INSTITUTIONAL DEVELOPMENTS WITHIN THE ANTARCTIC TREATY SYSTEM

I. INTRODUCTION

In July 2001, 40 years after the entry into force of the 1959 Antarctic Treaty,[1] the Antarctic Treaty Consultative Parties (ATCPs) decided to establish a Permanent Secretariat to the Treaty.[2] This latest development within what has been described as 'an evolving international institutional structure'[3] will undoubtedly serve to strengthen the Treaty, as well as provide support for the wider Antarctic system, in particular, the 1991 Environmental Protocol. Its impact within the wider environmental institutional context will depend to an extent upon the grant of legal personality to the secretariat, and the definition of its functions, rights and privileges. Described as an historic and landmark decision,[4] the establishment of a permanent secretariat has the potential indirectly to provide an additional line of defence in the fight to preserve and protect the Antarctic environment. The purpose of this article is to consider the future impact of, and issues relating to, this significant institutional development.

The topic of Antarctica is habitually introduced amid a flurry of superlative adjectives. Geologically, it is the highest, driest, windiest, and coldest of all the continents.[5] Environmentally, it represents an almost pristine ice-bound wilderness without permanent human habitation.[6] From the perspective of international law and politics, Antarctica has provided an arena for one of the most ambitious (and some would suggest successful) experiments in regional governance. The bedrock of the Antarctic System is the 1959 Antarctic Treaty[7] which provides that Antarctica shall

[1] (Washington) in force 1961; 402 UNTS 71.

[2] Decision XXIV-1 (2001) reproduced in the *Final Report of the Twenty-Fourth Antarctic Treaty Consultative Meeting, St. Petersburg, Russian Federation, 9–20 July 2001* (hereinafter *Report of the Twenty-Fourth ATCM*).

[3] Arthur Watts, *International Law and the Antarctic Treaty System* (Cambridge: Grotius Publications Ltd, 1992), at 12.

[4] See the *ATCM XXIV Declaration* contained in Appendix I of the *Final Report of the Twenty-Fourth ATCM*.

[5] As a result of Antarctica's ice sheet the continent has an average elevation of 5,550 feet. Known as a white desert, Antarctica receives less rainfall than the Sahara Desert (although its ice-cap contains 75 per cent of the world's fresh water supplies). The lowest temperature on Earth ever recorded (–128.6 °F) was measured in 1983 at Vostok Research Station in the Eastern Antarctic interior. See Christopher C Joyner, *Governing the Frozen Commons: The Antarctic Regime and Environmental Protection* (Columbia: University of South Carolina Press, 1998), at 2–7.

[6] During the summer months Antarctica is home to approximately 4,000 scientific research and support staff from twenty-nine states. However, this number falls to approximately 1,000 over the Winter. Source: <http://www.cia.gov/cia/publications/factbook/geos/ay.html>.

[7] On the 1959 Antarctic Treaty see John Hanessian, 'The Antarctic Treaty 1959' (1960) 9 *ICLQ* 436; Robert D Hayton, 'The Antarctic Settlement of 1959' (1960) 54 *American Journal of International Law* 349; Watts, op cit, n 3, ch 2.

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be maintained as a nuclear free zone[8] and used for peaceful purposes only.[9] Scientific cooperation in relation to Antarctic research, which had begun with the International Geophysical Year (IGY) in 1957, was officially endorsed and, as a principle, incorporated into Articles II and III of the Treaty. Prior to the negotiation of the convention, between 1908 and 1947, seven states officially made sovereign claims to a portion of the Antarctic continent.[10] These claims have been effectively suspended or frozen by Article IV which provides that nothing in the Treaty may be interpreted as a renunciation of, or prejudicial to, any previously asserted sovereign claims. Furthermore, Article IV(2) asserts that no activities taking place whilst the Treaty is still in force shall constitute a basis for asserting or denying a sovereign claim. It is this unique device of de-coupling the task of management from the problem of sovereignty[11] which has enabled the Antarctic regime to successfully withstand the pressures of the Cold War, and arguably, prevented the 1982 Falklands/Malvinas conflict escalating so as to encompass the Southern Continent.

