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TERRITORIAL CLAIMS IN ANTARCTICA: A MODERN WAY TO DEAL WITH AN OLD PROBLEM

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I. SIGNIFICANCE OF A DISCUSSION OF TERRITORIAL CLAIMS IN ANTARCTICA

The first question we may want to address when discussing territorial claims in Antarctica is whether it is still useful to talk about this subject today, or whether the subject is now obsolete, with no practical application and of no great significance for legal research. Some scholars might argue that there is no room for an inquiry into the legal soundness of the claims to sovereignty in Antarctica, because the Antarctic System has frozen such claims. It might be also argued that the Antarctic System has developed entirely on the basis of such a freezing—a situation which is very appropriate for a polar continent, indeed—so that it would make no sense to resume a discussion about territorial claims and their legal basis.

It is proper to speak of the "Antarctic System" rather than the "Antarctic Treaty," because several treaties and conventions provide for the freezing of territorial claims. In addition to article IV of the Antarctic Treaty,[1] the freezing of territorial claims is recognized under article IV of the Convention on the Conservation of the Antarctic Marine Living Resources (CCAMLR),[2] article VII of the Draft Articles prepared by the Chairman of the Special Consultative Meeting on

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1. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71. The complete text of the Antarctic Treaty appears in the Appendix, *infra*.

2. 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;

Antarctic Mineral Resources,[3] as well as the recommendations of the Consultative Parties to the Antarctic Treaty.

I believe that despite the freezing of territorial claims, a discussion of their legal soundness *may* be resumed, or let me say, *must* be resumed, in view of their continuing relevance at a practical policy level. Even if the overfreezing of territorial claims in Antarctica during the past years were a skillful diplomatic device, it cannot be considered one of the best aspects of the Antarctic System.

There are many reasons to consider the subject of territorial claims a timely one. First, it is doubtful whether article IV, paragraph 2, of the Antarctic Treaty covers all possible claims to sovereign rights that are connected with territorial jurisdiction. It is questionable, for instance, whether article IV, paragraph 2, can be applied to the sovereign rights of coastal states recognized after the entry into force of the Antarctic Treaty in 1959, such as the rights in the Exclusive Economic Zone (EEZ). In other words, article IV, paragraph 2, forbids new claims or the enlargement of existing claims. Is the claim to the EEZ, then, among the forbidden claims? Some of the states claiming territorial sovereignty in Antarctica (claimant states) and a number of distinguished scholars hold that the EEZ is not forbidden and can be proclaimed.[4]

I am not going to discuss this issue in all its implications. I would only like to note that, for at least two reasons, CCAMLR does not

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(b) be interpreted as a renunciation or dimunition by any Contracting Party of, or as prejudicing, any right or claim or 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.

Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, art. IV, 80 Stat. 271, T.I.A.S. No. 10240 (*entered into force* Apr. 7, 1982)[hereinafter cited as CCAMLR].

3. Negotiations are continuing in the Special Consultative Meeting, set up under the framework of article IX of the Antarctic Treaty, to establish an Antarctic mineral resources regime. The Special Meeting, which held its 7th Session in Paris in Sept./Oct. 1985, discussed Draft Articles submitted as personal proposals by the Chairman of the Meeting, Ambassador Christopher Beeby of New Zealand. *See* Beeby Draft: Antarctic Mineral Resources Regime, Jan. 28, 1983, *revised* Mar. 29, 1984 (on file at the offices of the *Cornell International Law Journal*) [hereinafter cited as Beeby Draft]. *See also infra* text accompanying note 6; Francioni, *Legal Aspects of Mineral Exploitation in Antarctica*, 19 CORNELL INT'L L.J. 163 (1986). Article VII of the Beeby Draft is similar to article IV of CCAMLR, *supra* note 2.

4. *See, e.g.*, Vicuna & Infante, *Le Droit de la Mer dans l'Antarctique*, 84 DE DROIT INTERNATIONAL PUBLIC 341, 344-45 (1980).

answer the question of whether claimant states may proclaim the EEZ in Antarctica.

First, although article IV of CCAMLR freezes not only the claims to territorial sovereignty (as the Antarctic Treaty does), but also claims "to any right or claim or basis of claim to exercise *coastal state jurisdiction*," the language of the article represents a compromise between claimant and non-claimant states. As a result of this "bifocal approach," the phrase "coastal state jurisdiction" can be interpreted in two different ways. It can be interpreted as meaning coastal jurisdiction around all the coasts of Antarctica, as claimant states desire, or as coastal jurisdiction around only a few islands of undisputed sovereignty (islands which are located north of 60° South latitude), as non-claimant states wish.[5] The ambiguity of the term "coastal state jurisdiction" thus renders unclear the effect of CCAMLR on territorial claims.

