

# Building the International Legal Framework for Antarctica

*Marie Jacobsson*

---

## INTRODUCTION

Imagine a pristine continent, cold as ice, extremely windy and dry, almost as giant as Latin America and clearly larger than Europe, but with little or negligible human activities, yet a continent in which states, some explorers, and scientists are taking an increasing interest. Imagine that, outlandish as it may seem, this continent was about to become a scene of international discord and that you had to solve the problem. What would you do? It is clear that you would need a political and a legal solution, a solution that would last and that everybody could live with. There is no room for one winner; there is no room for any loser. There is only room for numerous winners.

This was the situation that a number of particularly concerned states faced in the 1940s when they needed to address how Antarctica should be managed. Their challenges were

- to find a solution that would be accepted domestically,
- to settle the issue among the most concerned states (internal accommodation),
- to meet the challenges of states not involved in the discussions, the nonstate parties (external accommodation), and
- to meet the challenges of nonstate actors (public opinion).

This article will address the development of a legal framework for Antarctica, not only the 50 years of the Antarctic Treaty but also the decades preceding the treaty. These are phases of developments that mirrored, mirror, and will continue to mirror international and domestic political developments, including the expectations of civil society.<sup>1</sup>

---

*Marie Jacobsson, Swedish Ministry for Foreign Affairs, Department of International Law, Human Rights and Treaty Law, SE-103 39 Stockholm, Sweden. Correspondence: marie.jacobsson@foreign.ministry.se; marie.jacobsson@swipnet.se.*

## THE DEVELOPMENT OF THE LEGAL FRAMEWORK FOR ANTARCTICA

The necessity for a new power structure was already apparent during the Second World War and so was the need for new principles of law and politics to

be inaugurated and upheld.<sup>2</sup> The post-Second World War political discussions on Antarctica were no doubt influenced by the adoption of the United Nations (UN) Charter in San Francisco in 1945. “Regional” solutions became a sanctioned and encouraged means of conflict moderation, explicitly addressed in Article 52 of the UN Charter. At least the two Latin American claimants have endeavoured to regard Antarctica as a regional matter. The United States regarded Antarctica as a sphere of interest among a group of powers friendly to the United States. It was not until the Soviet Union claimed the right to participate in the political discussions on the future of Antarctica that the question of Antarctica developed into one of global interest, or rather, Antarctica became a pawn in global politics.

#### THE MOST IMPORTANT STEPS

Before I recount what took place at the intergovernmental level, let me state that the interest in Antarctic issues has never been limited to governmental interests alone. On the contrary, popular interest in the polar regions has always been considerable. The post-Second World War situation stimulated individuals as well as international organizations to bring forward ideas pertaining to the administration of the polar areas. The role of the newborn United Nations seemed self-evident to many. So, for instance, the Women’s International League for Peace and Freedom favoured control and administration of the uninhabited polar areas by one or two mandate commissions under the Trusteeship Council of the United Nations. Such administration was expected to result in, *inter alia*, equal and free access to raw materials (including to mineral resources), organized and adequate scientific research, and surveys whose results should be available to all those interested. The organization also argued for equitable arrangements regarding fishing and whaling rights, as well as prevention of “destructive methods in connection with whaling and sealing”.<sup>3</sup> This proposal was brought to the attention of the UN Trusteeship Council, which, however, decided to take no action. A similar proposal was made in 1947 by the Commission to Study the Organization of the Peace. Dr. Julian Huxley, the first Director-General of the UN Educational, Scientific and Cultural Organization (UNESCO), wished to see UNESCO set up an “International Antarctic Research Institute.” A member of the British parliament, Lord Edward Shackleton, son of the explorer Ernest Shackleton, argued in favour of involvement by the United Nations in the settlement of the Antarctic question. Others, such as Dr. Dana Coman, president of the American Polar Society, proposed, in an

internal discussion at the State Department, that Antarctica should be made the first “international park.”

There was, in short, a newly awoken interest in Antarctic political affairs that presumably stemmed from reading press reports on the growing friction in Antarctica and, furthermore, mirrored a confidence in the newly established United Nations.

Although the Second World War had brought with it a decrease in scientific activities in Antarctica, the political predicament with respect to Antarctica and, in particular, to the question of sovereignty over Antarctic territory had become more and more tense as British, U.S., Argentine, and Chilean activities during and after the ending of WWII clearly showed. It is often forgotten that all these states had sent military expeditions to Antarctica and undertook military operations there between 1943 and 1948.

The obviously increasing tension in Antarctica, together with the growing embarrassment to the United States of having three of its allies, namely, Chile, Argentina, and the United Kingdom, as antagonists with respect to sovereignty disputes in Antarctica, no doubt contributed to a conviction in the State Department that there was a compelling need for a more vigorous solution to the question of Antarctica.<sup>4</sup> There was also a fear that the Soviet Union would exploit the situation.<sup>5</sup>

The United States had to come up with a proposal that not only struck a balance between the United States’ interest in Antarctica and the claimant states’ interests but, at the same time, circumvented the perceived risk of Soviet involvement. The United States therefore became a key player in initiating the consultations on Antarctica in the late 1940s. But the United States was not alone.

#### THE PROPOSALS FOR A SOLUTION, 1939–1959

In fact, the suggestions and initiatives related to the future management of Antarctica were numerous, and it is not possible to address all of them in this paper. I will focus on only a few initiatives while asking readers to bear in mind that discussions were ongoing throughout the period from 1939 onward, with the exception of the WWII period.<sup>6</sup>

In sum, one can say that the first post-WWII initiative came from Chile and the action that led to the Antarctic Treaty came from the United Kingdom.

In October 1947, Chile, in reference to an initiative by the United States in 1939, asked the United States about its view on a possible convocation of an Antarctic Conference and of the likelihood of a territorial claim by the United States.<sup>7</sup> The background to the Chilean query is

that in late 1939, the United States had put forward the idea of a common inter-American policy with regard to the Antarctic. This policy consisted, *inter alia*, of an arrangement should the investigations and surveys show that natural resources might be developed and utilized. According to the U.S. proposal, all these governments should enjoy equal opportunities to participate in such development and utilization.<sup>8</sup> The 1939 initiative was clearly related to the claims and the issue of enjoying equal rights in possible development and utilisation.

Argentina had also put forward the idea of a conference on Antarctica in 1940 in proposing that an international conference among states claiming rights and interests in Antarctica should be assembled, with the objective of determining the “juridico-political status of that region.”<sup>9</sup>

The United States’ initiative in 1939–1941 on a common inter-American policy on Antarctica was unsuccessful. For obvious reasons, the Second World War overshadowed the Antarctic question, and it was temporarily set aside. In the meantime, the global geopolitical map changed. When Chile chose to resurrect the U.S. idea in 1947, the United States was already in the process of reconsidering its Antarctic policy. The U.S. response therefore conveyed the message that the time was not then opportune for such a conference, while also assuring that the “United States attitude remains essentially the same as it was at that time.”<sup>10</sup> While the internal discussion in the United States went on, the tension between the United Kingdom, Argentina, and Chile sharpened, and the United Kingdom contemplated taking the Antarctic controversy to the International Court of Justice.

#### DRAFT AGREEMENT ON ANTARCTICA, 1948

During the early months of 1948 the Draft Agreement on Antarctica was prepared in the State Department. It should be noted that the draft recommended the establishment of an international status for Antarctica and also that the United States should make official claim to areas in the Antarctic, so as to place the United States “on an equal footing with the other seven powers.” The claim was not to be announced until after an international settlement had been obtained.<sup>11</sup> The draft contained a proposal for the establishment of a trusteeship under the United Nations and joint sovereignty over the continent among eight countries, namely, Argentina, Australia, Chile, France, Norway, New Zealand, the United Kingdom, and the United States.

In reality, the United States’ draft was a combination of a trusteeship proposal and a condominium. Not

surprisingly, the idea of “pooling claims” did not appeal to the claimant states,<sup>12</sup> irrespective of the U.S. ambitions to blur this by the attempts to launch the proposal as a “trusteeship proposal.”<sup>13</sup>

Although the draft agreement contains no explicit reference to the freedom of scientific research in the area, it was “intended to provide for complete liberty of bona fide scientific research.”<sup>14</sup> This ambition was underlined by the obligation on the parties to foster free access to and freedom of transit through or over the area, although under rules prescribed by the commission that was proposed to be set up. It should be noted that, at that time, it was not a U.S. objective to declare Antarctica a demilitarised area,<sup>15</sup> notwithstanding the major objective to lower the tensions in the area.<sup>16</sup>

The basic postulates that resulted in the proposal were an identified need to solve territorial disputes and a belief that a collective solution to the question of Antarctica would best prevent disturbances between the current claimant states, particularly since it was judged that such disturbances could be exploited by the Soviet Union. There was, furthermore, an assumption that no significant exploitable resources existed in Antarctica and that the value of Antarctica was primarily scientific.

