type of claim is not forbidden and can be proclaimed or claimed.¹⁰ In this vain, Joyner considers that “*baselines for jurisdictional zones offshore*

⁷ Art. IV: 1. *With respect to the Antarctic Treaty area, all Contracting Parties, whether or not they are Parties to the Antarctic Treaty, **are bound by Articles IV and VI of the Antarctic Treaty** in their relations with each other.* 2. **Nothing in this Convention and no acts or activities taking place while the present Convention is in force shall:** (a) *constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in the Antarctic Treaty area or create any rights of sovereignty in the Antarctic Treaty area;* (b) *be interpreted as a renunciation or diminution by any Contracting Party of, or as **prejudicing, any right or claim on basis of claim to exercise coastal State jurisdiction** under international law within the area to which this Convention applies;* (c) *be interpreted as prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any such right, claim or basis of claim;* (d) *affect the provision of Article IV, paragraph 2, of the Antarctic Treaty that no new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the Antarctic Treaty is in force.* [Emphasis added]

⁸ Even Article IX of Convention on the Regulation of Antarctic Mineral Resource Activities (1988) -not in force (because the refusal by the French and the Australian Governments as well as the U.S. Congress to sign the Convention has moved negotiations from mineral exploitation of Antarctica to environmental protection)-: *Protection of Legal Positions under the Antarctic Treaty. **Nothing in this Convention and no acts or activities taking place while this Convention is in force shall: constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in the Antarctic Treaty area or create any rights of sovereignty in the Antarctic Treaty area; be interpreted as a renunciation or diminution by any Party of, or as prejudicing, any right or claim or basis of claim to territorial sovereignty in Antarctica or to exercise coastal state jurisdiction under international law; be interpreted as prejudicing the position of any Party as regards its recognition or non-recognition of any such right, claim or basis of claim; or affect the provision of Article IV(2) of the Antarctic Treaty that no new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the Antarctic Treaty is in force.*** [Emphasis added]

⁹ [Emphasis added]

¹⁰ CONFORTI, Benedetto “Territorial Claims in Antarctica: A Modern Way to Deal with an Old Problem”, *Cornwell International Law Journal* (1986), Vol. 19, pp. 249-250.

*Antarctica, if ever needed, might be delimited from the seaside perimeter of the ice shelf.*¹¹ The ice is there massive, cliff-like, structured, attached to the continental shelf or the sea floor, assimilate to land territory. Joyner adds that “(i)t is conceivable that states making claims to Antarctica might someday declare zones of national jurisdiction over costal waters offshore their claimed sectors.”¹² In contrast, Non-Consultative Parties under the Antarctic System, other States, and many scholars reject the possibility of exerting jurisdictional rights in the Antarctic zone. They understand that claims of extended continental platform imply a violation of the Antarctic Treaty and other arrangements under the System.¹³

The seven claimant States hold that they are “Coastal States” in the Antarctic Continent and that they have a right to submit claims over the EEZ and the continental shelf. It is worth noting that a frozen right is a right that, in the future, can be revived under different conditions. If at present there is a possibility to claim rights that depend on a frozen one, it seems reasonable to consider that claim legal, even though, the right to extended continental shelf will have identical conditions as those of the main right (frozen).

Other Parties to the Antarctic Treaty and several States believe that the lack of a clearly recognized costal sovereignty on the continent turns it difficult to admit legal capacity to claim offshore zones.¹⁴ If there was a violation of international law provisions, one could wonder: A violation against whom?

Violation of the Antarctic System as a whole, each treaty party or the international community?

The concept of responsibility in international law is one of the most complex subject matters within the general theory of international law. Every international wrongful act gives rise to international responsibility.¹⁵ In addition, those activities within a territory or

¹¹ Cf. JOYNER, Christopher C. *Antarctica and the Law of the Sea*, Kluwer Academic Publishers, Netherlands, 1992, pp. 198, 200 and 206.

¹² Ibidem.

