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THE ANTARCTICA QUESTION IN THE UNITED NATIONS

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I. INTRODUCTION

The question of Antarctica was discussed during two rounds of United Nations debate in 1983 and 1984, as well as in written observations submitted by governments. The debate so far has identified and clarified the principal issues surrounding Antarctica. As a result, international interest in and knowledge of the continent and its legal regime have expanded to an extent that no one could have imagined three years ago.

This Article will briefly describe the main trend of the Antarctica debate in the U.N. since 1982. Several issues were raised by countries which were outside the Antarctic Treaty system,[1] and their arguments were vigorously countered by the Treaty parties and other Treaty supporters. Some practical steps are offered that may help to narrow the gap between the two groups of states.

II. THE UNITED NATIONS DEBATE ON ANTARCTICA

A. THE MALAYSIAN INITIATIVE

The question of Antarctica was presented to the United Nations General Assembly on September 29, 1982, by the Prime Minister of Malaysia, Dr. Mahathir Bin Mohamad. In his address, the Prime Minister stated that, having successfully concluded the Third Conference on the Law of the Sea, the United Nations should focus its attention on Antarctica—the largest land area remaining on earth without natives or settlers. Stating that this area belonged to the international community, Dr. Mahathir suggested that the United Nations administer the area or that "the present occupants" act as trustees for the

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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 Treaty appears in the Appendix, *infra*.

nations of the world.[2] At the signing session of the U.N. Convention on the Law of the Sea at Montego Bay, Jamaica, on December 9, 1982, the Foreign Minister of Malaysia appealed to the international community to turn its attention to Antarctica—"another area of common interest . . . where immense potentialities exist for the benefit of all mankind."[3]

Malaysia promoted this idea actively at the non-aligned countries summit in New Delhi in March, 1983. Despite resistance by some of the participants, the summit included two paragraphs on Antarctica in its Economic Declaration. One of the paragraphs declared that the heads of State or Government, "in view of increasing international interest in Antarctica, considered that the United Nations at the thirty-eighth session of the General Assembly should undertake a comprehensive study on Antarctica, taking into account all relevant factors, including the Antarctic Treaty, with a view to widening international cooperation in the area."[4]

With the endorsement of the non-aligned countries, Malaysia decided to place the question of Antarctica on the agenda of the thirty-eighth session of the General Assembly, and announced that intention at a meeting of the non-aligned countries in New York on July 13, 1983.[5] On August 11, Malaysia, joined by Antigua and Barbuda, formally requested that the question be inscribed on the agenda of the General Assembly.[6]

During the debate on this request in the General Committee at the beginning of the thirty-eighth General Assembly, two lines of opinion emerged. Malaysia and Antigua and Barbuda, supported by Singapore, the Philippines, Thailand, Pakistan, Algeria, Sierra Leone, and Guyana, among others, stressed the need for the General Assembly to take up the question of Antarctica. However, the Consultative Parties of the Antarctic Treaty[7] opposed discussion of the question in

2. 37 U.N. GAOR (10th mtg.) at 17, U.N. Doc. A/37/PV.10 (1982)

3. 17 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA (UNCLOS III) O.R. 118 (signing session).

4. U.N. Doc. A/38/132 (1983), at sec. III, paras. 122-23.

5. Statement by Malaysian Ambassador Zainal Abidin Sulong, Plenary Meeting of the Non-Aligned Countries, New York (July 13, 1983).

6. 38 U.N. GAOR Annex (Agenda Item 8) (unpublished), U.N. Doc. A/38/193 (1983). This was not the first time that the question of Antarctica was proposed as an item for the General Assembly's agenda. In 1956, and again in 1958, India made such proposals. *See* 11 U.N. GAOR U.N. Doc. A/3118 (1956); 13 U.N. GAOR U.N. Doc. A/3852 (1958). India withdrew the proposal, however, before the agenda was adopted.

7. Antarctic Treaty, Appendix, *infra*. Among the parties to the Antarctic Treaty, Argentina, Australia, Belgium, Brazil, Chile, China, France, India, Japan, New Zealand, Norway, South Africa, U.S.S.R., the United Kingdom, the United States, and Uruguay form a group called Consultative Parties, which periodically consult together on matters of common interest, consider and recommend to their governments "measures in furtherance of the principles and objectives of the Treaty." *Id.* art. 9. For the decision-making

the General Assembly, pointing out in particular the validity and merits of the Treaty system. Those Consultative Parties that were General Committee members jointly chose not to participate in the decision whether to inscribe the question as a new item on the agenda. Thus, the General Committee recommended "without a vote" that the Antarctica issue be inscribed. The Plenary made a formal decision to that effect and referred the item to the First Committee.[8]

B. Discussions in the 38th and 39th Sessions

The First Committee discussed the question of Antarctica in five meetings, beginning on November 28, 1983, and adopted without vote a resolution: the General Assembly would request the Secretary-General "to prepare a comprehensive, factual and objective study on all aspects of Antarctica, taking fully into account the Antarctic Treaty system and other relevant factors," to seek the views of all Member States in the preparation of the study, and to report to the thirty-ninth session of the General Assembly in 1984. The resolution also intended the Antarctica question to be included in the agenda of the thirty-ninth session.[9] The Plenary adopted the resolution on December 15, 1983.[10]