The U.S. proposal was designed to legitimise the collective administration of Antarctica and to prevent certain “external interference” (read: the Soviet Union and its so-called “satellite states”).<sup>17</sup> The proposal foresaw the possibility of admitting states other than the eight original states that had a “legitimate interest” in Antarctica. It was in this context that the idea of a retrospective “activity criteria” as a key to admittance surfaced.<sup>18</sup> The draft was also designed to meet possible criticism of “by-passing and weakening the United Nations” since it was considered important for the United States to fully support the United Nations.<sup>19</sup>

During the course of developing the proposal, the United States consulted few other governments. The consultations with the United Kingdom, and later with Chile, were, however, crucial to the development.<sup>20</sup> The British reaction caused the State Department to elaborate a revised draft agreement “to provide for a condominium.”<sup>21</sup>

#### THE ESCUDERO PROPOSAL, 1948

A few months later, in July 1948, a representative of the State Department arrived in Santiago and thereafter in Buenos Aires to discuss the Antarctic question. It was during the discussion in Santiago that the Chilean representative, Professor Escudero, expressed doubts as to whether the trusteeship would be applicable under the UN Charter

and voiced the idea of a joint declaration by a limited group of states, which would freeze the current legal rights and interests in Antarctica for a period of 5 or 10 years. During that period, actions in Antarctica by the states party to the declaration would have no legal effects on their rights. This was the so-called *modus vivendi* proposal and the embryonic form of “the Escudero proposal”<sup>22</sup> presented later and designed to be a means of conflict moderation as well as to prevent any interpretation that Chile (or other claimants) would relinquish claims to sovereignty.

#### NEW U.S. PROPOSAL

At this early stage the United States neglected the Chilean idea of a *modus vivendi* agreement and decided instead to present the new version of its previous proposal to a wider circle of interested states, which included Chile and also Argentina, Australia, France, New Zealand, Norway, and the United Kingdom. This version was built on the comments made by the United Kingdom.<sup>23</sup> The trusteeship idea was abandoned and turned into a pure proposal for a condominium.<sup>24</sup>

The obligation to cooperate with the specialised agencies of the United Nations now constituted the only connection with the United Nations. Furthermore, the commission was to constitute “the actual government” with “full executive and administrative powers,” and decisions on matters of substance were to be taken by a two-thirds majority.

Not surprisingly, the proposal was not embraced wholeheartedly by the recipients, most of whom neither seemed to have had much idea about what was going on, nor had seen the proposal in advance. Hence, the responses varied on a scale from disapproval to sceptical consent. Argentina declared a clearly negative view to any international regime. Chile disapproved of the condominium solution but underlined a favourable attitude to a *modus vivendi* solution. Norway considered the establishment of an international administration “unnecessary.” Having taken an initially unfavourable view, Australia and New Zealand declared their willingness to “go along,” but New Zealand underlined that a closer relationship with the United Nations was preferable. France was reluctant and asked for clarification. The United Kingdom cautiously advised its acceptance “in principle and as a basis for discussion”.<sup>25</sup> None of the claimants were prepared to waive their claim and turn it into a “pooled” sovereignty.

However, the United States made its initiative public on 28 August 1948.<sup>26</sup> According to the press release, the suggested solution (“some form of internationalization”)

should best be such as to promote scientific investigation and research. The question of cooperation in scientific research as such was not addressed.<sup>27</sup> Reactions from states that had not been consulted did not fail to appear. South Africa and Belgium declared that they considered themselves entitled to participate in an Antarctic settlement.<sup>28</sup>

Chile was, as mentioned, still in favour of an international “understanding” in the form of a declaration. Chile had formally rejected the U.S. proposal. Instead, Chile proposed an agreement to exchange scientific data and including nonstrengthened claims by activity. Chile came back to the idea voiced by Escudero in the earlier bilateral discussions.

The negative responses to the specific proposal by the United States, together with the positive views expressed on an international solution to parts of the Antarctic question, such as scientific cooperation, led the United States to reconsider its proposal. It was concluded that the Chilean proposal offered the best prospect if it were modified on certain points<sup>29</sup> since it was considered to be too temporary and declaratory in nature.

#### THE U.S. DRAFT DECLARATION ON ANTARCTICA, 1950

A new blueprint entitled Draft Declaration on Antarctica was therefore elaborated by the Department of State in early 1950. Prior to the new outline, the United Kingdom had been consulted, and its suggestions were incorporated in the United States’ draft.<sup>30</sup> The new proposal now contained the Chilean idea of “freezing of claims.”

Irrespective of the fact that the new draft was labelled “declaration” and not “agreement,” its content resembled more an agreement than a declaration, although it had entirely left out the ideas on pooling of sovereign claims and collective governance. Instead, the Draft Declaration was an agreement on cooperation, to the benefit of all individual participants. Conscientiously drafted, it contained a provision that the parties to the declaration were disposed to discuss territorial problems in Antarctica and to freeze the claims. The area of application was identified as the territory south of 60°S latitude. Freedom of scientific research among the parties and its nationals and the exchange of scientific information were cornerstones of the declaration. A committee should be created, to which governments should report, but it would have no decision-making power. The question of third states’ activities in Antarctica was cautiously addressed by stating that the committee could make recommendations in relation to third states wishing to conduct scientific research. If such expeditions were carried out, they would not be

recognised as a basis for territorial claims. The declaration was of limited duration (5 or 10 years was proposed) but foresaw a possible future Antarctic Conference and, hence, an in-built opportunity to prolong the agreement.<sup>31</sup>

#### SOVIET REACTIONS

The State Department had calculated in 1948 that its first motion would prevent Soviet intervention in the process.<sup>32</sup> The exclusion of the Soviet Union from any future Antarctic solution remained a paramount objective.

The first indication that this was not a procedure that the Soviet government would observe in silence came via articles in *Pravda* and *Izvestiya* on 11 February 1949. The articles reported of a meeting of the All-Union Geographic Society, during which the president of the society, Lev Semyonovich Berg, declared that the Soviet Union had a valid claim to Antarctic territory based on the discoveries of the “Russian” navigators Bellingshausen and Lazarev.<sup>33</sup> Furthermore, the states that had an interest in Antarctica should be those that formed an Antarctic regime. A resolution with such content was adopted by the meeting of the society.<sup>34</sup> The wording of the resolution is almost identical to that of the Soviet diplomatic note to be delivered later. These news articles were observed, inter alia, in the United States and the United Kingdom but elicited no formal reactions on the part of the countries involved in the Antarctica discussions.

On 8 June 1950, the Soviet Union sent a memorandum to the United States, the United Kingdom, France, Norway, New Zealand, Australia, and Argentina stating that “the Soviet Government cannot recognize as legal any decision regarding the regime of the Antarctic taken without its participation.”<sup>35</sup>

#### U.S. PROPOSAL ON A MODUS VIVENDI, 1951

It has been maintained that “the negotiations ceased” after “the Soviet Note of June 1950 and the outbreak of the Korean War” on 25 June 1950. This belief does not seem to be correct. Despite the Korean conflict, Chile and the United States continued to exchange revised versions of the modus vivendi proposal during 1950 and 1951. However, the Korean situation no doubt put a damper on the discussions.<sup>36</sup>

The State Department sent a new draft, now labelled Modus Vivendi, to the Chilean Embassy on 14 November 1951.<sup>37</sup> It differed little from the previous proposal. The United States stated that the only substantive change was that it addressed the collection of fees, so as to meet

Chile’s concern. Under the new proposal, the collection of fees would not prejudice the right of any other party. There was, however, another substantial change. The article on the right to perform scientific research in Antarctica had been redrafted. Chile returned to the proposal in the autumn of 1953.<sup>38</sup>

In the meantime, the U.S. policy on Antarctica was under continuous assessment, and it was therefore anything but clear and consistent.<sup>39</sup> The interest focused primarily on the pro et contra arguments in relation to a pronouncement of a U.S. claim, the forthcoming U.S. expedition, and the emerging plans for an International Geophysical Year (IGY).<sup>40</sup> The idea of a modus vivendi was not entirely abandoned, but in view of the fact that the United States had had no official activity in Antarctica since 1948, the character of the argumentation was modified.<sup>41</sup> President Eisenhower accentuated the option of focusing the politics on a reaffirmation of U.S. rights and claims, rather than announcing a claim.<sup>42</sup> Documents from 1954 indicate that the United States had now deserted the idea of an internationalisation of Antarctica while “still being in favour of a standstill agreement between friendly powers.”<sup>43</sup> The primary objectives, laid down by the National Security Council, were a solution to the territorial problems of Antarctica so as to “ensure maintenance of control by United States [sic] and friendly powers and exclude our most probable enemies” and freedom of scientific research and exchange of scientific data “for nationals of the United States and friendly powers.”<sup>44</sup>

Antarctica surfaced as a global political factor—an element in the politics of containment.