¹³ V. *i.a.* Van der ESSEN “The Application of the Law of the Sea to the Antarctic Continent”, in Francisco ORREGO VICUÑA (Ed.) *Antarctic Resources Policy*, 1983, pp. 231-242.

¹⁴ V. ARMAS PFIRTER, Frida and Luis BAQUERIZA “The Balance between UNCLOS and the Antarctic Treaty with Regard to the Outer Limit of Continental Shelf”, Gianfranco TAMBURELLI (Ed.) *The Antarctic Legal System and Environmental Issues*, Giuffrè Editore, Milano, 2006, p. 35.

¹⁵ Responsibility arises despite any culpable contact or absence of care by the state, operating under an objective standard based on the breach of the obligation itself. The PCIJ in its judgement on the *Chorzow Factory (Germany v. Poland)* said: “It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation” (PCIJ, 1927, p 434). V. BROWNIE, Ian *State Responsibility*, Oxford University Press, Oxford, 1983. GRAY, Kevin R. “Transboundary Environmental Disputes along the Canada-U.S. Frontier: Revisiting the Efficacy of Applying the Rules of State Responsibility”, *The Canadian yearbook of international Law* (2005), Vol. XLIII, p. 337.

under the control of a State or an International Organization, which give rise or may give rise to loss or injury to third States or territories outside the States jurisdiction, require preventive measures. A lack of prevention in case of loss gives rise to responsibility¹⁶⁻¹⁷. A violation could rise from the mere breach of a treaty, of other instruments or of international norms applicable to Antarctica.

Article VI of the Antarctic Treaty states:

*The provisions of the present Treaty shall apply to the area south of 60° South Latitude, including all ice shelves, but **nothing in the present Treaty shall prejudice** or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to **the high seas** within that area [Emphasis added].*

Several experts have concluded that there are no coastal States in Antarctica and that all the sea surrounding Antarctica is high seas. In this view, the claim for ZEE or continental platform would imply a violation to high sea liberties. Such treaty breaches would be linked not only to *inter parties* of the Antarctic Treaty but also to third States. Even if it was alleged that Antarctica is considered an area of human heritage - which we do not reject - a violation of high sea liberties and the condition of sea and oceanic beds beyond national jurisdiction, would weaken the rights pertaining to the international community as a whole.

It is worth noting that, in conformity with the drafting of this Article, the obliged party is not each individual State, but the States as a whole in the framework of the system that arises from the agreement.

In this vein, Joyner asserts that: “One prominent conclusion is that international society has not enfranchised any portion of Antarctica with **formal** recognition of sovereignty. Evidently, Antarctic sovereignty remains a problem that continues to affect the development of the law of the sea over this region” [Emphasis added].¹⁸ Joyner wisely refers to “the formal recognition of sovereignty”, since it is no longer possible to assert that this recognition has not occurred tacitly. We think this is right; by freezing sovereign rights, the Antarctic Treaty recognizes them in an implicit way. Moreover, given the fact that this is a treaty that regulates Antarctica and its fate by means of *erga omnes* acts of sovereign

¹⁶ In relation to State responsibility, see JABBARI, S.E. “Taking Responsibility for Transboundary Environmental Effects, 1991, 14 *Hastings International and Comparative Law Review*”, pp. 796-797. JABBARI-GHARABAGH, Mansour “Type of State Responsibility for Environmental Matters in International Law”, 33 *RJT*, (1999), p. 59.

¹⁷ V. DRNAS DE CLÉMENT, Z. V. *La diligence due comme lien entre la responsabilité découlant d'un acte illicite international et la responsabilité découlant de conséquences préjudiciables d'activités non interdites par le droit international* (www.acader.unc.edu.ar). The standard of due diligence should be deemed applicable with regard to the principle of prevention and was generally considered to be proportional to the degree of risk of transboundary harm in a particular case.