Second, CCAMLR cannot solve the problem of the EEZ in Antarctica because the Convention neither covers the whole range of EEZ issues nor transfers relevant decision-making powers to the Commission on Living Resources, an institution created by CCAMLR. Thus, claimant states could still claim a set of residual rights and powers. It is clear that all disputes on the interpretation of the Antarctic Treaty and CCAMLR regarding the EEZ would be superceded if we reached the conclusion that the territorial claims in Antarctica had no legal basis at all.

The second and stronger reason for reopening the discussion on territorial claims is the potential importance of a *regime* of mineral resources in Antarctica. The Contracting Parties to the Antarctic Treaty have engaged in long negotiations over a minerals regime. For the time being, the exploitation of Antarctic mineral resources has no commercial value; the quantity and the quality of the resources are scarcely known. But it is possible that the exploitation of these resources will acquire great importance in the future. Thus, the agreement we are trying to reach today may be of tremendous importance

5. The bifocal approach is possible because CCAMLR applies to a larger area than the Antarctic Treaty. Its area is not the territory south of 60° South latitude, but extends to the Antarctic Convergence where cold Antarctic waters mix with warmer sub-Antarctic waters between 47° and 63° South latitude. The islands mentioned in the text are located exactly between the Convergence line and the 60° line. According to the strict interpretation by non-claimant states, these islands should be the only territorial basis for asserting coastal jurisdiction. On this subject, see *Question of Antarctica, Study Requested Under General Assembly Resolution 38/77*, Report of the Secretary-General, 39 U.N. GAOR Annex (Agenda Item 66), U.N. Doc. A/39/583, part I at 61-62 (1984). *See also* Triggs, *The Antarctic Treaty Regime: A Workable Compromise or a 'Purgatory of Ambiguity'?*, 17 CASE W. RES. J. INT'L L. 195, 202-03 (1985).

to future generations. It may establish once and for all a system of lawful appropriation of natural resources among nations.

The negotiating text now under discussion purports to transfer entirely the decision-making power concerning mineral resources to international institutions, so that there is no room for the exercise of national jurisdiction. Until now, the claimant states have obtained significant advantages within these institutions, especially within the Regulatory Committee that would regulate and monitor mineral activities in a given area. Under the negotiating text, each claimant state has a very special position within the Regulatory Committee governing the activities in the claimed territory.[6] This is the first time that such a special position has been granted to the claimant states. Such a position exists neither under the Antarctic Treaty nor under CCAMLR. Under those two instruments, all the Consultative Parties—claimant and non-claimant states alike—enjoy an equal status.

Allowing the claimant states to enjoy privileges under a future regime on mineral resources will amount to the recognition of their claims. Legal scholars have the duty to ascertain, before it is too late, whether this acquiescence in territorial claims, which is justified by the necessity of reaching an agreement, is acceptable under international legal principles.

Finally, there are some minor reasons to justify a discussion of territorial claims. These reasons are not connected to international relations among states, but to national relations, both public and private. For example, if a person is born, gets married, or dies in an Antarctic station belonging to one state but in a territory claimed by another state, where is he (or she) born, married, or dead? How, as far as Antarctica is concerned, should we interpret the penal, fiscal, constitutional, and other national rules that adopt different standards according to whether an event takes place on national territory, abroad, or in a *terra nullius*? The answer to these questions will clearly depend on the recognition of the legal basis of territorial claims. This problem will cause greater trouble, for instance, to an Italian judge, who must make a decision by himself, than to an American judge, who may ask the State Department for appropriate advice.[7]

6. *See* Beeby Draft, *supra* note 3, art. XX.

7. Relevant in this respect is Martin v. Commissioner of Internal Revenue, 50 T.C. 9 (1968). The Court ruled that the term "foreign country" in section 1-911-1(b)(7) of the United States Income Tax Regulations could not apply to Antarctica because the United States government did not recognize territorial claims in Antarctica. *See* Martin v. Commissioner of Internal Revenue, 63 AM. J. INT'L L. 141, 141-42 (1969).

II. TRADITIONAL THEORIES INVOKED BY THE CLAIMANT STATES

Having established that a discussion of territorial claims is important, I turn now to the various theories invoked by the claimant states to support their territorial claims in Antarctica.[8] I will provide only an overview of the various theories before attempting to expound a modern way to deal with this old problem.