#### POLITICAL DEVELOPMENT IN THE MID-1950s

In 1955, the United Kingdom filed the Antarctica Case at the International Court of Justice, but the case was removed from the court’s list since the court found that it did not have any acceptance by Argentina to deal with the dispute.<sup>45</sup>

In January 1956, the New Zealand prime minister, the former Labour leader of the opposition Walter Nash, proposed that Antarctica should be a UN trusteeship.<sup>46</sup> Nash also proposed the abandonment of claims in Antarctica.<sup>47</sup> Allegedly inspired by Nash,<sup>48</sup> India proposed in early 1956 that the question of Antarctica be included in the agenda of the UN General Assembly. According to an explanatory memorandum, the reason for the initiative was that India wanted “to affirm that the area will be utilised entirely for peaceful purposes and for the general welfare.” Another

objective was to secure “the development of Antarctica’s resources for peaceful purposes”.<sup>49</sup>

The Indian request was evidently caused by a concern that Antarctica would be utilised for nuclear testing. There was no attempt to transfer the issue of territorial claims to the UN agenda, but rather, the attempt was to secure the peaceful use of Antarctica, a concern that the United States tried to meet by assuring that the United States had no intention in using Antarctica as a nuclear site.<sup>50</sup> Documents disclose U.S. concern that the Indian move was inspired by the Soviet Union and that it would attract “neutral states.” The claimant states were also clearly negative to the Indian proposal, and Argentina and Chile argued that it would be contrary to Article 2, paragraph 7, of the UN Charter.<sup>51</sup> The Indian proposal was withdrawn by 4 December 1956.<sup>52</sup>

#### A REVIVAL OF THE U.S. CONDOMINIUM PROPOSAL, 1957

The United States became more and more aware of the urgent need to revise (or rather to formulate) an Antarctic policy before the IGY, not least in light of the controversy among the United Kingdom, Chile, and Argentina and the Indian proposal to include the question of Antarctica at the UN. The U.S. fear of a UN involvement seems to have been related to anxiety about getting the Soviet Union involved.

A condominium was considered preferable to a trusteeship. By the spring of 1957 the U.S. plans for proposing a condominium had come to fruition.<sup>53</sup> It was considered that a condominium would be consistent with the assertion of claims, which was the only way to persuade most of the claimants to accept the idea. A condominium, it was argued, could be designed “to facilitate the further development of the area in the interest of all mankind.” The idea of a condominium could “be presented as a dramatic Free World initiative.” Although the idea was not a watertight way of keeping the Soviet Union outside the condominium, it was assessed that such ambitions on the part of the Soviet Union could be curbed.<sup>54</sup> This assessment was wrong.

#### THE UNITED KINGDOM’S PROPOSAL

Before the United States had formulated a policy on the future of Antarctica and decided on how to proceed however, the United Kingdom proposed quadripartite talks among the United States, Australia, New Zealand, and the United Kingdom. These quadripartite talks were apparently preceded by talks in London between Australia, New Zealand, South Africa, and the United Kingdom.<sup>55</sup> A major difference between the British and U.S. perspectives at the time was the view on Soviet participation. The United Kingdom’s more realistic view of the

situation apparently presupposed that the Soviet Union could not be left outside an agreement and hence calculated that it would be included, whereas the United States remained negative to such inclusion.<sup>56</sup> The British initiative is yet another example of the role the United Kingdom played in setting in motion the negotiations of the Antarctic Treaty. The four-power talks prepared the ground for entering into the more formal Preparatory Meeting.

On 15 July 1958, a new attempt to include the question of Antarctica on the UN agenda was made by India. The attempt was unsuccessful.<sup>57</sup> At that time, the IGY was in full progress, the United States had convened a Conference on Antarctica, and the Preparatory Meeting had commenced.

#### ELEMENTS THAT BORE FRUIT FROM THE EARLY PROPOSALS

Several elements in the Antarctic Treaty can be traced back to the earlier proposals. A brief recounting gives the following list.

1. *The removal of Antarctica from the arena of international disputes.* The objective survived, although the motives did not, namely, the fear that the Soviet Union might exploit the potential conflict and that the United States did not benefit from such friction.

2. *Safeguarding individual interests; limited participation by states with special interests.* During the course of discussions on the proposals, no one seems to have proposed an open-ended group of participants. From the outset, and from the U.S. perspective, there was a clearly identified group of states with so-called special interests. No other state claimed the right to participate, nor was there a discussion on the “legitimacy” of the states to regulate. Those states that claimed the right to participate in an Antarctic solution later became original signatories to the Antarctic Treaty.

3. *Obligation to cooperate with the United Nations and other organisations.* The obligation to cooperate with the United Nations underwent a negative transition during the discussions from a clear trusteeship proposal, under which an Antarctic trusteeship would have been a UN-sanctioned administration, or a condominium, possibly sanctioned by the UN, to an obligation to cooperate with specialised agencies of the UN.

4. *Freedom of scientific research, freedom of movement, and cooperation.* The question of “freedom of scientific research” was directly related to the identified group of participants, or “friendly powers.” Freedom of scientific research on the high seas would still prevail under international law. However, the idea of cooperation in other areas as well and the obligation to cooperate developed in the Antarctic Treaty.

5. *Public interest and the benefit of scientific progress to “people.”* Public interest in Antarctica is well documented, and it had the benefit of bringing in funds and economic support for the poorly funded scientific community. The general assertion that mankind would benefit from scientific progress was considered a fact rather than a matter to be debated.

6. *Demilitarisation; peaceful use.* Even if the proposals were aimed at preventing Antarctica from becoming an arena for international conflicts, there was no direct proposal with respect to a demilitarisation of the area.

7. *Exploitation and conservation of resources.* At the time, it was judged that there were no economically exploitable resources in Antarctica, with the possible exception of marine living resources, which were considered not to be included in an agreement because fishing activities were subject to the freedom of the high seas. Regulation and conservation of resources (except whaling) were therefore not an issue.

8. *Territorial scope: south of 60°S Latitude.* A clear distinction is made between the continent and the water areas south of 60°S latitude. This distinction is less clear in the Antarctic Treaty. It was clear throughout the discussions that the high-seas freedoms south of 60°S latitude could not be limited.

9. *Consensus.* Attempts to have a decision-making procedure by majority rule failed. The claimant states were not prepared to accept any decision-making procedure that would not have given them a veto. The consensus principle was a prerequisite.

10. *Duration.* The discussions on the duration of the agreement mirrored, at an early stage, the tension between the wish to have a stable agreement and the concern on the part of the claimant states not to give the impression that they were relinquishing their claims. It was important to find a formula that satisfied the two aspects.

It is therefore maintained that most elements in the Antarctic Treaty can be traced back to the previous proposals, especially to those based on the so-called Escudero proposal in 1948, which despite its ambiguity, would have been constructive enough to serve as a foundation for a stable agreement. The political ambitions alone did not lead to a result until 1957, when help came from a seemingly nonpolitical arrangement, namely, the IGY.

#### THE INTERNATIONAL GEOPHYSICAL YEAR

The IGY exercise helped transfer the question of Antarctica from the table of diplomacy to the table of science, which was, indeed, a fortunate catalytic process for future legal and political development.

The agreement and achievements of the IGY are also of relevance to lawyers.<sup>58</sup> One of the most important steps was the move by French Colonel (later General) Georges Laclavère to not allow political controversies to prevail over scientific efforts. From the very outset, namely, at the first Antarctic Conference in Paris in 1955, Georges Laclavère, the conference chairman, stated that there was no room for political considerations and underlined, in his opening address, the technical character of the conference. Political questions were not the concern of the conference since it was a conference about science.<sup>59</sup> This declaration led to the conference unanimously adopting a resolution that ensured that “the objectives of the conference are exclusively of a scientific nature.”<sup>60</sup> The political innovations of the IGY, such as the gentlemen’s agreement, “some international administration,” and the exchange of scientists between bases, were “political” elements that were later sanctioned and given a legal meaning in the Antarctic Treaty.

The primary reason why the IGY remains relevant in the Antarctic context is that Article II of the Antarctic Treaty contains a cross-reference to the IGY. This cross-reference is one component of the two prerequisites for the material application of the very fundamental provision in the Antarctic Treaty that deals with the right to perform scientific research in Antarctica. According to this article, “freedom of scientific investigation and co-operation toward that end, *as applied during the International Geophysical Year*, shall continue, subject to the provisions of the Antarctic Treaty” (my emphasis). This formulation is the result of a compromise. In order to understand the meaning of the wording of Article II of the Antarctic Treaty, it is necessary to examine what the relevant features of the IGY were.