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JOYNER, Christopher R. *Op. cit.*, p. 263.

disposition, any State (or the international community through its operative system) that has been deprived of its real or potential rights, should complain formally, diplomatically or jurisdictionally¹⁹. This is also right if one takes into account that no Antarctic sector is claimed by a State; however, under the Treaty, its original *status* is also frozen, not being considered *res nullius*. Thus, for over forty five years the States community has accepted the regime imposed by the Antarctic system. The absence of a formal claim by the States implies the tacit acceptance of the Antarctic system legitimacy. This statement covers the whole community that is represented by an international organization such as the United Nations, which is invoked by the Antarctic Treaty itself.

In this case it is not appropriate – as it is frequently the case – to invoke the Antarctic Treaty and other instruments under the system, such as treaties that create obligations for third States,²⁰ but it is more suitable to refer to treaties that regulate the rights of a group of States to cover violations to real or potential rights pertaining to the international community, in the event that the Antarctica is considered part of human heritage or *terra nullius*, as some doctrinaires have attempted to assert. Thus, the principle *pacta tertiis nec nocet nec prosunt is not applicable*, as all the other States could not be considered “third states” in the relationship; they would be States that have had their real or potential rights infringed, States that have been deprived of their rights. This is particularly important when we consider international law as a decentralized judicial system and that the rules are created by the same actors that may also be responsible for the violation of those or other rules.

As above mentioned, the Antarctic Treaty is a “dispositive” or “constitutive-semi-legislative” treaty that provides an “objective legal regime”.²¹ In relation to this Treaty, Dupuy wrote that “*un collège international se comporte comme un ensemble gouvernemental et organise le statut d’une région (...)*”²².

Perhaps the Antarctic System serves as a primitive organization that establishes a regime that is not rejected by any court for been considered illegal, a regime that has existed for over 45 years in a territory that is managed and owned by the system itself.

Status of the Antarctic System

¹⁹ See CPJI *Series A./B.*, *Fasc. 53, Legal Status of Eastern Greenland*, judgement of April 5th, 1933, p. 28.

²⁰ Articles 34 and 35 of the Vienna Convention on the Law of Treaties.

²¹ HARDY, D.J. *Cases and Materials on international Law*, Sweet and Maxwell, London 1991, Note 4, p. 781. SIMMA, Bruno “The Antarctic Treaty as a Treaty Providing an “Objective Regime”, *19 Cornell International Law Journal* (1986), pp. 189-209.

²² DUPUY, R.-J. “Le Traité sur l’Antarctique”, AFDI, 1960, p. 121. Other writers advocate opposability toward third parts, *i.a.* GUYER, Roberto “The Antarctic System”, *Recueil des Cours*, 153 (1973), pp. 223-226.

While the Antarctic System does not operate under any international organization, it has a particular form of cooperation that has turned an uninhabitable territory into an “*anecumene*”.²³

The International Law Commission states that “*forms of international cooperation are sometimes established without a treaty. In certain cases, for instance with regard to the Nordic Council, a treaty was subsequently concluded*”. The ILC also considers that “*in other cases, although an implicit agreement may be held to exist*”²⁴.

Explicitly in its advisory opinion on Reparation for Injuries Suffered in the Service of the United Nations²⁵, the Court holds that when an organization has legal personality, this is an “objective” personality. Thus, it would not be necessary to determine whether the legal personality of an organization has been recognized by an injured State before considering if the organization can be held internationally accountable, according to Giorgio Gaja’s proposal of draft articles. However, an organization that merely exists on paper can not be considered as having an “objective” legal personality under international law, which is not the case of the Antarctic System²⁶.

The Secretariat of the Antarctic Treaty, in its Website reported that the “Antarctic Treaty Consultative Meetings are the *international forum for the administration and management of the region*”. Only 28 out of 46 parties to the agreements have right to participate in the decision-making process of these meetings, though the other 18 are also allowed to attend. Those 28 Consultative Parties constitute the government of the continent.

When a central institution exercises governmental tasks and determines activities, just like those pertaining to governments under the Rule of Law, one may well suppose that there is an international organization involved. Those standards may be internal to the organization (limits to their mandates), or external (they are expected to be approved by the international community).