The 1959 Antarctic Treaty provides the linchpin for what is commonly termed the 'Antarctic Treaty System' (ATS).[12] Although protection of the Antarctic environment is not an explicit objective of the 1959 Treaty,[13] the parties are permitted to negotiate further measures regarding, *inter alia*, the preservation and conservation of living resources in Antarctica.[14] All the treaty instruments subsequently concluded by the ATCPs to date have an environmental focus. The principal formal components which constitute the Antarctic Treaty System comprise the Convention for the Conservation of Antarctic Seals 1972,[15] the Convention on the Conservation of Antarctic Marine Living Resources 1980 (CCAMLR),[16] the Convention on the Regulation of Antarctic

[8] Art V. [9] Art I.

[10] Argentina, Chile, and Great Britain claim an overlapping section of the West Peninsular of Antarctica. Claims are also maintained by Australia, France, New Zealand, and Norway. The area between 90º west and 150º west is unclaimed. The USA and Russia have reserved a right to make a future claim to territory. See generally, FM Auburn, *Antarctic Law and Politics* (London: C Hurst & Co, 1982), chs 2 and 3; Maria Pia Casarini, 'Activities in Antarctica Before the Conclusion of the Antarctic Treaty', in Francioni and Scovazzi (eds), *International Law for Antarctica*, 2nd edn (The Hague: Kluwer Law International, 1996), 627.

[11] Olva Schram Stokke and Davor Divas 'Conclusions', in Stokke and Vidas (eds), *Governing the Antarctic: The Effectiveness and Legitimacy of the Antarctic Treaty System* (Cambridge: Cambridge University Press, 1996), 432 at 443.

[12] The term 'Antarctic Treaty System' is used to describe the 1959 Antarctic Treaty plus those measures concluded by the ATCPs under Art IX of the Treaty. Although these instruments may include Treaties, Measures, Decisions and Recommendations (on which see below at n 34 and accompanying text), the term will be used here as a reference to the Antarctic Treaty and its additional treaty-based components. On the Antarctic regime as a 'system' see Alfred Van der Essen, 'The Origin of the Antarctic System', in Francioni and Scovazzi (eds), *International Law for Antarctica*, 2nd edn (The Hague: Kluwer Law International, 1996), 17 at 25–9; Davor Vidas, 'The Antarctic Treaty System in the International Community: an Overview', in Stokke and Vidas op cit, 35.

[13] But note the prohibition of nuclear explosions and the disposal of radioactive waste material as provided for under Art V(1) of the Antarctic Treaty (subject to Art V(2)).

[14] Art IX(1)(f).

[15] In force 1978. 11 ILM (1972), 251.

[16] In force 1982. 19 ILM (1980), 841. For a recent assessment of CCAMLR see Erik Jaap Molenaar, 'CCAMLR and Southern Ocean Fisheries' (2001) 16(3) *International Journal of Marine and Coastal Law* 465.

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Mineral Resource Activities 1988,[17] and the 1991 Protocol on Environmental Protection to the Antarctic Treaty.[18]

The original twelve ATCPs[19] have since been joined by a further fifteen states who have demonstrated their commitment to substantial Antarctic scientific research and accordingly participate within decision making in relation to, and management of, Antarctica.[20] This relatively small management group has been criticised in the past as comprising a hegemonic consortium of world powers.[21] During the 1970s and 1980s calls for the internationalisation of Antarctica were articulated within the broader context of developing states' demand for a New International Economic Order.[22] The prominence of resource exploitation issues in the 1980s further added to this pressure and in 1983 Malaysia placed the subject of Antarctica on the UN General Assembly's agenda.[23]

[17] 27 ILM (1988), 868. CRAMRA has not entered into force, and, in the light of the support for the 1991 Environmental Protocol, is unlikely to do so in the near future. See Donald R Rothwell, 'The Antarctic Treaty System: Resource Development, Environmental Protection or Disintegration?' (1990) 43(3) *Arctic* 284. However, since the prospect of mining in Antarctica is not permanently precluded under the Environmental Protocol, (the prohibition under Art 7 of the Environmental Protocol is subject to a 50-year review under Art 25(2)), CRAMRA should not be entirely discarded. A condition for the lifting of the mining ban is that a mineral resource regime should be operational (Art 25(5)(a) Environmental Protocol 1991). On the prospects and implications of Antarctic mining see David W Floren, 'Antarctic Mining Regimes: An Appreciation of the Attainable' (2001) 16 *Journal of Environmental Law and Litigation* 467; Joseph J Ward, 'Black Gold in a White Wilderness—Antarctic Oil: The Past, Present and Potential of a Region in Need of Sovereign Environmental Stewardship' (1998) 13 *Journal of Land Use and Environmental Law* 363.