First, the IGY was a decision made by scientists, which was supported by an understanding by governments, to put aside political and legal struggles—the gentlemen’s agreement—and to concentrate on the overall scientific aim. The gentlemen’s agreement survived in essence and is now reflected in Article IV of the Antarctic Treaty. Second, it featured participation and openness. Third, it outlined the importance of presence and activities in Antarctica. The “activity requirement” is reflected in Article IX, paragraph 2, but had precedents in earlier U.S. proposals. Fourth, it specified access to scientific data and cooperation. Also, the exchange of data and scientists between stations commenced with the IGY.<sup>61</sup> This practice is reflected in Articles II and III of the Antarctic Treaty. Fifth, it required unanimity in decision making. The IGY conferences could make decisions for their own organisation of work. On such occasions the conferences worked under

“the rule of unanimity.” This procedural rule is codified in the Antarctic Treaty, Articles IX, XII, and XIII.

In conclusion, most of the provisions in the Antarctic Treaty that relate to the performance of scientific research in Antarctica have their origin in the IGY. They were, as will be shown, taken up during the preparatory meetings before the Washington Conference, and from there, they found their way into the Antarctic Treaty. The treaty itself elaborated science as part of the requirement for acceptance of the treaty.

## THE DEVELOPMENT FROM ONE SINGLE TREATY, THE ANTARCTIC TREATY, TO THE ANTARCTIC TREATY SYSTEM

### THE ANTARCTIC TREATY

It is not my intention to go through the provisions of the Antarctic Treaty but, rather, to shed light on what is not there, namely, resource management and administrative structures, despite attempts to regulate them in the treaty. Many, if not all, articles of the Antarctic Treaty are, of course, of utmost importance, but the heart of the treaty is Article IV (the article that deals with the claims). However, for the issue of building a legal regime for Antarctica, Article IX is of paramount importance since it is the legal basis for the administration of Antarctica. Article IX is structured around two basic components. The first relates to the meetings under the Antarctic Treaty (when, where, and how they can be held) and who can participate in those meetings. The second component relates to the mandate for these meetings and what measures can be taken during such meetings and by whom.

It is on the basis of this article that the entire legal management of the Antarctic region has been built. In short, Article IX is the foundation of the Antarctic Treaty System.

### THE AGREED MEASURES FOR THE CONSERVATION OF ANTARCTIC FAUNA AND FLORA

The Agreed Measures for the Conservation of Antarctic Fauna and Flora (AMCAFF), adopted by the Consultative Parties at Antarctic Treaty Consultative Meeting (ATCM) III (1964), was the first more-ambitious attempt to adopt elaborate conservation measures for Antarctica. The potential need for measures with respect to the preservation and conservation of living resources in Antarctica was foreseen in the Antarctic Treaty. The First Consultative Meeting had already addressed the issue

in Recommendation I-VIII, and it could be said that AMCAFF grew out of that recommendation. The Agreed Measures for the Conservation of Antarctic Fauna and Flora was not labelled a convention, but its form indirectly indicates its status as a treaty under the Antarctic Treaty. The Agreed Measures for the Conservation of Antarctic Fauna and Flora is considered by the Treaty Parties and by some authors as a comprehensive successful international instrument for wildlife conservation. It foreshadows a development within the treaty system with respect to environmental protection, transparency, information sharing, and the role of international organisations, namely, the Scientific Committee on Antarctic Research (SCAR).

### THE CONVENTION ON THE CONSERVATION OF ANTARCTIC SEALS

The next step was to regulate Antarctic seals, probably not so much because seals were threatened but because this step was part of a much-larger objective, namely, to accustom reluctant parties to the Antarctic Treaty to the idea that it was appropriate to deal with matters or conservation. The parties to the Antarctic Treaty took it upon themselves to regulate their potential activities in the high-seas area. In this respect, the convention resembles a traditional fishery-conservation agreement.

New and important features of the Antarctic Treaty System<sup>62</sup> were introduced by the negotiations on, and conclusion (in 1972) of, the Convention on the Conservation of Antarctic Seals (CCAS). First of all, the negotiations were held parallel to the ATCM and outside the Antarctic Treaty. The negotiating Antarctic Treaty Parties recognised that negotiation of the matters dealt with under the CCAS did not fall within the framework of the Antarctic Treaty. They further recognised that states, not parties to the Antarctic Treaty, could have a legitimate interest in the conservation and commercial exploitation of seals. The view that management of resources in the maritime areas south of 60°S latitude was outside the frame of the Antarctic Treaty was later to be modified. The Treaty Parties had obvious problems in tackling the question of whether the Antarctic Treaty was applicable to sea areas or not, hence the issue of high-seas rights.

Second, the CCAS was the first treaty to address how to manage the economic exploitation of an Antarctic resource and also the management of a resource not yet economically exploited.

Third, the CCAS introduced an “open accession formula.” There is no formal requirement that parties *in spe* be parties to the Antarctic Treaty. The CCAS strengthened



the role of SCAR, and the participation in 1972 of representatives from a specialised agency of the UN as observers and their de facto liberty to circulate documents were new instruments in opening up the system. Today, nongovernmental organizations and UN specialised agencies definitely have a role of their own within the Antarctic Treaty System.

Wolfrum claims that the CCAS is interesting from a “Rechtssystematisch” (systematic) perspective, in that Consultative Parties as “selbstbestellte Sachwalter” (self-appointed guardians) for the Antarctic environment are established.<sup>63</sup> Although I agree with such a conclusion, it is important to stress that such a situation was, indeed, facilitated by neglect of the issue on the part of the remaining international community. The Antarctic Treaty Parties were later to learn that being a self-appointed trustee is not easily recognised. Yet it should be stressed that if AMCAFF is regarded as a treaty, this development had been started by the conclusion of AMCAFF.

#### THE CONVENTION ON THE CONSERVATION OF ANTARCTIC MARINE LIVING RESOURCES

Despite the lack of enthusiasm for addressing the issue of the preservation and conservation of marine living resources at the Washington Conference, this convention only lasted until the first Antarctic Treaty Consultative Meeting (1961), when four proposals were presented with respect to the conservation of living resources in the treaty area. The Scientific Committee on Antarctic Research also recommended that conservation measures be taken.<sup>64</sup>

The Antarctic Treaty Parties decided in 1977 to commence negotiations. The participants included the 12 signatories to the Antarctic Treaty and states that had acceded to the treaty, namely, the German Democratic Republic, the Federal Republic of Germany, and Poland. A number of international organisations participated as observers: the European Community, the UN Food and Agriculture Organization (FAO), the International Whaling Commission, the Intergovernmental Oceanographic Commission, the International Union for Conservation of Nature, the Scientific Committee on Oceanic Research, and SCAR.

Signals from the FAO and UN Development Programme for the need to exploit resources were met with strong reactions from the Treaty Parties.<sup>65</sup> Other UN representatives spoke with a slightly different, more conservationist, voice. The UN Environment Programme suggested that it should be “involved in the protection of the Antarctic environment and the establishment of ecologically sound guidelines for exploration and exploitation of resources.”<sup>66</sup> Nontreaty parties were also interested in

exploitation. It was time for the Treaty Parties to secure control, and the CCAS had opened the door for the regulation of resources in international waters.

The aim of the Treaty Parties was to conclude a treaty before the end of 1978. As was the case with AMCAFF and the CCAS, the discussions had revealed that the area of application of such regulation was not self-evident, nor were the contents, nor the form of agreement. Questions were also raised as to who should participate in the development of a regime, what kind of institutional arrangements were needed, if any, how conservation measures could be enforced, and whether a dispute settlement procedure was needed. Yet the negotiations were fruitful. By agreeing to the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), the parties to the Antarctic Treaty recognized among themselves a functional, efficient, regional treaty that applies both to areas that have the legal status of high seas and to areas that are, or are claimed to be, the territorial seas and exclusive economic zones of claimant states. It is a treaty that applies to areas that third parties clearly have rights to and interests in, as well as certain obligations, for example, under the UN Convention on the Law of the Sea. In addition, the CCAMLR brought about the first “institutionalisation” of Antarctica through the establishment of the commission and the Scientific Committee under the commission. Since the conclusion of the treaty, the CCAMLR has shown that it is capable of developing and adjusting to the requirements of the time.

When the Antarctic Treaty Consultative Parties (ATCPs) took control of the situation and decided to tackle the question of marine living resources, they acted preemptively. Any attempts by third states to exploit marine living resources in a claimed area would most likely have disturbed peaceful Antarctic cooperation; to use the wording of the Antarctic Treaty, they would have threatened to make Antarctica a scene or object of international discord.

#### CONVENTION ON THE REGULATION OF ANTARCTIC MINERAL RESOURCES

The decision to start negotiations on a minerals regime had had a long prelude. Many states realised at the time of the Washington Conference that there was a need to reach agreement on living and nonliving resources, but the issue was, at the time, far too complicated to even attempt accomplishing.