The First Committee debate during the thirty-eighth General Assembly was characterized by a clear division of views between the Malaysia group and the Consultative Parties. Malaysia and a number of other third world countries criticized the Antarctic Treaty system, advocated the management of the continent by the international community, and urged the application of the "common heritage of mankind" concept[11] to the area. The Consultative Parties and certain others[12] stressed the achievements, advantages, and openness of the Treaty system and pointed out the dangers of either revising the Treaty or establishing an alternative regime to replace it.[13]

After the December resolution was adopted, Malaysia advanced the idea of a special committee of the General Assembly to consider in detail the study to be prepared by the Secretary-General. As it had in

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authority of the Consultative Parties under the Treaty, *see infra* notes 43-57 and accompanying text.

8. 38 U.N. GAOR (Agenda Item 8) at 245, U.N. Doc. A/38/47 (1983). *See also* U.N. Doc. A/38/646, para. 2.

9. U.N. Doc. A/C.1/38/L.80 (1984).

10. G.A. Res. 38/nn, 38 U.N. GAOR Supp. (No. 47) at 69, U.N. Doc. A/38/47 (1984). The draft resolution was co-sponsored by Antigua and Barbuda, Bangladesh, Malaysia, Pakistan, the Philippines, Singapore, Sri Lanka, and Thailand.

11. *See infra* notes 76-85 and accompanying text.

12. *See infra* notes 86-88.

13. 38 U.N. GAOR First Comm. (42d-46th mtg.), U.N. Doc. A/C.1/38/PV.42-46 (1983) [hereinafter cited as 38 First Comm. (42d-46th mtg.)].

the previous year, Malaysia attempted to muster support for that idea first in the non-aligned group during 1984. However, mainly due to the negative position of India, the chairman state of the non-aligned group, and Argentina, the group failed to endorse the idea.[14] The ministerial meeting of the non-aligned countries, held during the thirty-ninth General Assembly, thus merely adopted a short statement welcoming the consensus adoption of Resolution 38/nn and expressing hope that the Secretary-General's study and debate at the thirty-ninth session would contribute to expanded international cooperation regarding Antarctica.

On November 28, 1984, the First Committee resumed its discussion of Antarctica, again devoting five meetings to the subject.[15] The First Committee had before it the Secretary-General's study[16] which consisted of analyses of the physical, legal, political, economic, and scientific aspects (Part One) and the views of fifty-four states gathered by the Secretary-General (Part Two). The comprehensive study was unanimously praised during the debate, but opinions on how to follow up the study were again sharply divided.

On one hand, Malaysia and certain other non-aligned countries presented the idea of an *ad hoc* committee to examine the Secretary-General's study in detail and to make recommendations for measures to be taken by the General Assembly. This group of countries further expressed their dissatisfaction with the Antarctic Treaty system, as they had done during the thirty-eighth session debate. The general tone, however, became more realistic: while criticisms during the previous session had been based on misinformation, misunderstanding, or suspicion, the critics at the thirty-ninth session more readily admitted the achievements of the Treaty and tended to advocate a modification of the Treaty rather than press for an alternative or parallel regime.[17] On the other hand, the Consultative Parties continued to fully endorse the adequacy of the Treaty system.

After intensive negotiations to produce a consensus resolution during the thirty-ninth session, the two groups finally agreed that since there was insufficient time available for governments to consider carefully the Secretary-General's study, no specific action was to be taken by the General Assembly during the session. A draft resolution[18] sub-

14. India acceded to the status of a Consultative Party under the Antarctic Treaty in September, 1984. Argentina is an original Consultative Party.

15. 39 U.N. GAOR First Comm. (50th-55th mtg.), U.N. Doc. A/C.1/39/PV.50-55 (1984) [hereinafter cited as 39 First Comm. (50th-55th mtg.)].

16. *Question of Antarctica: Report of the Secretary-General*, 39 U.N. GAOR (Agenda Item 66), U.N. Doc. A/39/583 (1984) [hereinafter cited as *Antarctica Study*].

17. *See generally* 39 First Comm. (50th-55th mtg.), *supra* note 15.

18. Draft Res., 39 First Comm., U.N. Doc. A/C.1/39/L.83 (1984).

mitted by Malaysia and several other states merely expressed the General Assembly's appreciation to the Secretary-General for his study and requested the inclusion of the Antarctic Treaty System in the agenda of its fortieth session.[19] The First Committee approved the resolution without a vote, and it was likewise adopted by the General Assembly.[20]

III. PRINCIPAL ISSUES RAISED IN THE ANTARCTICA DEBATE

The basic difference in opinion on the question of Antarctica, evident from the U.N. debate, stimulated identification and discussion of specific issues. These issues can be divided into three broad categories for purposes of analysis: territorial claims of sovereignty, adequacy of the Treaty regime, and proposed international management of Antarctica.