[18] In force 1998. 30 ILM (1991), 1461. See generally SK in Blay, 'New Trends in the Protection of the Antarctic Environment: The 1991 Madrid Protocol' (1992) 86 *American Journal of International Law* 377; Catherine Redgwell, 'Environmental Protection in Antarctica: The 1991 Protocol' (1994) 43 *ICLQ* 599; Donald R Rothwell, 'Polar Environmental Protection and International Law: The 1991 Antarctic Protocol' (2000) 11 *European Journal of International Law* 591.

[19] Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, Russia (formally the USSR), United Kingdom, and USA.

[20] Art IX(1) and (2). Art IX(2) stipulates that the establishment of a scientific station or the dispatch of a scientific expedition demonstrates a substantial commitment to Antarctic research. However, it was noted in the *Final Report of the Twenty-Fourth ATCM* at para 138 in relation to the Czech Republic's professed aim to become an ATCP, that the establishment of a scientific research station is not necessary in order to conduct a substantial scientific research programme.

A total of forty-five states are currently party to the Antarctic Treaty. The remaining eighteen states which do not fall within the remit of Art IX(2) have been entitled to attend the Antarctic Treaty Consultative Meetings (ATCM) since 1983 (Recommendation XIII-15), but are unable directly to participate within the decision-making process. All ATCM Documents subsequently cited are reproduced in the *Handbook of the Antarctic Treaty System* which is also available online at: <http://webhost.nvi.net/aspire/>.

[21] Jorge Berguño, 'Institutional Issues for the Antarctic Treaty System with the Protocol in Force: An Overview', in Davor Vidas (ed), *Implementing the Environmental Protocol Regime for the Antarctic* (Dordrecht: Kluwer Academic Publishers, 2002), 93 at 96. See also ibid, n 12 at 51.

[22] Berguño, in ibid. On the application of Common Heritage of Mankind to the Antarctic see Sudhir K Chopra, 'Antarctica as a Commons Regime: A Conceptual Framework for Co-operation and Coexistence', in Joyner and Chopra (eds), *The Antarctic Legal Regime* (Dordrecht: Martinus Nijhoff Publishers, 1988), 163; Ellen Tenenbaum, 'A World Park in Antarctic: The Common Heritage of Mankind' (1990) 10 *Virginia Environmental Law Journal* 109.

[23] A/RES/38/77 See Peter J Beck, 'Antarctica: A Case for the UN?' *The World Today* (Apr 1984) 165; Hayashi, 'The Antarctica Question in the United Nations' (1986) 19 *Cornell International Law Journal* 275. UN trusteeship of Antarctica was not of course a new idea, having

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The Question of Antarctica, as it was termed, remained on the General Assembly agenda until 1990.[24] Subsequently, although General Assembly resolutions continued to affirm that mankind as a whole had an interest in Antarctica, calls for its internationalisation diminished as measures were taken to improve the transparency and openness of the Antarctic Treaty System,[25] and the ATCPs became preoccupied with protecting the Antarctic environment, rather than the exploitation of mineral resources.[26] Moreover, the parties to the Antarctic Treaty today represent over 80 per cent of the world's population,[27] which further diminishes the 'internationalisation versus exclusive club' polarisation. More recently, the almost universal acceptance of the legitimacy of the Antarctic Treaty System has lead some commentators to suggest that the duties it generates are owed *erga omnes* and bind *all* members of the international community.[28]

II. ANTARCTIC INSTITUTIONS[29]

The absence of a permanent secretariat to the Antarctic Treaty, although surprising within the context of modern regime creation, was in fact a deliberate omission.[30] Reluctance on the part of Australia, Argentina, and Chile to accept any form of permanent administrative machinery during the original negotiations[31] led to the adoption of a minimalist approach to institution creation.[32] The Antarctic Treaty itself provides only for a meeting of representatives of the ATCPs (under Article IX), which currently

been suggested as long ago as 1948 by the US and again in 1956 by New Zealand. See Hanessian, op cit, n 7 at 437 and C Wilfred Jenks, *The Common Law of Mankind* (London: Stevens and Sons Ltd, 1958), at 367.