Between 1908 and 1940, seven states advanced territorial claims in Antarctica. The first claimant state was Great Britain; the last was Chile. The five other claimant states are Argentina, Australia, France, New Zealand, and Norway. Although the claimed territories have different extensions, each territory has a triangular shape with its base on the 60° South parallel (except Great Britain which starts from the 50° South parallel) and its apex at the South Pole. The territories claimed by Argentina, Chile, and Great Britain overlap to some extent. This overlap has been a source of dispute among the three countries on numerous occasions. The territorial claims do not cover the entire continent. A large triangle on the side of the Pacific Ocean, between 90° and 150° West longitude, is not claimed.

The Sector Principle

Due to the triangular shape of the claimed territories, one of the first arguments upon which claimant states based their claims was the "sector principle."[9] Canada first asserted this principle at the beginning of this century regarding the Arctic polar regions. The Soviet Union later maintained the theory.

According to the sector principle, all the states whose territories extend beyond the Arctic Polar Circle should *ipso facto* acquire sovereignty over all polar regions, including land and sea (although the Arctic is mainly sea), situated in a triangle with its apex at the North Pole and its base in a line joining the east-west extremities of the coast of each state. The other three states whose territories extend beyond the Arctic Polar Circle—the United States (with respect to Alaska),

8. A recent, accurate, and complete analysis of the subject can be found in R. WOLFRUM, DIE INTERNATIONALISIERUNG STAATSFREIER RÄUME 36-49 (1984). *See also* Waldock, *Disputed Sovereignty in the Falkland Island Dependencies*, 25 BRIT. Y.B. INT'L L. 311, 321-53 (1948); J.-F. DA COSTA, SOUVERAINETÉ SUR L'ANTARCTIQUE (1958); G. BATTAGLINI, LA CONDIZIONE DELL'ANTARTIDE NEL DIRITTO INTERNAZIONALE 37-162 (1971); Guyer, *The Antarctic System*, *in* 2 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 156-64 (1973); Peterson, *Antarctica: The Last Great Land Rush on Earth*, 34 INT'L ORGANIZATION 377, 391-99 (1980); Boczek, *The Soviet Union and the Antarctic Regime*, 78 AM. J. INT'L L. 835, 840-43 (1984).

9. On the sector principle, see Mouton, *The International Regime of the Polar Regions*, *in* 3 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 243-45 (1962).

Denmark (with respect to Greenland), and Norway—have never sustained the sector principle. These three states, as well as many legal scholars, have objected to the sector principle under the theory of the freedom of the seas and the lack of effective occupation.[10]

In analyzing this dispute, I only wish to raise the question of whether the sector principle is actually applicable to Antarctica. My answer to this question is no, simply because none of the territories of the claimant states extends beyond 60° South latitude.[11] Therefore, the geographical basis of the territorial claims—the base of the triangle—is not a coastal line but only a purely imaginary line. It is the line of the 60° South parallel or, as far as Great Britain is concerned, the 50° South parallel. The sector principle is founded on geography, but the triangle in Antarctica has no geographic base.

The truth is that the sector principle has been upheld in the Arctic mainly for defense and security purposes. The principle is invoked to prevent attacks coming from the other side of the Pole, and perhaps the sector principle has some legal basis for this reason.[12] I, however, cannot reach the same conclusion for Antarctica, not even for the territorial claims of the claimant states situated in the nearest regions, such as Argentina, Chile, New Zealand, and Australia.

The Theory of Propinquity

Another theory advanced to justify the appropriation of territories without effective occupation is the old and very ambiguous theory of contiguity and continuity, also called "propinquity."[13] According to the propinquity theory, the sovereignty acquired over a part of a geographical unit *ipso facto* extends to all parts of the same unit. For instance, the sovereignty over an island belonging to an archipelago would entail sovereignty over the whole archipelago; the sovereignty acquired on the coast would entail sovereignty over all land behind the coast (the "hinterland") up to a natural border.

A few states invoked the concept of contiguity and continuity in the nineteenth century to enlarge their colonial possessions in Africa. (I stress the *colonial* origin of the theory for the reason I will deal with shortly.) The General Act of the Berlin Congo Conference of 1885, however, rejected the invocation of contiguity and continuity by reaffirming the principle of effective occupation.