A. TERRITORIAL CLAIMS OF SOVEREIGNTY

Discoveries and exploration began in Antarctica in the nineteenth century by scientists from several countries. Since the turn of the century, seven states—Australia, Argentina, Chile, France, New Zealand, Norway, and the United Kingdom—have made territorial claims on the continent. Such claims cover approximately eighty-five percent of the area. Claimant countries have invoked discovery, occupation, and the exercise of administrative power as bases in international law for their claims. These countries have also raised geographical proximity and the "sector principle" to justify their claims.[21]

Territorial claims on Antarctica are problematic. For example, the areas claimed by Argentina, Chile, and the United Kingdom partly overlap. Although the United States and the Soviet Union have refrained from making territorial claims, they maintain that they each have a basis for such a claim. Moreover, a number of other states refuse to recognize territorial claims by any country.[22]

The complicated and confusing legal status of Antarctica caused disputes, particularly after World War II, that obstructed the smooth conduct of scientific research and, occasionally, even threatened to

19. Malaysia explained that it would not press the idea of setting up an *ad hoc* committee at that session in view of opposition and reservations it had encountered. 39 First Comm. (50th mtg.), *supra* note 15, at 16.

20. G.A. Res. 39/152, 39 U.N. GAOR Supp. (No. 51) at 94, U.N. Doc. A/39/51 (1984).

21. For a complete discussion of territorial claims of sovereignty, see generally Conforti, *Territorial Claims in Antarctica: A Modern Way to Deal with an Old Problem*, 19 CORNELL INT'L L.J. 249.

22. *Id.*

develop into more serious conflicts. This situation was eventually stabilized by a *modus vivendi* created during the International Geophysical Year of 1957-58 (IGY). The seven claimant states plus Belgium, Japan, South Africa, the Soviet Union, and the United States agreed to cooperate closely in research activities.[23]

These countries took a longer-lasting measure to prevent a recurrence of disputes by confirming provisions of the Antarctic Treaty in 1959. In essence, the twelve states agreed to preserve the *status quo ante*: nothing in the Treaty would prejudice the positions of the claimant states, the states which maintain that they have a basis for claims, or states that do not recognize territorial claims.[24] The Treaty also provides that scientific personnel and observers sent to any part of Antarctica under the Treaty are subject only to the jurisdiction of the Party-nation of which they are nationals.[25] During the recent debate, some developing countries denied the validity of the territorial claims from the viewpoint of decolonization; others pointed out the defects in the Treaty regime's treatment of territorial claims.

In regard to the validity of territorial claims, Pakistan argued that such claims were "a vestige of the colonial era."[26] In today's world, they asserted, where decolonization has been completed, "the colonial premise on which these claims were based has been rejected."[27] Ghana also rejected the "notions of discovery, military superiority, and territorial contiguity," upon which claimants allegedly relied, as unacceptable vestiges of colonialism.[28] Zambia took the rejection of colonialism further, arguing that it was "only logical" that the Antarctic resources should now come under "common heritage governance."[29] Malaysia made a similar attack on territorial claims by stating that Antarctica does "not legally belong to the discoverers, just as the colonial territories do not belong to the colonial powers."[30] It argued that, since there were no native people, the continent, "like the seas and the sea-bed, . . . belong[s] to the international community."[31]

Putting aside the validity of territorial claims, critics also focused on the Treaty's handling of territorial claims. Sri Lanka, Tunisia, and

23. *See* Francioni, *Legal Aspects of Mineral Exploration in Antarctica*, 19 CORNELL INT'L L.J. 163, n.1 (1986) (*citing* BULLIS, THE POLITICAL LEGACY OF THE INTERNATIONAL GEOPHYSICAL YEAR [1973]).

24. *See* Antarctic Treaty, Appendix, *infra*, art. 4.

25. *Id.*, art. 8.

26. 39 First Comm. (54th mtg.), *supra* note 15, at 18.

27. *Antarctica Study*, *supra* note 16, part III, vol. III, at 32.

28. 38 First Comm. (43d mtg.), *supra* note 13, at 24; 39 First Comm. (53d mtg.), *supra* note 15, at 53.

29. 38 First Comm. (46th mtg.), *supra* note 13, at 6. *See infra* notes 76-91 and accompanying text.

30. 37 U.N. GAOR plenary (10th mtg.), U.N. Doc. A/37/PV.18 (1982), at 17.