[24] See A/RES/39/152, A/RES/40/156, A/RES/41/88, A/RES/42/46, A/RES/43/83, A/RES/44/124 and A/RES/45/78. The Question of Antarctica also appeared on the UN General Assembly Agenda in 1994 (see A/Res/49/80), 1996 (see A/RES/51/56) and 1999 (see A/RES/54/45). It will be further discussed during the 57th General Assembly meeting due to take place in Sept 2002.

[25] In 1983 Recommendation XII-6 expanded the circulation of documents to Antarctic Treaty Parties other than ATCPs, the Secretary General of the United Nations and other appropriate specialised agencies. From the mid-1980s onwards the ATCM meetings permitted non-ATCP state and certain NGO observers. The current Revised rules of Procedure (1997) (attached to Decision XXI-1) allows representation of the CCAMLR Commission, SCAR and the Council of Managers of National Antarctic Programs (COMNAP) as well as other invited experts. On the role of NGOs within the Antarctic Treaty System see Richard A Herr, 'The Changing Role of Non-Governmental Organisations in the Antarctic Treaty System', in Stokke and Vidas (eds), op cit, 91; Lee Kimball, 'The Role of Non-Governmental Organizations in Antarctic Affairs', in Joyner and Chopra (eds), op cit, 33.

[26] Additionally, the accession of India and Brazil (in 1983) and China and Uruguay (in 1985) to ATCP status divided the united developing country position on the internationalisation of Antarctica, resulting in diminished demands for such a change. See Vidas, op cit, n 12, at 55.

[27] ATCM XXIV Declaration appended to the *Final Report of the XXIV ATCM*.

[28] See Dagmar Butte, 'International Norms in the Antarctic Treaty' 1990 3 *International Legal Perspectives* 1; Jonathan I Charney, 'The Antarctic System and Customary International Law', in Francioni and Scovazzi (eds), op cit, 51; Watts, op cit, n 3, ch 11.

[29] See generally, Berguño, op cit, n 21; Phillippe Gautier, 'Institutional Developments in the Antarctic Treaty System', in Francioni and Scovazzi (eds), 31; Watts, op cit, n 3, chs 2 and 3.

[30] Auburn, op cit, n 10, at 155.

[31] Hanessian, op cit, n 7, at 462.

[32] Francesco Francioni, 'Establishment of an Antarctic Treaty Secretariat: Pending Legal Issues', in Vidas (ed), op cit, 125, at 125.

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takes place annually.[33] The purpose of this plenary body is to provide a forum for the exchange of information, consultation on matters of interest and the formulation of measures, decisions and resolutions on the uses of, and jurisdiction over, Antarctica, the facilitation of scientific research, cooperation, and inspection, and the preservation of Antarctic living resources.[34] Administrative functions are currently undertaken by the host state of each Antarctic Treaty Consultative Meeting (ATCM)[35] although other states have, in the past, provided *ad hoc* administrative assistance.[36] The only other institution worthy of particular note within the context of the Antarctic Treaty itself, is the Scientific Committee on Antarctic Research (SCAR). SCAR is the direct descendant of the Special Committee on Antarctic Research, which was established by the International Council of Scientific Unions (ICSU) to coordinate Antarctic research during the IGY. Although a non-governmental body which does not enjoy a formal relationship with the Antarctic Treaty,[37] it has developed a close relationship with the ATCPs, providing objective, independent scientific advice.[38]

It has been noted that the Antarctic Treaty System has developed with greater institutional sophistication within some of its more peripheral treaties.[39] The 1972 Seals Convention provides for the establishment following the commencement of commercial sealing of a Commission and a Scientific Advisory Committee.[40] Under CCAMLR 1980, in addition to the Commission for the Conservation of Antarctic Marine Living Resources established under Article VII, a Scientific Committee[41] and Secretariat[42] is provided for.[43] The most sophisticated institutional provision of all the Antarctic instruments to date was provided for in CRAMRA 1988. The comprehensive minerals regime which has not come into force, envisaged a Commission,[44] two Committees,[45] a Secretariat,[46] and an Arbitral Tribunal[47] necessary for the proper regulation of Antarctic resource exploitation. By contrast, the most recent Antarctic instrument, the 1991 Environmental Protocol to the Antarctic Treaty, establishes only a Committee on Environmental Protection (CEP)[48] in order to provide advice on, and

[33] Art IX refrains from stipulating the regularity of ATCM meetings that must be held at 'suitable intervals'. Originally held biannually, the ATCPs decided to meet annually from 1991 onwards.