New Zealand raised the question of Antarctic mineral resources at a Preparatory Meeting before ATCM VI (1970), and there were many countries that saw the need

for raising this issue, not least the United Kingdom. The decision to commence negotiations on a minerals convention was underlined by the aspiration to negotiate a minerals regime before any commercial exploitation had commenced. Only the Consultative Parties were initially allowed to attend the session of that meeting. That restriction changed after ATCM XII (1983), when Non-Consultative Parties (NCPs) were invited for the first time to attend a Consultative Meeting. As a result, NCPs were also invited to attend the mineral negotiations. There is little doubt that the parallel development at the UN General Assembly (that is, an increasing criticism of the alleged “closed and secret nature” of the Antarctic Treaty) inspired the Consultative Parties to make that decision.

The Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) was adopted in Wellington on 2 June 1988, but it never entered into force, although not because of the external criticism stemming from the UN General Assembly. Instead, a revolution from within the Treaty Parties posed a great challenge. The treaty process was interrupted by Australian and French political turnabout. Belgium and Italy soon sided with France and Australia.<sup>67</sup>

The Convention on the Regulation of Antarctic Mineral Resource Activities is an interesting legal conception since it was negotiated as a regime for the management of resources that were known or believed to exist, but without any evidence that they would become economically exploitable. The negotiation of CRAMRA was not so much about the exploitation of resources as it was a tool to prevent disharmony and conflict in Antarctica. Hence, the Treaty Parties were obliged to address this delicate issue, although that was not how the nontreaty parties saw it. On the contrary, one of the main criticisms against the Antarctic Treaty Parties was the alleged lack of a mandate to negotiate a minerals regime since the Antarctic Treaty lacks any reference to mineral resources.

From a political perspective, CRAMRA is, at present, of marginal interest. However, the legal constructions in CRAMRA, the balance of interests between claimant and nonclaimant states, might serve as an example when the time is right to address other resource issues.

#### PROTOCOL ON ENVIRONMENTAL PROTECTION TO THE ANTARCTIC TREATY

As has been shown, the initiatives to protect the Antarctic environment did not start with the Environmental Protocol. At the Preparatory Meeting (1989) to ATCM XV, Chile suggested that the question of “comprehensive

measures” for the protection of the Antarctic environment ought to be addressed.<sup>68</sup> Behind the choice of obscure words was the diplomatic insight that the time was not right for discussions on yet another convention, particularly in light of a situation in which the future of CRAMRA was at stake. A series of formal meetings were held, and the negotiations resulted in a proposal on a protocol to the Antarctic Treaty that was adopted in Madrid in 1991 and entered into force in 1998.

With the Environmental Protocol, the Treaty Parties took a step toward more-modern management of the Antarctic environment. In short, the protocol institutionalised the protection of the Antarctic environment, not only by requiring environmental impact assessments before activities take place but also by establishing the Committee on Environmental Protection.

#### THE LIABILITY ANNEX

The Environmental Protocol, Article 16, foresees the adoption of a liability regime to elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by the protocol. The first step in that direction was taken by the adoption of the so-called Liability Annex, at ATCM XXVII in Stockholm in 2005.<sup>69</sup> Despite the fact that this annex is not yet in force, its conclusion meant that the Treaty Parties showed their preparedness to tackle difficult and serious issues relating to the prevention and restoration of the Antarctic environment.

#### CONCLUDING REMARKS AND A LOOK INTO THE CRYSTAL BALL

Article IV is clearly the heart of the Antarctic Treaty and the Antarctic Treaty System.<sup>70</sup> However, Article IX, the article that allows for management of the continent, is an absolute legal and political necessity for stable cooperation and the peaceful use of Antarctica. No progress would have been possible without the so-called “measures” taken, according to the article.<sup>71</sup> The establishment of a secretariat serves to facilitate the interactions of the claimants; the decision-making power remains with the ATCPs operating through the ATCM. In the meantime, the ATCPs have considerably developed, strengthened, and adapted the Antarctic Treaty System.

After more than 20 years of debate, the Question of Antarctica was effectively taken off the agenda of the UN General Assembly in 2005<sup>72</sup>; at that time, the assembly did

not request the secretary-general to submit a report to a forthcoming session and did not include it on the agenda of forthcoming sessions but only wished to “remain sized of the matter.” This decision can be seen as an important recognition of the successful management of Antarctica under and within the Antarctic Treaty System. The present secretary-general of the United Nations, Ban Ki-moon, was the first sitting UN secretary-general to visit Antarctica.<sup>73</sup>

It is sometimes claimed that it is the issue of illegal, unregulated, and unreported (IUU) fishing or tourism that constitutes the challenges to the Antarctic Treaty System. I do not share that view. The IUU fishing is certainly a threat to the Antarctic marine ecosystem, but not to the Antarctic Treaty System as such. The issue of IUU fishing is well taken care of within the context of CCAMLR,<sup>74</sup> and management by CCAMLR has not been politically challenged by nonstate parties, nor has there been a proposal that the management of marine living resources would be better handled elsewhere.

The same goes for the issue of tourism. Tourism is a legitimate use of Antarctica, and tourists and individual explorers bring about a greater interest in the Antarctic region. The tourism industry has, in fact, helped to buttress the legitimacy of the Antarctic Treaty System, and the tourism industry is now a natural “party” to the system, though not legally, of course.

However, other issues are likely to pose more of a challenge, such as the continental shelf issue and the issues of bioprospecting and genetic resources. The reason is that these issues are so closely related to Article IV and the issue of claims. These issues are further complicated by the fact that we are discussing not only shelf areas stemming from the Antarctic continent but also shelf areas extending from north of 60°S latitude into the Antarctic Treaty Area.

I believe that these issues need to be more effectively and preemptively addressed by all the Antarctic Treaty Parties. The continental shelf issue is not an issue solely for those countries that have expressed claims or potential claims to the continent. This issue is, indeed, related to ensuring that the Antarctic will not become the scene of international discord. The Antarctic Treaty is a model for international cooperation at its best. It shows that cooperation is possible even in situations when sovereignty, the fight for resources, and different political aims are at stake. It is a heritage that needs to be nurtured.

## NOTES

1. This article is based on the research I did for my doctoral thesis “The Antarctic Treaty System: *Erga Omnes* or *Inter Partes*?” which was

presented at the University of Lund, Sweden, on 31 January 1998. The dissertation is available through a few Swedish libraries and from the author. It is accepted for publication. The original text is, for obvious reasons, overloaded with footnotes. For the benefit of the reader I have only retained a selected number of footnotes.

2. The contents of what was to come were already foreshadowed by the famous joint declaration by President Roosevelt and Prime Minister Churchill in 1941. The declaration put forth eight basic principles for the conduct of states in their international relations. Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom, released to the press by the White House on 14 August 1941, reprinted in *American Journal of International Law* 35 (official supplement) (1941): 191–192.

3. Emily Greene Balch, 1948, “The Polar Regions as Part of One World,” *Survey Graphic* 37(9): 392–393. Professor Balch had become a Nobel Peace Prize Laureate in 1946. The International Executive Committee of the Women’s International League for Peace and Freedom voted in favour of the appointment of an ad hoc committee to consider and report on the proposal to internationalise all uninhabited polar areas at a meeting in May 1947 in Geneva.

4. The development was closely followed by the U.S. press, which took an active interest in the matter and thereby put a certain pressure on the government, for instance, by asking about the U.S. view on an international conference for the settlement of the claims to Antarctica. The Secretary of State to the Embassy in London, Telegram, Washington, January 30, 1947, in *Foreign Relations of the United States, 1947*, vol. I (Washington, D.C.: U.S. Government Printing Office, 1971), p. 1050.

5. Paper Prepared by the Policy Planning Staff, [Washington,] June 9, 1948, in *Foreign Relations, 1948*, vol. I, pt. 2, p. 979; and The Department of State to the British Embassy, Aide-Mémoire, Washington, June 25, 1948, in *Foreign Relations, 1948*, vol. I, pt. 2, p. 988.

6. A brief account of the background history is found in John Hanessian, “The Antarctic Treaty 1959,” *International and Comparative Law Quarterly* 9 (1960): 436–480. (Hereinafter Hanessian, ICLQ 1960.)

7. The Chilean Embassy to the Department of State, 13 October 1947, in *Foreign Relations, 1947*, vol. I, p. 1052.

8. See “United States Instructions to Diplomatic Officers of the United States in the American Republics Proposing a Common Inter-American Policy with Reference to the Antarctic,” extracts reprinted as US11121939 in W. M. Bush, *Antarctica and International Law. A Collection of Inter-state and National Documents* (London: Oceana Publications Inc., 1988), vol. 3, pp. 446–447. This document was preceded by, inter alia, an instruction of 8 August 1939 to diplomatic officers of the United States in the 21 American republics to give notice of the United States Antarctic Service expedition (The Acting Secretary of State to Diplomatic Officers in the American Republics, Washington, August 8, 1939, in *Foreign Relations, 1939*, vol. II, pp. 9–10). The instruction is an indicator of (or at least leaves open) the possibility of a future U.S. claim. Simultaneously, President Roosevelt instructed Admiral Byrd, who was the commanding officer of the United States Antarctic Service, to take appropriate steps “which might assist in supporting a sovereignty claim by the United States Government” (President Roosevelt to the Commanding Officer of the United States Antarctic Service (Byrd) Washington, November 25, 1939, in *Foreign Relations, 1939*, vol. II, p. 13). As to the development at the Second Meeting of Ministers of Foreign Affairs of the American Republics in Havana in 1940, see Bush, *Antarctica and International Law*, vol. 1, p. 604. See also United Nations Treaty Series, vol. 161, p. 253, Article XVIII, which excluded Antarctica from any part of trusteeship.