31. *Id.*

Oman, for example, took the position that the Treaty has not settled the issue of territorial claims; and there is no guarantee that further disputes will not arise, perhaps through denunciation of the Treaty by a claimant party.[32] Malaysia argued that the Treaty has merely postponed the issue of territorial claims, leaving a vacuum on the question of resources and uncertainty on the issue of legal jurisdiction.[33]

For example, Pakistan and Malaysia pointed out the uncertainty of whether the claimant states could legally establish exclusive economic zones (EEZs) in the areas they claimed.[34] Similarly, Tunisia expressed the concern that serious conflict might arise over exploitation of the sea south of 60° south latitude—a vast area where sovereignty claims were "frozen."[35] Pakistan and the Philippines also suggested that the jurisdiction of the International Seabed Authority, under the U.N. Convention on the Law of the Sea,[36] might extend to the sea area concerned.[37]

In response to these criticisms, the claimant states reiterated the validity of their claims under international law.[38] Furthermore, the Consultative Parties emphasized that article 4 was one of the Treaty's most well thought-out and delicately-crafted provisions. During the Treaty's life-time, (i.e., indefinitely), article 4 removes the possibility of international dispute over sovereignty questions. Absent such a provision, reassertions of territorial claims or fresh claims could have been made, reintroducing instability in the Antarctic region.[39] Non-Consultative Parties also stressed the advantages of the Treaty system in terms of stability: Sweden maintained that the Treaty guaranteed that the issue of territorial claims would not be raised again.[40]

The position of the Consultative Parties regarding the question of EEZ is not uniform. Some Consultative Parties, especially the non-claimant states, take the view that the article 4 ban on enlargement of existing claims is incompatible with the establishment of an EEZ.[41]

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32. *See* 39 First Comm. (50th mtg.), *supra* note 15, at 42 (Sri Lanka); *id.* (54th mtg.) at 31 (Tunisia); *id.* (55th mtg.) at 3-5 (Oman).

33. *Antarctica Study*, *supra* note 16, part II, vol. II, at 110.

34. 38 First Comm. (44th mtg.), *supra* note 13, at 9 (Pakistan); 39 First Comm. (50th mtg.), *supra* note 15, at 27 (Malaysia).

35. 39 First Comm. (54th mtg.), *supra* note 15, at 31. *See generally* Conforti, *supra* note 21.

36. U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261 (1982).

37. *See* 39 First Comm. (54th mtg.), *supra* note 15, at 18; *Antarctica Study*, *supra* note 16, part II, vol. III, at 45.

38. *See generally Antarctica Study*, *supra* note 16, part II (views of States).

39. *See* Letter (Oct. 5, 1983) from Permanent Representative of Australia to Secretary-General, U.N. Doc. A/38/439/Rev.1 (sent on behalf of the Consultative Parties).

40. 39 First Comm. (53d mtg.), *supra* note 15, at 33.

41. *See Antarctica Study*, *supra* note 16, part II, vol. II, at 99. For example, Italy felt that the article 4 ban could "act as a brake on nationalistic claims, particularly with regard

The claimant states generally reserve the right to proclaim such zones, though none have actually done so.[42]

B. Adequacy of the Treaty Regime

1. The "Exclusivity" of the Treaty Regime

Aside from the handling of territorial claims, the exclusive nature of the Antarctic Treaty regime was frequently criticized. However, the Antarctic Treaty and all related conventions are open to all states for accession. Twenty states have acceded to the Treaty since 1961.[43] General objections to exclusivity, rooted in misunderstanding, ignorance, or groundless perceptions, were thus overcome early in the debate.

A more substantial attack, however, has been made against decision-making under the Antarctic Treaty. Decision-making power is conferred upon the sixteen Consultative Parties—the twelve original parties to the Treaty and the four states that have acceded to the Treaty and have acquired the status of Consultative Parties.[44] Consultative Party status is conferred through unanimous recognition by existing Consultative Parties that the acceding nation has conducted substantial scientific research on the continent. Non-Consultative Parties do not enjoy decision-making power. Current negotiations on a mineral resources regime are also restricted to the Consultative Parties as far as decision-making is concerned.

During the debates, Malaysia took issue with the distinction between Consultative and Non-Consultative Parties, contending that it was undemocratic and went "against the grain of current international reality."[45] According to Malaysia, the requirement of substantial scientific research activities in Antarctica goes beyond the means of most states.[46] Malaysia also questioned "whether any group of countries should confer upon itself the moral and legal right to self-elected determination or management of Antarctica."[47]

Other developing countries expressed dissatisfaction with the requirements to become a Consultative Party, asserting that they only benefit developed countries and thus render the system unfair, unjust,

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to marine resources" and would be inconsistent with establishment of exclusive economic zones. *See* Antarctica Treaty, Appendix, *infra*, art. 4.

42. *Antarctica Study*, *supra* note 16, part I, at 27.

43. *Id.* at 22.

44. *See generally id.* at 28-31.

45. *See id.*, part II, vol. II, at 110; 38 First Comm. (42d mtg.), *supra* note 13, at 16-17.

46. *Id.* at 17.