“Historically, international organizations have often, perhaps always, been conceptualized as entities endowed with a single task: the management of common problems. Organizations are the extensions of States, doing those things that States cannot do on their own. The concept that dominates in the juridical literature is a concept of an international organization as endowed with tasks; a concept of an entity created by States to do the sort of things States cannot do (or might be reluctant to do) on their own, for whatever reason: manage an international waterway, monitor human rights violations, provide loans so as to facilitate economic development, facilitate smooth industrial

²³ V. COLACRAI, Miryam *El Ártico y la Antártida. Su Rol en las Relaciones Internacionales. Su relevancia desde la perspectiva ambiental*, CERIR-CECAR, Rosario, 1998, pp36-37.

²⁴ *ILC Report of the fifty-fifth session A/58/10*, Chapter IV, Responsibility of International Organizations, pp. 29-49.

²⁵ *I.C.J. Reports*, 1949, p. 185.

²⁶ *ILC Report of the fifty-fifth session (...), Op. Cit.* p.

relations, etc.”²⁷ This is a classic “*managerial vision*” of international organizations²⁸. From this view, scholars worldwide and international jurisprudence refer to the ‘personality’, ‘identity’, and ‘independence’²⁹ of organizations. They speak of organizations with powers and a ‘*volonté distincte*’ of Member States -organizations exercising tasks and functions. This is the prevailing theory about organizations. This functional, managerial approach dominates the scene.

But there is another conception of international organizations: the “*agora vision*” of an international organization points to a mere forum for discussion, just a form of trans-governmentalism. The *Antarctic System has become much more than a talking shop*³⁰. It operates as a system of control over Antarctica. A significant number of specialists consider

²⁷KLABBERS, Jan *Two Concepts of International Organization* (<http://www.helsinki.fi/eci/AddressKlabbers.html>).

²⁸ First report of the Special Rapporteur on Responsibility of International Organizations (International Law Commission/ILC), Giorgio Gaja, considered the concept of international organization. Article 2 of the report reads as follows: *Use of terms: For the purposes of the present draft articles, the term ‘international organization’ refers to an organization which includes States among its members insofar it exercises in its own capacity certain governmental functions.* The Text of draft articles on responsibility of international organizations so far provisionally adopted by the Commission states: *For the purposes of the present draft articles, the term “international organization” refers to an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.*

²⁹ The concept of “independence” has not been systematically applied to the study of international institutions. Most arguments regarding the ability of international organizations to promote cooperation and mitigate conflict rely on the implicit assumption that such institutions possess some independence from states, and yet the field has failed to conceptualize -let alone measure- this institutional characteristic. Cf. HAFTEL, Yoram Z. and Alexander THOMPSON “The Independence of International Organizations. Concept and Applications”, *Journal of Conflict Resolution*, 2006, Vol. 50, pp. 253- 255. [

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For example, the letter directed to the Foreign Minister of the Republic of Cyprus, dated on May 11 2007, reads: “*The XXX Antarctic Treaty Consultative Meeting, assembled in New Delhi, two weeks ago has been advised of a proposal by a Cypriot-based company, Louise Cruise Lines, to conduct an Antarctic tourism expedition in the 2007/08 austral summer. This proposed expedition reportedly involves the use of a very large tourist vessel with the capacity to carry approximately 1200 passengers. Further, it is report that the expedition intends to disembark passengers onto land. If so, this would be the first occasion on which such a very large cruise liner has sought to do this within the Antarctic Treaty area (area south of 60 South Latitude, as described under Article 6 of the 1959 Antarctic Treaty). The Antarctic Treaty Consultative Parties are currently discussing concerns about the potential environmental, safety, search and rescue and other implications of the use of large tourist ships in the Antarctic Treaty area. Delegations from over 40 nations attended and participated in the most recent Antarctic Treaty Consultative Meeting, and have adopted a Resolution discouraging the landing of passengers from vessels carrying more than 500 passengers. Current Antarctic tourism industry standards also discourage landings from large ships in order to limit adverse impacts on the Antarctic environment and to safeguard life at sea. In view of this, the Meeting wished to inform you that Antarctic Treaty Consultative Parties have, since 1991, developed a legal framework and policy guidelines in relation to Antarctic tourism activities, including: *The 1991 Protocol on Environmental Protection to the Antarctic Treaty; *1994 Guidelines; *Measure 4 (2004); *Resolution 4 (2004); and *Resolution A (2007) Ship-based Tourism in the Antarctic Treaty Area. These materials are attached for your consideration. Accordingly, consistent with our obligations under Article X of the Antarctic Treaty and Article 13 paragraphs 2 and 5 of its Protocol on Environmental Protection, the Parties respectfully request [note the verb utilized, which indicates public authority) that you consider taking whatever measures are within your competence to discourage activities that may be inconsistent with the above legal framework*