9. Argentinean Memorandum to the United Kingdom proposing a Conference to determine the juridico-political status of the Antarctic, reprinted in translation as AR11091940 in Bush, *Antarctica and International Law*, vol. 1, p. 605. The proposal was reiterated on several occasions (Bush, *Antarctica and International Law*, vol. 1, p. 606).

10. Department of State to the Chilean Embassy, Memorandum, Washington, November 3, 1947, in *Foreign Relations, 1947*, vol. I, p. 1052. The same message was also conveyed by the president at a press conference on 7 January 1947 (The Secretary of State to the Embassy in the United Kingdom, Telegram, Washington, January 30, 1947, in *Foreign Relations, 1947*, vol. I, p. 1050). At the same time, the internal discussions in the United States were intense. Although the United States at first favoured a trusteeship solution, other alternatives were contemplated, primarily an international administration in the form of a condominium. The initial attention given to a trusteeship solution under the UN Charter foresaw an identified group of especially interested countries as primarily responsible and who would “safe-guard special interests of certain countries by giving them permanent control of trusteeship administration”; see The Acting Secretary of State to the Embassy in the United Kingdom, Telegram, Washington, September 22, 1947, in *Foreign Relations, 1947*, vol. I, p. 1051.

11. Draft Agreement Prepared by the Department of State, [Washington, n.d.], in *Foreign Relations, 1948*, vol. I, pt. 2, p. 984. This document was circulated together with a Paper Prepared by the Policy Planning Staff [Washington], June 9, 1948 [PPS-31] (hereinafter PPS-31), which, in turn, was the result of a series of internal consultations during the spring of 1948; see Editorial Note, in *Foreign Relations, 1948*, vol. I, pt. 2, pp. 976–977. The paper was also submitted to the National Security Council (Editorial Note, p. 977, note 1). See also Editorial Note (p. 982) for reference to an international status. In addition, Hanessian (ICLQ 1960, p. 437, note 4) refers to a “Draft Communication Regarding the Antarctic,” Department of State, February 19, 1948.

12. R. E. Guyer, “The Antarctic System,” *Recueil des cours* 139, no. II (1973): 171.

13. The draft text proposed that the eight states were to be “designated jointly as the administering authority of the trust territory” and that a commission, also consisting of the eight states, should be created and decisions be taken by a two-thirds majority. There was a prescribed duty for the commission to cooperate with appropriate specialised agencies of the United Nations and international scientific bodies. The tasks for the commission were to draw up plans for, inter alia, scientific research as well as to prescribe appropriate procedures under which states and private expeditions might be granted permission to conduct scientific investigations, develop resources, or carry out other activities consistent with the purposes of the agreement.

14. Department of State to the French Embassy, Aide-Mémoire, Washington, September 28, 1948, in *Foreign Relations, 1948*, vol. I, pt. 2, p. 1005.

15. The Secretary of Defense (Forrestal) to the Secretary of State, Washington, 12 April 1948, in *Foreign Relations, 1948*, vol. I, pt. 2, p. 973. Cf. Hanessian, ICLQ 1960, p. 439 and note 12, who refers to a Department of State Memorandum (EUR) of 25 February 1948, Washington, D.C. Hanessian asserts that an “important new element, providing for the demilitarisation of the area,” was also included. Such an element cannot be found in the documents from this period reprinted in *Foreign Relations*.

16. The draft agreement provided for accession by other states. The proposed territorial scope of the agreement was “the Antarctic continent and all islands south of 60° South latitude except the South Shetland

and South Orkney groups.” The area of application did not include the sea areas, the reason being that the United States did not wish to involve these areas for reasons of defence, security, and whaling.

17. This was by no means only a U.S. interest. Lord Shackleton claims that the proposals for a solution on the Antarctic question that had a UN involvement were not popular because such a solution could have attracted the Soviet Union to Antarctica. Shackleton in House of Lords Debate (1960), p. 167.

18. The Secretary of the Interior (Krug) to the Acting Secretary of State, Washington, January 8, 1948, in *Foreign Relations, 1948*, vol. I, pt. 2, p. 962. See note 22.

19. It is difficult to see how the Soviet Union could have been kept outside the regime proposed in the draft agreement since Article 86, paragraphs 1a and 1b, of the UN Charter (together with Article 23) would have provided for the Soviet Union to be a member of the Trusteeship Council.

20. The United Kingdom, which was the first country to be informed, indicated that an eight-power condominium was preferable to a trusteeship under the United Nations since a trusteeship solution would allow for the Soviet Union to interfere. The role of the United Kingdom, and in particular of the legendary Brian B. Roberts, in these early stages of the development is still hidden in the closed archives of the Foreign and Commonwealth Office.

21. Editorial Note, in *Foreign Relations, 1948*, vol. I, pt. 2, p. 992. Cf. F. M. Auburn, *British Yearbook of International Law* 43 (1971), who asserts that “the very word condominium brought shivers to the Foreign Office” (p. 86), “presumably due to the intractable problems detailed in D. P. Connell, ‘The Condominium of the New Hebrides’” (note 12). Auburn’s conclusion is difficult to reconcile with the information in *Foreign Relations* that the United Kingdom preferred a condominium to a trusteeship; see, e.g., Position Paper Prepared in the Office of the United Nations Political and Security Affairs, in *Foreign Relations, 1955–1957*, p. 647; and the observation of Hanessian, ICLQ 1960, p. 440.

22. The Ambassador in Chile (Bowers) to the Secretary of State, Telegram, Santiago, July 19, 1948, *Foreign Relations, 1948*, vol. I, pt. 2, p. 995. Professor Escudero was an acknowledged Chilean expert on Antarctic matters. He had, inter alia, in 1939 been appointed to study Antarctic questions and their bearing on Chilean interests; see Bush, “CH07091939,” in *Antarctica and International Law*, vol. 2, pp. 307–308. It should be noted that the discussions in Argentina did not lead to a continuing discussion between the United States and Argentina like the meeting in Chile did between the United States and Chile. The prime concern voiced by the Argentine representative was that it was inadmissible that countries outside the Western Hemisphere should be given a voice within the American quadrant; see The Chargé in Argentina (Ray) to the Secretary of State, Telegram, Buenos Aires, July 21, 1948, *Foreign Relations, 1948*, vol. 1, pp. 995–996. This was a shift in attitude; cf. note 18.

23. *Foreign Relations, 1948*, vol. I, pt. 2, p. 997, note 2.

24. The Department of State to the French Embassy, Aide-Mémoire, Washington, September 28, 1948, in *Foreign Relations, 1948*, vol. I, pt. 2, p. 1005. See also, Bush, *Antarctica and International Law*, vol. 2, pp. 2, 165.

25. For the views of the consulted states, see *Foreign Relations, 1948*, vol. I, pt. 2: Chile, p. 997, note 2, and Memorandum of Conversation, by the Under Secretary of State (Lovett), [Washington,] August 16, 1948, p. 1002; Argentina, p. 997, note 2, and The Ambassador in Argentina (Bruce) to the Secretary of State, Telegram, Buenos Aires, November 1, 1948, p. 1011; Australia, Memorandum of Conversation, by

the Secretary of State, [Washington,] August 17, 1948, p. 1003, and The Ambassador in the United Kingdom (Douglas) to the Secretary of State, p. 1014; New Zealand, The Minister in New Zealand (Scotten) to the Secretary of State, Telegram, Wellington, September 7, 1948, p. 1005; United Kingdom, The Ambassador in the United Kingdom (Douglas) to the Secretary of State, Telegram, London, November 24, 1948, p. 1014; France, p. 1005, note 1; Norway, The Norwegian Ambassador (Morgenstjerne) to the Acting Secretary of State, Washington, November 15, 1948, pp. 1011–1013; United Kingdom, p. 997, note 2, and Editorial Note, p. 1015; and a summary of views in Paper Prepared in the Department of State, [Washington, n.d.], in *Foreign Relations, 1949*, vol. I, pp. 800–801. See also Hanessian, ICLQ 1960, p. 445 (Argentina).