47. 38 First Comm. (42d mtg.), *supra* note 13, at 19.

and undemocratic.[48] Peru, a Non-Consultative Party, requested that Non-Consultative Parties be given expanded participation in the mineral resource negotiations.[49]

The Consultative Parties maintained that the decision-making system under the Treaty was valid under international law, as well as just, reasonable, and effective. India supported special categorization for countries that have conducted substantial exploration in the area and that were able to contribute effectively to ongoing scientific, technical, and other activities as an "optimally effective and feasible arrangement."[50] New Zealand also considered the Consultative/Non-Consultative distinction valid since a party establishing a scientific program in Antarctica "immediately assumes a range of practical, financial, and legal responsibilities relating to its activities."[51] The effective discharge of such responsibilities would require regular consultation and cooperation with other countries carrying out similar activities. Likewise, Australia contended that the two-tier structure of decision-making was sensible and more workable than a system allowing full participation by all.[52] According to Chile, the system is "just and equitable" because the Consultative Parties have done much more than others in Antarctica, where the uniqueness of the continent, the fragility of the ecosystem, and the harshness of the environment require a certain degree of knowledge and expertise.[53]

The United Kingdom pointed out that decisions of the Consultative Parties "virtually always concerned the undertaking of some obligations, i.e., [they involved] some curtailment, in the interest of all States active in the region, in the freedom of Consultative Parties to act as they chose."[54] Because of this conduct-restraining effect, no one outside the decision-making process was disadvantaged. The United Kingdom concluded that the existing decision-making system was "right" and "accords with the sense of natural justice and with international law."[55] The United Kingdom noted that decision-making is currently based on consensus in order to avoid international discord. They argued that it would "fly in the face of reason" to allow decision

48. *See, e.g.*, 38 First Comm. (46th mtg.), *supra* note 13, at 9 (Bangladesh); *id.* (44th mtg.) at 14 (Sri Lanka); 39 First Comm. (54th mtg.), *supra* note 15, at 41 (Zambia); *id.* at 18 (Pakistan); *id.* (50th mtg.) at 43-45 (Sri Lanka); *Antarctica Study*, *supra* note 16, part III, vol. II, at 136 (Zambia); 38 U.N. GAOR Gen. Comm. (2d mtg.) (Agenda Item 141), para. 43, U.N. Doc. A/BUR/38/SR.2, (1983) (Singapore) (as corrected by General Committee, Sessional Fascicle 5).

49. 39 First Comm. (54th mtg.), *supra* note 15, at 7.

50. *Antarctica Study*, *supra* note 16, part II, vol. II, at 89.

51. 38 First Comm. (42d mtg.), *supra* note 13, at 43.

52. 39 First Comm. (55th mtg.), *supra* note 15, at 11.

53. 38 First Comm. (42d mtg.), *supra* note 13, at 31.

54. 39 First Comm. (52d mtg.), *supra* note 15, at 26.

55. *Id.* at 27.

to be blocked by countries with no activity in the continent and no ability to effectively discharge ensuing obligations.[56] Finally, Australia and India stressed that the existing system was not unique, but could also be found in the United Nations and other international institutions and conventions.[57]

2. *"Secrecy" of Meeting and Information Sharing*

Related to the criticisms of treaty exclusivity are complaints of the alleged "secrecy" of Consultative Party meetings—especially those on mineral resources—and the failure to disseminate information about such meetings to the international community at large. Because Antarctica is a matter of interest to the entire international community, the whole community has the right to be informed of the meetings and other activities relating to Antarctica.

At the extreme, Antigua and Barbuda alleged that all regular meetings of the Consultative Parties were held behind closed doors. Due to secret meetings, "not only other nations but their own people were denied any knowledge of the decisions" made.[58] Moreover, the world had "a right to know" about the meetings, the decisions made, and the reasons for them.[59] Singapore similarly characterized the work of the Consultative Parties as "cloaked with secrecy" to assert that the international community had an interest in ensuring that the environmental impact of krill harvesting and oil and gas exploitation received sufficient consideration.[60] Malaysia and Zambia likewise stated that the Consultative Parties were engaged in secret negotiations to establish a new, exclusive regime on mineral resources development in the area.[61] Several States called for much freer and wider dissemination of information relating to activities on the continent.[62] Bangladesh and Jamaica suggested that some kind of machinery be set up to secure such dissemination.[63]

The Consultative Parties explained that, although they were conducting part of their negotiations confidentially, confidentiality was

56. *Id.* at 26.

57. *See* 39 First Comm. (55th mtg.), *supra* note 15, at 11; *Antarctica Study*, *supra* note 16, part II, vol. I, at 88 (Australia); *id.* vol. II at 89 (India).

58. 38 First Comm. (42d mtg.), *supra* note 13, at 6.

59. *Id.*

60. 38 U.N. GAOR Gen. Comm. (2d mtg.) (Agenda Item 141), paras. 43-44, U.N. Doc. A/BUR/38/SR.2 (1983) (as corrected by General Committee, Sessional Fascicle 5).

61. 38 First Comm. (42d mtg.), *supra* note 13, at 19 (Malaysia); 39 First Comm. (54th mtg.), *supra* note 15, at 41 (Zambia).

62. *See, e.g.*, 38 First Comm. (42d mtg.), *supra* note 13, at 18 (Malaysia); *id.* at 3 (Bhutan); *id.* (43d mtg.) at 7 (Indonesia); *Antarctica Study*, *supra* note 16, part II, vol. III, at 53 (Singapore).