that in the Arctic it is necessary to attain a comprehensive and integrated Arctic regime similar to the Antarctic Treaty System “that has developed to govern the Circumpolar South.”³¹ Other scholars refer to the States *Members* of the Antarctic System.³²

The **Scientific Committee on Antarctic Research** (SCAR) defines the Antarctic System as “the whole complex of arrangements made for the purpose of regulating relations among States in the Antarctic”.³³

Article IX of the Antarctic Treaty states that:

*1. Representatives of the **Contracting Parties** named in the preamble to the present Treaty shall meet (...) for the **purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty, including measures regarding: a)a. use of Antarctica for peaceful purposes only; (...)***

*2. Each Contracting Party which has become a party to the present Treaty by accession under Article XIII³⁴ shall be entitled to appoint representatives to participate in the meetings referred to in paragraph 1 of the present Article, **during***

and policy guidelines. Should you wish to discuss these matters for obtain any further information about the Antarctic Treaty, which is open to accession by all States, representatives of the Consultative Parties will be pleased to put themselves at your disposal. A list of the Consultative Parties and their national contact points is enclosed. Further information about the Antarctic Treaty is also available on the Antarctic Treaty Secretariat website (www.ats.aq). Yours faithfully (signed) Dr. U.R. Rao Chairman XXX Antarctic Treaty Consultative Meeting” (emphasis added). One must take in account that in order to provide an added element of enforcement of maritime standards and the provisions of the Madrid Protocol, merchant and tourist vessels, bound for the Antarctic Treaty Area and engaged in non-governmental activities, and calling at departure ports, can be subject to inspection. This Information Paper updates the international law basis for a port state regime for the Antarctic, proposes a revised draft Memorandum of Understanding on this subject, and responds *i.a.* to concerns raised by delegations at ATCM XXV. The Antarctic tourism industry has been effectively left to self-regulation through the International Association of Antarctica Tour Operators (IAATO). The States Parties have a duty to develop appropriate regulatory mechanisms. This duty is imposed by the System. (See <http://www.asoc.org/Documents/ATCMXXVI/IP-44portstate.pdf>).

³¹ See YOUNG, Oran R. *The Internationalization of the Circumpolar North: Charting a Course for the 21st Century*, (<http://www.thearctic.is>). For a distinction between institutions and organizations, see also: YOUNG, Oran R. *International Cooperation: Building Regimes for Natural Resources and the Environment*, Cornell University Press, Ithaca, 1989, Ch. 2.).

³²See *i.a.* ANDREONE, Gemma “Illegal, Unreported, Unregulated Fishing”, Gianfranco TAMBURELLI (Ed.) *The Antarctic legal System and Environmental Issues*, Giuffè Editore, Milano, 2006, p. 122.

³³ www.scar.org

³⁴ Art. XIII. 1. *The present Treaty shall be subject to ratification by the signatory States. It shall be open for accession by any State which is a Member of the United Nations, or by any other State which may be invited to accede to the Treaty with the consent of all the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX of the Treaty.(...).*

*such times as that Contracting Party demonstrates its interest in Antarctica*³⁵ by conducting substantial research activity there, such as the establishment of a scientific station or the despatch of a scientific expedition. 3 (...).