26. Editorial Note, in *Foreign Relations, 1948*, vol. I, pt. 2, p. 1004. The press release can be found in the File on Antarctica, Swedish Ministry for Foreign Affairs, Doss. HP 53 P (1), containing the Department of State Press Release, August 28, 1948, No. 689. Apparently, the British Foreign Office and the Chilean Ministry for Foreign Affairs had already issued statements regarding the discussions on Antarctica. See also *Department of State Bulletin* 19, No. 479 (5 Sept. 1948).

27. Chile explicitly stated an interest in scientific cooperation, Hanessian, ICLQ 1960, p. 441.

28. Memorandum of Conversation by the Chief, Division of Northern European Affairs (Hulley), [Washington,] October 1, 1948, in *Foreign Relations, 1948*, vol. I, pt. 2, pp. 1007–1010. The notes from which the South African chargé d'affaires spoke are reprinted as an annex. It is worth noticing that parallel to this, consultations between the United Kingdom, Argentina, and Chile had commenced, so as to avoid “naval displays” in the southern latitudes. These consultations resulted in a tripartite declaration on 18 January 1949 not to send warships south of 60°S latitude, apart from customary routine movements.

29. Paper prepared in the Department of State, [Washington, n.d.], in *Foreign Relations, 1949*, vol. I, pp. 800–803; and Memorandum by the Secretary of State for the Executive Secretary of the National Security Council (Souers), Washington, August 29, 1949, in *Foreign Relations, 1949*, vol. I, p. 805. See also Memorandum of Conversation, by the Chief of the Division of Northern European Affairs (Hulley), [Washington,] March 23, 1949, in *Foreign Relations, 1949*, vol. I, p. 795.

30. Draft Declaration on Antarctica Prepared by the Department of State, [Washington, n.d.], in *Foreign Relations, 1950*, vol. I, pp. 905–906. The Chileans were apparently not informed about the British involvement. Memorandum of Conversation, by the Chief of the Division of Northern European Affairs, Washington, September 13, 1949, in *Foreign Relations, 1949*, vol. I, p. 806. For a similar vein of handling the matter, see *Foreign Relations, 1950*, vol. I, p. 907, note 2; and Memorandum by the Officer in Charge of British Commonwealth and Northern European Affairs (Hulley) to the Director of the Office of North and West Coast Affairs (Mills) [Washington,] January 4, 1950, in *Foreign Relations, 1950*, vol. I, p. 905.

31. Draft Declaration on Antarctica Prepared by the Department of State, [Washington, n.d.], in *Foreign Relations, 1950*, vol. I, p. 905–906.

32. PPS-31, Washington, June 9, 1948, in *Foreign Relations, 1948*, vol. I, pt. 2, p. 982.

33. *Foreign Relations, 1949*, vol. I, p. 794, note 1. Bellingshausen was, however, Estonian, rather than Russian, although he sailed a Russian ship. He was received with lukewarm interest when he returned to Russia, but his achievement has, in recent times, been described as “second only to that of Cook.” G. E. Foggs and David Smith, *The Explorations of Antarctica* (London: Cassell Publishers Limited, 1990), p. 28. See Headland (Chronology), p. 115, index no. 433.

34. The Embassy in Moscow to the Minister for Foreign Affairs, 22 February 1947, Swedish Ministry for Foreign Affairs, File on Antarctica, Doss. HP 53 P. See also Department of State Policy Statement, [Washington,] July 1, 1951, *Foreign Relations, 1951*, vol. I, p. 1727.

35. The Embassy of the Soviet Union to the Department of State, Memorandum Washington, June 8, 1950, in *Foreign Relations, 1950*, vol. I, pp. 911–913. Chile and the Soviet Union had no diplomatic relations, Klotz (America), p. 24.

36. F. M. Auburn, *Antarctic Law and Politics* (Bloomington: Indiana University Press, 1982), p. 86; Philip W. Quigg, *A Pole Apart: The Emerging Issue of Antarctica* (New York: McGraw-Hill Book Company, 1983), p. 136; and Bush, *Antarctica and International Law*, vol. 1, p. 57. But cf. Memorandum of Conversation, by the Officer in Charge of British Commonwealth and Northern European Affairs (Hulley), [Washington,] September 7, 1950, in *Foreign Relations, 1950*, vol. I, pp. 917–919, and Memorandum of Conversation, by Mr. Grant G. Hilliker of the Office of British Commonwealth and Northern European Affairs, [Washington,] March 5, 1951, in *Foreign Relations, 1951*, vol. I, pp. 1717–1718. See also Hanessian, ICLQ 1960, p. 447.

37. Draft Declaration on Antarctica, Prepared in the Department of State, [Washington, November 14, 1951], *Foreign Relations, 1951*, vol. I, pp. 1734–1736.

38. Hanessian, ICLQ 1960, p. 447.

39. *Foreign Relations, 1952–1954*, vol. X, p. 1738, note 5.

40. See the documents in *Foreign Relations, 1952–1954*, in particular, Draft Statement of Policy Proposal by the National Security Council, [Washington,] June 28, 1954, pp. 1744–1756, but also see Quigg, *A Pole Apart*, pp. 137–138.

41. Draft Statement of Policy Proposed by the National Security Council, [Washington,] June 28, 1954, in *Foreign Relations, 1952–1954*, vol. I, pp. 1754–1761. The debate was, to a large extent, a budgetary discussion; it is costly to fulfil and maintain a claim.

42. Memorandum of Discussion at the 206th Meeting of the National Security Council on Thursday, July 15, 1954, in *Foreign Relations 1952–1954*, vol. I, p. 1758. President Eisenhower is quoted as having said that he “would rather offend the British than our Latin American friends regarding issues in Antarctica.” See also, Klotz, *America*, p. 25.

43. Statement of Policy by the National Security Council, [Washington,] July 16, 1954, in *Foreign Relations, 1951–1954*, vol. I, p. 1761 (approved by the president; see p. 1760).

44. Statement of Policy by the National Security Council, [Washington,] July 16, 1954, in *Foreign Relations, 1951–1954*, vol. I, p. 1761 (approved by the president; see p. 1760).

45. *Antarctica Case, United Kingdom v. Argentina*, ICJ Report of Judgment, Advisory Opinions and Orders 1956, Order 16, March 1956, p. 14.

46. John Hanessian Jr., New Zealand and the Antarctic. Part II: International Political Aspects, in Polar Area Series, vol. II, No.3, (Antarctica) American Universities Field Staff. Report Service, (New York?) 1962, especially pp. 3–8. As Labour leader of the opposition, Nash had proposed international control over Antarctica. His ideas did not receive support from the New Zealand government, but when back in power, he pursued the idea of international control of the area and also that the United Nations should approve of, but not necessarily administer, such a regime. Nash had previously in 1948, as acting foreign minister, expressed a positive attitude to the U.S. proposal on a condominium (Hanessian, New Zealand and the Antarctic, p. 3).

47. New Zealand orally maintained this idea up to the stage of the commencement of the Washington Conference. See Opening Statement

by the New Zealand representative A. D. McIntosh, C.M.G. in Doc. 6 at the Washington Conference. It is stated that New Zealand had been “prepared to consider the relinquishment of national rights and claims in Antarctica if such a step towards the establishment of a wider regime were generally agreed” (p. 1). “This is why my Prime Minister has put forward the view that the establishment of a completely international regime for Antarctica would require countries to forego their national claims . . . only on this basis that a fully effective administration of the whole of Antarctica could be achieved—an administration that could coordinate all activities and ensure the permanent neutralization of the area. Such an international regime could prepare for the eventual use of resources of Antarctica in a regulated and orderly manner” (p. 2).

48. Hanessian, *New Zealand and the Antarctic*, p. 3.

49. S. Chaturvedi, *The Dawning of Antarctica* (New Delhi: Segment Books, 1990), p. 72. See also Memorandum From the Assistant Secretary of State for European Affairs (Merchant) to the Under-Secretary of State (Hoover), Washington, February 24, 1956 and Telegram From the Department of State to the Mission at the United Nations, Washington, September 3, 1956, in *Foreign Relations, 1955–1957*, vol. XI, pt. II, pp. 643–645. The date of the request was 19 February 1956, and the explanatory memorandum was presented to the U.S. mission on 3 September.

50. Memorandum From the Assistant Secretary of State for European Affairs (Merchant) to the Under-Secretary of State (Hoover), Washington, February 24, 1956 and Telegram From the Department of State to the Mission at the United Nations, Washington September 3, 1956, in *Foreign Relations, 1955–1957*, vol. XI, pt. II, pp. 643–645.

51. See the document “Question of Antarctica” attached to a Position Paper Prepared in the Office of the United Nations Political and Security Affairs, in turn attached to a Memorandum From the Director of the Office of the United Nations Political and Security Affairs (Adams) to the Assistant Secretary of 1956, in *Foreign Relations, 1955–1957*, p. 648.