63. *Antarctica Study*, *supra* note 16, part II, vol. I, at 92 (Bangladesh); 38 First Comm. (45th mtg.), *supra* note 13, at 29 (Jamaica).

something quite different from secrecy. A certain degree of confidentiality, unusual in the negotiation process, was often essential to secure reconciliation of differing views and approaches. Furthermore, the reports of Consultative Party meetings, containing decisions and recommendations, had always been made public.[64] Greater efforts to disseminate information were being made as global interest in the questions of Antarctica became stronger. Finally, Non-Consultative Parties could now observe official meetings of Consultative Parties, including those on the mineral resources regime, and have their views reflected in the decision-making process.

3. *Preservation of the Environment*

It is well known that Antarctica's environment is extremely fragile and that any major change in Antarctica's environment could have an unpredictable impact on the environment and climate in other parts of the globe.[65] Critics of the Antarctic Treaty have expressed concern that the environment might not be sufficiently protected under that system. During the debates, Malaysia criticized the lack of a centralized reviewing body in charge of environmental questions. Currently, enforcement responsibility is left to each State.[66] Indirectly attacking the Treaty system, Nigeria suggested a comprehensive measure to replace the current "self-imposed constraints of the Consultative Parties, which are no more than voluntary codes of conduct."[67] Ghana also called for a "centralized, professional agency such as an Antarctic Environmental Protection Agency" under United Nations auspices.[68]

The Consultative Parties countered these arguments by stressing that environmental protection had been one of the areas of greatest importance from the inception of the Treaty. Approximately seventy recommendations on environmental protection have been adopted by the Consultative Parties since 1961.[69] Sweden, a Non-Consultative Party, felt that the Treaty system, consisting of binding obligations as well as recommendations, formed a sound basis for the efficient protection of Antarctic nature.[70]

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64. *See, e.g.*, 38 First Comm. (44th mtg.), *supra* note 13, at 24-25 (United Kingdom); *id.* (42d mtg.) at 44 (New Zealand); *id.* (45th mtg.) at 18 (Australia).

65. *See generally* Joyner, *Protection of the Antarctic Environment: Rethinking the Problems and Prospects*, 19 CORNELL INT'L L.J. 259 (1986).

66. *See* 38 First Comm. (42d mtg.), *supra* note 13, at 18.

67. 39 First Comm. (53d mtg.), *supra* note 15, at 18-20.

68. *Antarctica Study*, *supra* note 16, part II, vol. II, at 83.

69. *See, e.g.*, *id.* at 104 (Japan); 38 First Comm. (42d mtg.), *supra* note 13, at 42 (New Zealand); 39 First Comm. (53d mtg.), *supra* note 15, at 32 (New Zealand); 38 First Comm. (43d mtg.), *supra* note 13, at 15-16 (U.S.S.R.); *id.* (45th mtg.) at 5 (United States).

70. 39 First Comm. (53d mtg.), *supra* note 15, at 32.

As an example of important efforts made under the Treaty system, New Zealand and Norway referred to the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR).[71] That unique Convention adopted the "ecosystem approach" that treats the living resources in the ocean south of the Antarctic Convergence as one single system and has been hailed widely as a landmark in international environmental law.[72]

4. *Question of South African Participation*

South Africa has actively engaged in scientific research in Antarctica.[73] As an original party to the Antarctic Treaty, South Africa is legally entitled to maintain its consultative status under the Treaty. Reflecting the anti-apartheid drive in the United Nations, however, a number of African and other third world States have argued that South Africa does not deserve to keep its status because its racial policy and related actions are contrary to the purposes of the Treaty and flout international law. South Africa should thus be expelled from the consultative group.[74] No Treaty party attempted to rebut this argument, probably in order not to provoke unnecessary debate, which would inevitably be of a highly political nature.

C. PROPOSED INTERNATIONAL MANAGEMENT OF ANTARCTICA

Commentators critical of the current regime on Antarctica have analogized developments regarding outer space and the deep seabed to Antarctica, arguing that the concept of "common heritage of mankind" should be applied to the continent and its resources as well.[75] Pakistan and Bangladesh maintained that the absence of a native population in Antarctica, the fragility of its ecology, and the possible existence of important mineral deposits justify the establishment of a global regime on Antarctica on the basis of the "common heritage of

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

72. *See* 38 First Comm. (42d mtg.), *supra* note 13, at 42 (New Zealand); *id.* (43d mtg.) at 3 (Norway); *see also* Joyner, *supra* note 65.

73. *See Antarctica Study*, *supra* note 16, part II, vol. II, at 54-69.

74. The representative of Sierra Leone, among others, made a statement to this effect on behalf of the African Group of the First Committee. *See* 38 First Comm. (46th mtg.), *supra* note 13, at 12. Sierra Leone, again, on behalf of the African Group, further submitted an amendment to the draft Resolution tabled by Malaysia to insert a preambular paragraph which reads: "*Concerned* that the apartheid regime of South Africa has been allowed to remain a party to the Antarctic Treaty." U.N. Doc. A/C.1/38/L.84 (1984). This amendment, however, was withdrawn before being put to a vote because of the difficult negotiation that had been necessary to reach a consensus on the Malaysian draft.