4. *The measures referred to in paragraph 1 of this Article shall become effective when approved by all the Contracting Parties whose representatives were entitled to participate in the meetings held to consider those measures. (...)*

The Recommendations and Measures appended to Recommendations in accordance with the Rules of Procedure of the Antarctic Treaty Consultative Meetings, must be adopted by unanimous vote of the delegates of all Consultative Parties attending the Consultative Meeting. To achieve effective Recommendation-Measures, the Consultative Parties' unanimous approval (so-called "rule of the double unanimity") is required. This condition opposes an important characteristic of any organization with an identity of its own. Nevertheless, the most important aspects to consider are not the conditions of the recommendations to enter into force, but their dispositional effect *ad extra, erga omnes*. These recommendations set up a common policy in Antarctica, reflecting the Consultative Parties' joint political will.

Colella says that such recommendations and measures have a *status* comparable to those enacted by most international organizations and can not be considered as having "treaty status", with binding character, that create rights and duties for States. Colella adds that the expression "enter into force" is different from "entry into force". Moreover, for example, "the term 'should' is used instead of 'shall', in the wording of most Recommendations".³⁶ Some recommendations are limited in scope as to the operative function of the Antarctic Treaty Consultative Meetings (ATCM) (Decisions), many others have a hortatory character (Resolutions), but there are others that contain measures with regulatory or (quasi) legislative character (Measures).³⁷⁻³⁸

The Antarctic Treaty Secretariat was established in 2004 (Buenos Aires) to: *support the Antarctic Treaty Consultative Meetings (ATCM) and the Committee for Environmental Protection (CEP);* promote the official information exchange between the Parties of the

³⁵ This means that only permanent Consultative Parties serving a normative role are the twelve original States of the Treaty.

³⁶ COLELLA, Alberto "The Legal Nature of Antarctic Recommendations and their Implementation in the Domestic Legal System", in FRANCESCO FRANCONI (Ed.) *International Environmental Law for Antarctica*, Giuffrè Publishing, Milano, 1992, 205-206.

³⁷ See HUBER, Johannes "Notes of the ATCM Recommendations and their Approval Process", *The Antarctic Legal System and Environmental Issues*, Gianfranco TAMBURELLI (Ed.), Giuffrè Editore, Milano, 2006, p. 17-18. JOYNER, Christopher C. "Recommended Measures under the Antarctic Treaty: Hardening Compliance with Soft International Law", *Michigan Journal of International Law*, Vol. 19, N° 2, pp. 407-408.

³⁸ The Drafting of Annex V to the Environmental Protocol includes provisions for a fast-track procedure: automatic approval 90 days after the closure of the Consultative Meeting at which the measure was adopted, "unless one or more of the Consultative Parties notifies the Depositary, within that time period, that it wishes an extension of that period or is unable to approve the measures".

Antarctic Treaty; * collect, maintain and publish the records of the ATCM and the CEP and provide information on the Antarctic Treaty system³⁹. One can see that in the above mentioned letter, the promotion and publication of the information is not directed to the contracting Parties only.

Some scholars see the Antarctic System as a condominium arrangement of the Consultative Parties that govern Antarctica, including the ocean South, 60° South latitude. Others consider the system as a *de facto* policy-making mechanism, designed to operate in the area. One can not affirm that the Antarctica is an international common region, a *res communis*, as there is a system governing the area, a system that does not refuse territorial claims, and has operated undisturbed *erga omnes* for half a century.

The Antarctic Treaty sets up the legal basis for Consultative Meetings held by Consultative Parties⁴⁰, as well as conditions of Recommendations emanating from them.

In its Preamble, the Treaty states that (2nd. paragraph): “*Recognizing that it is in the interest of all mankind that Antarctica shall continue for ever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord.*” It cannot be denied that this expression implies an act of disposition in the name of mankind.