In any event, it does not matter whether the contiguity and continuity principle is still alive in Africa. The question is whether the

10. *See, e.g.*, M. GIULIANO, 2 DIRITTO INTERNAZIONALE 354 (1983).
11. The Drake Strait between South America and Antarctica is about 700 miles wide.
12. *See* G. BATTAGLINI, *supra* note 8, at 126-29.
13. *See* Wright, *Territorial Propinquity*, 12 AM. J. INT'L L. 519 (1918).

principle is applicable to Antarctica. Here again, the answer is no. What is the geographical unit of each sector claimed? The whole continent and only the continent is a geographical unit. Shall we say, then, that every claimant state, and particularly the first one, could have extended its sovereignty over the whole continent by occupying a very small part of it? The borders between the various claimed sectors are formed by straight lines running along meridians between 60° South latitude and the Pole. Geography, however—the basis for the contiguity and continuity principle—does not tolerate straight lines but follows mountain chains, rivers, and lakes.

The Uti Possidetis *Principle*

The claimant states have also appealed to the priority of discovery and exploitation of some parts of the continent, as well as the doctrine of *uti possidetis*. The *uti possidetis* principle has sometimes been applied in South America. The principle suggests that the newly independent states "inherited" from Spain the borders between the South American states that existed prior to independence.[14]

Who would have inherited from Spain, and what, in Antarctica? Applying the *uti posseditis* principle, Argentina and Chile maintain that they inherited Antarctica from Spain. To support their claim, the two states rely upon the Bull of Pope Alexander the 7th of 1493, which, more or less, gave one half of the world to Spain and the other half to Portugal.[15] Antarctica was situated entirely in that half of the world given to Spain!

The Principle of Effective Occupation

All the principles and theories discussed so far avoid consideration of an undisputable reality, namely, the lack of effective occupation or real settlement by claimant states in Antarctica. The claimant states have tried to demonstrate compliance with the principle of effective occupation by continuously maintaining settlements in Antarctica as large as the natural conditions (e.g., climate and ice) allow. But I seriously doubt whether the claimant states can provide sufficient evidence to establish their claimed effective settlement. The presence of the claimant states in Antarctica has always consisted of scientific stations, which, although quite numerous, only occupy small areas. The only other activity the claimant states have carried out is fishing. Scientific research and fishing, however, do not constitute evidence of a

14. On the *uti possidetis* doctrine, see Fischer, *The Arbitration of the Guatemalan-Honduras Boundary Dispute*, 27 AM. J. INT'L L. 403, 415-16 (1933).

15. The Bull was included in the Tordesillas Treaty concluded by Spain and Portugal in 1494.

permanent settlement. Moreover, states other than claimant states have carried out these activities.

Of course, when claimant states have set up stations, they have also adopted laws and regulations extending their complete jurisdiction over the entire sector claimed. Nevertheless, the effectiveness of such laws and regulations must be demonstrated. At present, the continent remains largely inaccessible. It seems absurd to maintain that state jurisdiction can extend where man cannot arrive.

Some scholars have tried to draw support for the validity of territorial claims in Antarctica from the decision of the Permanent Court of International Justice in the *Eastern Greenland* case.[16] The *Eastern Greenland* opinion addresses the dispute between Denmark and Norway over the sovereignty of Eastern Greenland in the Arctic regions. The Court held that Danish sovereignty over the eastern part of Greenland could not be denied even though the inhabitants of the island (the Eskimo people) did not live there and most of the region in dispute was almost permanently covered by ice.

The decision, however, did not specifically address Denmark's effective occupation of Eastern Greenland. The Court premised its decision on the ground that no states had opposed the Danish claim to the island[17] and that Norway had even recognized the Danish claim in many multilateral and bilateral agreements.[18] Because no states have ever recognized the territorial claims in Antarctica, the *Eastern Greenland* case cannot serve as a relevant precedent.

I have been examining the problem of sovereign claims in Antarctica in a traditional way. I have discussed the applicability to Antarctica of the sector principle, the propinquity theory, and the *uti possedetis* principle. I have also addressed the requirement of effective occupation in Antarctica. My review of the traditional principles concurs with the position of some scholars that the territorial claims in Antarctica lack a strong legal basis.[19]

III. PROPOSED MODERN PRINCIPLES

I now propose to study the territorial claims in Antarctica under a different approach. I doubt that today, in 1985, it is still appropriate

16. Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J., ser. A/B, No. 53, at 22 (Judgment of Apr. 5). On the applicability of the Eastern Greenland award to Antarctica, see Auburn, *Legal Implications of Petroleum Resources of the Antarctic Continental Shelf, in* OCEAN YEARBOOK 500, 504 (1978); R. WOLFRUM, *supra* note 8, at 45; Boczek, *supra* note 8, at 841.