75. *See infra* notes 80-82 and accompanying text; *see generally* Francioni, *supra* note 23 (applying the "common heritage of mankind" concept to mineral exploration in Antarctica).

mankind" principle.[76] To Zambia, the continent's resources should logically be managed under "common heritage governance" because an important concept evolving out of the demise of colonialism was the obligation to share the wealth and resources "of such an uninhabited continent as Antarctica."[77]

In July of 1985, at Addis Ababa, the heads of State and Government belonging to the Organization of African Unity (OAU) adopted a resolution declaring Antarctica "to be [the] common heritage of mankind" and called upon OAU members to take appropriate steps at the United Nations "to seek the recognition of Antarctica as the common heritage of mankind."[78] Although most arguments in the United Nations called for future application of the "common heritage of mankind" concept to the continent, some states—e.g., Ghana, the Philippines, Tunisia, and Thailand—contended that Antarctica and its resources were already part of such "common heritage."[79]

The implications and specific contents of the "common heritage of mankind" concept have yet to be fully clarified with respect to Antarctica. However, suggestions based on experience with outer space,[80] celestial bodies,[81] and the deep seabed[82] included the following elements:[83]

(1) the non-appropriation by any nation of any part of Antarctica and its resources;
(2) the joint management of Antarctica and its resources by the international community;
(3) the sharing of benefits by all mankind;

76. *See* 38 First Comm. (44th mtg.), *supra* note 13, at 10 (Pakistan); 39 First Comm. (54th mtg.), *supra* note 15, at 51 (Bangladesh); *Antarctic Study*, *supra* note 16, part II, vol. I, at 92 (Bangladesh).

77. 38 First Comm. (46th mtg.), *supra* note 13, at 6; 39 First Comm. (54th mtg.), *supra* note 15, at 42.

78. *See Cooperation Between the United Nations and the Organization of African Unity*, 40 U.N. GAOR (Agenda Item 25) at 73, U.N. Doc. A/40/666 (1985) for the text of the OAU Council of Ministers' resolution on the question of Antarctica, which was subsequently endorsed by the summit-level meeting.

79. *See* 38 First Comm. (43d mtg.), *supra* note 13, at 21, 24 (Ghana); 39 First Comm. (53d mtg.), *supra* note 15, at 66 (The Philippines); 38 First Comm. (45th mtg.), *supra* note 13, at 3 (Tunisia); *Antarctica Study*, *supra* note 16, part II, vol. III, at 80 (Thailand).

80. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

81. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, *opened for signature* Dec. 5, 1979, U.N. Doc. A/34/664, *reprinted in* 18 I.L.M. 1934 (1979) (*entered into force* July 11, 1984).

82. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, art. 136, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261 (1982) ("The Area and its resources are the common heritage of mankind").

83. *See Antarctica Study*, *supra* note 16, part II, vol. III, at 138 (Zambia). For a slightly different formulation of the elements, see Joyner, *Antarctica and the Common Heritage of Mankind*, Paper delivered at the American Society of International Law, 79th Annual Meeting, April 25, 1985.

(4) the use of the area and its resources exclusively for peaceful purposes; and
(5) the preservations of resources for use also by future generations.

Some states proposed that the U.N. or another international body manage the continent.[84] Others suggested that the U.N. should consider taking concrete steps for establishing a new regime or body to manage Antarctica.[85] Antigua and Barbuda even drafted an outline of the new body to be established.[86]

The Consultative Parties and several other states expressed strong objections from the *de lege lata* and *de lege ferenda* viewpoints, and pointed out that the analogies to the outer space and deep seabed regimes were not in order. Claimant states argued that seven countries had made sovereignty claims to parts of Antarctica, exercised their administrative powers, conducted scientific research activities, and in some cases kept groups of settlers in Antarctica. The area therefore could not be regarded as *res nullius*, situated outside the national jurisdiction of any state.[87]

A number of Consultative and Non-Consultative Parties also emphasized that the existing legal regime on Antarctica, which conforms to international law and the United Nations Charter, had been administered successfully for a quarter of a century. The situation thus differed fundamentally from that of outer space or the deep seabed, where there had been a "legal vacuum" until the international community recently created a new regime.[88] Australia explained that the "common heritage of mankind" embodied a developmental purpose. Since this purpose has never been dominant in Antarctica, where the environment is extremely vulnerable to the activities of man, they argued that it would not be appropriate to apply the concept to Antarctica.[89]

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84. *See, e.g.*, 38 First Comm. (44th mtg.) *supra* note 13, at 16 (Libya); *id.* (46th mtg.) at 6 (Zambia); 39 First Comm. (53d mtg.), *supra* note 15, at 51 (Ghana); *id.* at 56 (Cameroon); *id.* (54th mtg.) at 53-55 (Bangladesh); *Antarctica Study*, *supra* note 16, part II, vol. IV, at 135 (Yugoslavia).

85. 38 First Comm. (42d mtg.), *supra* note 13, at 20 (Malaysia); 39 First Comm. (50th mtg.), *supra* note 15, at 11 (Malaysia); *id.* (54th mtg.) at 21 (Pakistan).