52. Memorandum From the Acting Assistant Secretary of State for Inter-American Affairs (Rubottom) to the Secretary of State, Washington, December 4, 1956, in *Foreign Relations, 1955–1957*, p. 652.

53. Memorandum From the Director of the National Security Council Secretariat (Boggs) to the National Security Council Planning Board, including enclosures, among others a Draft Statement of Policy by the National Security Council on Antarctica, in *Foreign Relations, 1955–1957*, vol. XI, pp. 675–689.

54. Paper Prepared in the Department of State [n.d.], Subject: Establishment of a Condominium of Antarctica, in *Foreign Relations, 1955–1957*, pp. 681–682. It was perceived that this “would not preclude the Soviets from claiming the right to participate in the administration of the area based on such claims as it might make, and while it would not force or necessarily bring about the withdrawal of Soviet personnel from the area, it would provide a basis for the U.S. and the present claimant powers to question its [sic] validity of Soviet presence in the area.”

55. Telegram from the Department of State to the Embassy in the United Kingdom, Washington, August 23, 1957, in *Foreign Relations, 1955–1957*, vol. XI, pp. 710–711. The United States informs London, Canberra, and Wellington that it is prepared to participate in such quadripartite talks. The telegram also reveals the U.S. plan to gradually establish and expand a condominium over Antarctica and that these plans were to remain secret until after the IGY.

56. Telegram from the Department of State to the Embassy in the United Kingdom, Washington, August 23, 1957, in *Foreign Relations, 1955–1957*, vol. XI, pp. 710–711. When the United States advised that it was prepared to participate in such quadripartite talks, it declared

that [the State Department’s] “first reaction to British suggestion is that creation of condominium including USSR would not best serve interests and security free world and would be inconsistent with present U.S. policy.” See also Hanessian, ICLQ 1960, p. 452. As to the British role, see Ivo Meisner, “Evolution of the Antarctic Treaty System: Responding to Special Interests” (doctoral thesis, Scott Polar Research Institute, Cambridge, 1986). The contents of and comprehensiveness of the British role remains to be examined.

57. Chaturvedi, *The Dawning*, p. 72.

58. For a historic perspective of the IGY, see Cornelia Lüdecke, “Parallel Precedents for the Antarctic Treaty,” in *Science Diplomacy: Antarctica, Science, and the Governance of International Spaces*, ed. Paul A. Berkman, Michael A. Lang, David W. H. Walton, and Oran R. Young (Washington, D.C.: Smithsonian Institution Scholarly Press, 2011, this volume), pp. 253–263.

59. This took place at the First International Geophysical Year Antarctic Conference in Paris on 6–10 July 1955; see Marjorie M. Whiteman, *Digest of International Law*, vol. 2, Department of State Publication 7553 (Washington, D.C.: U.S. Department of State, 1963), p. 1242. Also at a meeting of the Comité Spécial de l’Année Géophysique Internationale (CSAGI) in Brussels, 8–14 September 1955, the president of CSAGI, Dr. Chapman, emphasised that CSAGI was a strictly nonpolitical organisation; Sullivan (Assault) p. 277. In this light, it is particularly interesting that the (unofficial) “U.S. programs in Antarctica in connection with the IGY” should be designed in support of a policy designed to protect the U.S. national interest; see Memorandum of Discussion at the 272nd Meeting of the National Security Council, Washington, January 12, 1956, in *Foreign Relations, 1955–1957*, vol. XI, p. 642.

60. Resolution 1 approved by the conference on 10 July 1955, reprinted in Bush, “GE10071955,” in *Antarctica and International Law*, vol. I, p. 501. For the text of the Argentine and Chilean statements, see Whiteman, *Digest*, pp. 1242–1243.

61. As to coordination of scientific observations, see T. Nagata, pp. 73–74, Shapley, p. 88. A scientist from the U.S. Weather Bureau wintered at Mirny Base, and a group of scientists, including a Soviet meteorologist, wintered at a U.S. base.

62. The notion of the Antarctic Treaty System had not yet been conceived by the time of the negotiations of CCAS.

63. Rüdiger Wolfrum, *Die Internationalisierung* (Location: Publisher, 1984), pp. 80–81.

64. Sec. paper/8, 10 July 1961, Suggested Form of Measures to Promote Conservation of Nature in the Antarctic, SCAR document. David W. H. Walton, “The Scientific Committee on Antarctic Research and the Antarctic Treaty,” in *Science Diplomacy: Antarctica, Science, and the Governance of International Spaces*, ed. Paul A. Berkman, Michael A. Lang, David W. H. Walton, and Oran R. Young (Washington, D.C.: Smithsonian Institution Scholarly Press, 2011, this volume), pp. 75–88.

65. James N. Barnes, “The Emerging Convention on the Conservation of Antarctic Marine Living Resources: An Attempt to Meet New Realities of Resource Exploitation in the Southern Ocean,” in *The New Nationalism and the Use of Common Spaces*, ed. Jonathan I. Charney (Totowa, N.J.: Allanheld, Osmun & Co. Publishers Inc., 1982), p. 278, note 35.

66. Matthew Howard, “The Convention on the Conservation of Antarctic Marine Living Resources: A Five-Year Review,” *International and Comparative Law Quarterly* 38 (1989), p. 111.

67. For a more detailed analysis, see T. Scully, “The Development of the Antarctic Treaty System,” in *Science Diplomacy: Antarctica, Science, and the Governance of International Spaces*, ed. Paul A. Berkman,

Michael A. Lang, David W. H. Walton, and Oran R. Young (Washington, D.C.: Smithsonian Institution Scholarly Press, 2011, this volume), pp. 29–38.

68. Information paper, presented by the Delegation of Chile, PREP/WP/1 and attachment, both are undated. On file with the author.

69. Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty Liability Arising From Environmental Emergencies.

70. Its importance has been stressed by Gillian Triggs; see Gillian Triggs, “The Antarctic Treaty System: A Model of Legal Creativity and Cooperation,” in *Science Diplomacy: Antarctica, Science, and the Governance of International Spaces*, ed. Paul A. Berkman, Michael A. Lang, David W. H. Walton, and Oran R. Young (Washington, D.C.: Smithsonian Institution Scholarly Press, 2011, this volume), pp. 39–49. For an analysis of Article IV, see G. Triggs, *International Law and Australian Sovereignty in Antarctic* (Sydney: Legal Books PTY, 1986), pp. 137–150.

71. They were initially called recommendations but were subsequently renamed to decisions, measures, or resolutions, depending on their legal character. The importance of governance through the

decisions, measures, and resolutions is dealt with in other contributions to this volume (e.g., Scully, this volume).

72. See UN General Assembly, Sixtieth Session, A/60/PV.61 GA Resolution 60/47, adopted without a vote on 8 December 2005 on the basis of a Report of the First Committee (A/60/454).

73. He returned to the UN and declared (at a briefing to an informal meeting of the General Assembly, New York, 21 November 2007) that “in the ice shelves of Antarctica, the glaciers of Torres del Paine and the rainforests of the Amazon, I saw up-close how some of the most delicate and precious treasures of our planet are being threatened by the actions of our own species. Antarctica’s message was chillingly simple: the continent’s glaciers are melting, far faster than we used to think. If large quantities of Antarctica’s ice were to vanish, sea levels could rise catastrophically.”

74. Denzil Miller, “Sustainable Management in the Southern Ocean: CCAMLR Science,” in *Science Diplomacy: Antarctica, Science, and the Governance of International Spaces*, ed. Paul A. Berkman, Michael A. Lang, David W. H. Walton, and Oran R. Young (Washington, D.C.: Smithsonian Institution Scholarly Press, 2011, this volume), pp. 103–121.

This broad international legal framework is contained in a system of International Law instruments regulating relations between subjects of International Law: first of all, between Arctic States, and then between them and non-Arctic States; especially in such branches of States' activity as the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and. Building Common Interests in the Arctic. The Arctic certainly differs from Antarctica and from the. The Antarctic Treaty and related agreements, collectively known as the Antarctic Treaty System (ATS), regulate international relations with respect to Antarctica, Earth's only continent without a native human population. For the purposes of the treaty system, Antarctica is defined as all of the land and ice shelves south of 60°S latitude. The treaty entered into force in 1961 and currently has 54 parties. The treaty sets aside Antarctica as a scientific preserve, establishes freedom of scientific An assessment of the framework of the international law for protecting the health of Antarctic wildlife first requires an appreciation of the Antarctic Treaty System (ATS 1959). The ATS has rapidly... The ATS has rapidly developed since the adoption of the Antarctic Treaty in 1959. While initially designed to resolve tensions over sovereignty, the freedom of scientific research, and the potential militarisation of the continent during the Cold War, the Treaty parties soon began to direct their attention to the protection of the Antarctic environment. In 1964, the Agreed Measures for the Conservation of Antarctic Fauna and Flora were adopted as Recommendation III-VIII (Bush 1982a, pp. 146-169).