17. Eastern Greenland, *supra* note 16, at 28.

18. *Id.* at 50-53.

19. *See* G. BATTAGLINI, *supra* note 8, at 152-62; M. GIULIANO, *supra* note 10, at 355-57; R. WOLFRUM, *supra* note 8, at 46.

to apply criteria mostly employed by colonial states in acquiring the African continent one century ago. Isn't it possible to draw new criteria from general principles of contemporary international law reflecting the values held by today's international community? I believe this is possible. New principles exist that can and must be applied. Under these contemporary principles, the territorial claims in Antarctica appear even more anachronistic and legally unsound.

The Decolonization Principle

The first principle I would suggest is the decolonization principle. It is true that, in the case of Antarctica, we are not dealing with the subjugation of peoples to an alien domination: Antarctica has no population, except scientists and fishermen, and no alien domination, because scientists and fishermen are not natives of Antarctica. For several reasons, however, the spirit of territorial claims is clearly a colonial one. First, the claimed areas are far from the homeland. Second, no affinity exists between the claimant states and the claimed territories. Third, no substantial reason exists for asserting national jurisdiction in Antarctica other than prestige and appropriation of natural resources. These factors suggest a true colonial situation. Application of the decolonization principle would compel claimant states to abandon their claims just as a colonial power has the duty to free the colony under its domination.

The Principle of Common Heritage of Mankind

Another modern principle applicable to territorial claims in Antarctica is the principle of common heritage of mankind. The common heritage principle does not prevent the *unilateral* exploitation of an area. The principle, however, demands that such exploitation be conducted to the benefit of mankind once an equitable reward of investments is ensured.[20] Under the common heritage principle, both claimant and non-claimant states carrying out activities in Antarctica have the same duty to pursue the interest of the entire international community.[21]

20. *See* Francioni, *supra* note 3 (inferring this conclusion from some views expounded by the Author of this paper on unilateral mining activities in the deep seabed, Conforti, *Notes on the Unilateral Exploitation of the Deep Seabed, in* 4 ITAL. Y.B. INT'L L. 3-19 (1978/79). On the same line of thought, see Treves, *Continuité et Innovation dans les Modéles de Gestion des Ressources Minérales des Fonds Marins Internationaux, in* HAGUE ACADEMY OF INTERNATIONAL LAW, WORKSHOP: THE MANAGEMENT OF HUMANITY'S RESOURCES: THE LAW OF THE SEA 63-83 (1982); Treves, *Seabed Mining and the United Nations Law of the Sea Convention, in* 5 ITAL. Y.B. INT'L L. 22, 27-31 (1980/81).

21. Under the proposed Beeby Draft, the Commission of the future regime on Antarctic mineral resources should, among other functions, "establish measures to ensure participation by the international community in possible benefits derived from the regime."

The Social Function Requirement

Exercising our imagination, it would be possible to find additional principles that invalidate the territorial claims in Antarctica. According to a general principle of law recognized by civilized nations,[22] territorial sovereignty in Antarctica, if tolerated, should be treated in the same way that modern national constitutions (particularly those constitutions adopted after the Second World War) treat private ownership. For example, article 42 of the Italian Constitution recognizes and protects private property. But private property is subject to all the limitations necessary "to ensure its social function." Similarly, article 14, paragraph 2, of the Constitution of the Federal Republic of Germany states that "[p]roperty imposes duties. Its use should also serve the public weal." If we elevate these rules to an international level and apply them to territorial sovereignty in Antarctica, we should maintain that sovereignty in Antarctica must ensure a social function within the international community. This social function requirement is in accord with the common heritage of mankind principle.

CONCLUSION

I will conclude at this point because I would not like my imagination to go too far. The modern principles I have formulated, however, illustrate the course we should take in analyzing territorial claims in Antarctica. These contemporary theories suggest that the claimant states do not enjoy any rights superior to those enjoyed by the other states carrying out activities in Antarctica. The Antarctic Treaty grants privileges to the states that "demonstrate their interest in Antarctica by conducting substantial scientific research activity there."[23] And I believe that this is the only special position that modern legal theories can justify regarding Antarctica.

Beeby Draft, *supra* note 3, art. XIII, para. 1(p). This provision is consistent with the principle of common heritage of mankind if reasonable measures for the benefit of all states are actually taken.

22. *See* Statute of the International Court of Justice, art. 36, para. 1, 1977 U.N.Y.B. 1190.

23. Antarctic Treaty, Appendix, *infra*, art. IX, para. 2.