86. *See* 39 First Comm. (50th mtg.), *supra* note 15, at 6-7; *Antarctica Study*, *supra* note 16, part II, vol. I, at 3.

87. *See* 38 First Comm. (45th mtg.), *supra* note 13, at 16 (Australia); *Antarctica Study*, *supra* note 16, part II, vol. I, at 90 (Australia); 39 First Comm. (52d mtg.), *supra* note 15, at 53-55 (France); *id.* (53d mtg.) at 13-15 (Argentina); *Antarctic Study*, *supra* note 16, part II, vol. II, at 71 (German Democratic Republic).

88. *See, e.g.*, 38 First Comm. (42d mtg.), *supra* note 13, at 28 (Chile); *id.* (45th mtg.) at 21 (Belgium); *id.* (46th mtg.) at 4 (Argentina); *Antarctic Study*, *supra* note 16, part II, vol. II, at 30-31, 71, 99 (Chile, German Democratic Republic, and Italy); *id.*, part II, vol. I, at 90 (Australia); 39 First Comm. (52d mtg.), *supra* note 15, at 53-55 (France); *id.* (53d mtg.) at 13-15 (Argentina).

89. *See Antarctica Study*, *supra* note 16, part II, vol. I, at 90.

Finally, the Consultative Parties explained that the purpose of the mineral resource negotiations was never to monopolize the resources among the Parties themselves. The main motive was to secure the smooth operation of resource development, if and when it became feasible, without inflicting adverse consequences on the environment. Therefore, the Consultative Parties expect that the future system will be open to all states, just like CCAMLR,[90] and managed for the benefit of all mankind.[91] The current negotiations also have the purpose of preventing future conflict between states, which could conceivably be triggered by a discovery of important resources.[92]

IV. CONCLUSIONS

Unfortunately, the debate at the United Nations over Antarctica has sometimes evoked excessive political and emotional arguments. A great many of the criticisms, especially at the early stages of the Antarctica debate, were apparently based on misunderstandings or a lack of information regarding Antarctica and the Treaty system. The issues were clarified in the second round of the debate, particularly with the help of the comprehensive study of the Secretary-General. As a result of the United Nations debate, interest in the Antarctic regime widened among academic circles, offering an opportunity for scholars to re-evaluate the Treaty system as a whole. In this sense, the Malaysian initiative may be regarded as a contribution to the international community.

Today, two different schools of thought exist on certain fundamental issues regarding Antarctica. Despite the views of the Consultative Parties that the debate has exhausted the issues that can be profitably addressed, it appears that the United Nations is likely to continue its discussion of the question of Antarctica.[93] The strong interest of its initiator and its supporters is evidenced by the declaration adopted by the ministerial conference of the non-aligned countries held at Luanda, Angola, in early September, 1985.[94]

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90. *See* CCAMLR, *supra* note 71, arts. III, VII.

91. *See, e.g., Antarctica Study, supra* note 16, part II, vol. I, at 83 (Australia); *id.*, part II, vol. III, at 91 (U.S.S.R.); 38 First Comm. (45th mtg.), *supra* note 13, at 7 (U.S.); 39 First Comm. (55th mtg.), *supra* note 15, at 12 (Australia).

92. *See* 38 First Comm. (42d mtg.), *supra* note 13, at 44 (New Zealand); *id.* (44th mtg.) at 21 (U.K.).

93. After a third round of debate in the First Committee from Nov. 25 to 29, 1985, the General Assembly adopted on Dec. 16 Resolution 40/156 A and B, deciding that the question of Antarctica be included in the provisional agenda at its forty-first session in 1986. For the First Committee debate see 40 U.N. GAOR First Comm. (48th-54th mtg.), U.N. Doc. A/c.1/4.0/Pv.48-54 (1985).

94. *See* 40 U.N. SCOR, para. 58-60, U.N. Doc. A/40/854 (1985) (Final Political Declaration of Conference of Foreign Ministers of the Non-Aligned Countries).

To narrow the gap between the two groups, each side's reasonable arguments and legal positions must be considered in a truly objective manner. Those who are critical of the Treaty system must make a more *bona fide* assessment of its benefits and achievements, as well as its sound foundation in international law. At the same time, the Treaty Parties, and in particular the Consultative Parties, must make further efforts to alleviate the concerns and suspicions of their opponents. The following proposals might be considered by all interested parties as practical measures aimed at an accommodation that deserves priority attention:

1. Dissemination of information to the international community should be systematized by distributing the reports of Consultative Party meetings and other documents and materials on a regular basis through the U.N.;
2. A periodical of an informative and educational character, containing news and articles on Antarctica and related subjects should be published and circulated as widely as possible;
3. The possibility of a small-scale secretariat for the Treaty system should be examined to implement the two suggestions above to better coordinate and strengthen cooperative relations with international bodies, and to enhance cooperation between the Consultative and Non-Consultative Parties;
4. Observer participation in Consultative Party meetings should be expanded by inviting non-Treaty Party states and international organizations;
5. Giving greater publicity to those aspects of Antarctic scientific research which would particularly benefit developing countries should be expanded and more greatly publicized.