In addition, the Preamble of the Treaty assumes a role of legal interpreter of the UN Charter (5th paragraph): “*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.*”

Also, the States Parties to the 1991 Madrid Protocol have a “legal duty” to prevent, reduce and control maritime pollution in the Antarctic, overlapping with the faculties of the International Maritime Organization in the area⁴¹. In the case of an extended continental shelf, there is an overlap of duties-rights, and potential conflicts could arise between the claimants and the International seabed Authority. The rights over the continental shelf and sea areas depend on continental sovereignty rights.

The States Parties to the Antarctic Treaty, according to the Antarctic System, are responsible for their own acts, but their faculties (and the faculties of third States) in the Antarctic area are determined by the "Antarctic System"; that is to say, at will of a set of States in *agora*. As the sovereign rights of the claimant States are not applicable by virtue of the Treaty, all faculties are given to them under by the Antarctic System. The Antarctic system is much more than the potentiality sum of actions and decisions of Consultative Parties (including claimant Parties). Those areas that are not claimed by any State are

³⁹ <http://www.ats.aq/>

⁴⁰ The [Consultative Parties](#) comprise the original 12 Parties of the Antarctic Treaty and a further 16 States that have become Consultative Parties by accessing to the Treaty and demonstrating their interest in Antarctica by carrying out substantial scientific activities in the continent.

⁴¹ A similar situation occurs with the rights emerging of The Convention for the Conservation of Living Marine Resources (1980).

regulated by the System and they cannot be considered true *terra nullius* -as above mentioned-. The Antarctic System operates at a regional level but it has global impacts⁴².

Final Remarks

For over 45 years, the Consultative Parties have worked out their differences. They have established perhaps the most unique record of international cooperation on the Planet⁴³ (“Pax Antarctica”), and have left the most ambitious (and perhaps successful) experiences in regional governance.⁴⁴ Article IV of the Antarctic Treaty is the basis for every peaceful activity. It is necessary that new claims over the seabed do not drive relationships in a divisive direction. If this occurs, it will not be possible to prevent Antarctica from becoming a scene of international discord. The eventual responsibility for the violation of agreements under the Antarctic System not only affect States that wish to submit new claims, but the whole “*agora*” of Consultative Parties that are in charge of the pacific use of Antarctica.

Perhaps, the resolution of an more precise and organic institutional status to govern Antarctica and a more transparent and historically fair identification of distinctive situations according to best rights of State Parties (*i.a.* claims on the basis of discovery, contiguity, exploration, human activity, administration, *etc.*) is the most reasonable solution to preserve “the last continent” “in the interest of mankind”.

Hopefully, during the 2007-2008 International Polar Year and, more specifically, during the Consultative Parties next meeting to be held at Kiev (by mid 2008), the *agora* of States that govern the Antarctic regime will reach a renewed and improved consensus on State Parties claims and subsequent responsibilities emerging from these claims, as well as on new expectations for exploitation of the area (paying special attention to its environmental vulnerability⁴⁵), to the best interest of the States Parties under the system and for the sake of mankind.

⁴²It is nowadays accepted as an undeniable fact that the earth's biosphere represents a single indivisible system characterized by the interrelation of its various functional and ecological subsystems, the disruption of any one of which promotes the breakdown and destabilization of another.. Cf. DAMATO, Anthony “Hazardous Activities. Transboundary Pollutions”, *International Law Environmental Anthology*, p. 93 (<http://anthonydamato.law.northwestern.edu/Books-2.htm#interenv>).

⁴³

COLSON, David A. “Remarks”, *80 American Society of International Law Proc.* (1986), p 276.

⁴⁴

SCOTT, Karen “Institutional Developments within the Antarctic Treaty System”, *International Law and Comparative Law Quarterly*, Vol. 52, April 2003, p. 473).

⁴⁵

PINESCHI, Laura *La Protezione dell'Ambiente in Antartide*, Universita degli Studi de Parma, CEDAM, Padova, 1993, p. 7.