[34] Art IX(1). This Article in fact refers only to measures and recommendations. The definition of, and distinction between, measures, decisions, and resolutions as Treaty instruments and their normative consequences, was made at the XIXth ATCM in 1995 (see Decision 1 (1995)).

[35] Rule 7, Revised Rules of Procedure 1997, attached to Decision XXI-1.

[36] The USA (the depositary government for the Antarctic Treaty), for example, is responsible for the publication of the *Handbook of the Antarctic Treaty System.*

[37] Since 1987 SCAR has been able to attend ATCMs in the capacity of Antarctic Treaty System Observer. See the ATCM Rules of Procedure (Revised 1997) attached to Decision XXI-1, Rules 2 and 30.

[38] See in particular Recommendations I-I and I-IV made at the First ATCM held in 1961. Hayton, op cit, n 7, at 370; Watts, op cit, n 3, at 33. SCAR's website can be found at: <http://www.scar.org/>.

[39] Berguño, op cit, n 21, at 100.

[40] Arts 6(1)(b) and (c)(ii). The absence of commercial sealing has meant that neither of these institutions has been established to date.

[41] Art XIV.

[42] Art XVII.

[43] The Commission and Secretariat is headquartered at Hobart, Tasmania, Australia (Art XIII(1)). The Commission's website can be found at: <http://www.ccamlr.org/>.

[44] Art 18.

[45] A Scientific, Technical, and Advisory Committee was established under Art 23 and a Regulatory Committee was provided for under Art 29.

[46] Art 33.

[47] Art 1 of the Annex to CRAMRA.

[48] Art 11.

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formulate recommendations in relation to, the implementation of the Protocol.[49] The ATCM represents the acme of the Antarctic Treaty System and as such has, since 1985, maintained an overview of its secondary Treaty components and their relationships with the wider system.[50]

III. TOWARDS A PERMANENT SECRETARIAT

As originally envisaged, the Antarctic Treaty was to provide the forum for intergovernmental cooperation rather than the basis for an international institution.[51] Therefore, although Britain, during the Washington negotiations for the Treaty, professed itself in favour of 'some form of continuing organisation to promote its [the Antarctic Treaty's] aims',[52] proposals for permanent institutions were rejected by Argentina, Chile, and Australia.[53] A South African proposal at the first ATCM held in 1961 for a permanent secretariat with a revolving headquarters failed to command support,[54] and, instead, administrative and organisational tasks fell to a 'troika' arrangement of past, present, and future hosts of the ATCM.[55] This highly unusual decentralised approach to administration has in fact served the Antarctic Treaty relatively well over the past four decades.[56] However, by 1985 it was becoming apparent that some form of permanent administrative machinery was not only desirable but necessary for the continued functioning of the Antarctic Treaty System. Thirty-two states were party to the Treaty by the mid-1980s, and this in itself created logistical difficulties that were not apparent when accessions were limited to twelve. Moreover, the scope and complexity of Antarctic activities had likewise increased significantly, particularly in relation to environmental protection.[57]

Formal recognition of the need for a permanent secretariat was first expressed in 1985 at the XIIIth ATCM where delegates noted that such a body could provide valuable assistance in relation to the organisation of ATCMs, and the preparation and

[49] Art 12(1). See further Olav Orheim, 'The Committee for Environmental Protection: Its Establishment, Operation and Role within the Antarctic Treaty System' in Vidas (ed), op cit, 107. The CEP website that is currently hosted by the Norwegian Polar Institute in Tromso can be found at: <http://cep.npolar.no//cephome.htm>.

[50] 1985 Recommendation XIII-2. The ATCM receives reports from the CEP the CCAMLR Commission and the Seals Convention in addition to reports from SCAR and the Council of Managers of National Antarctic Programmes (COMNAP). In 1999 the XXIII ATCM took the unprecedented step of addressing CCAMLR directly (see the *Final Report of the Twenty-Third ATCM, Lima, Peru, 24 May–4 June*, para 42 and Resolution 3 (1999). Resolution 3 stated that the Representatives 'recommend that Consultative parties which are Members of CCAMLR take action within their competence to support strongly the CCAMLR Commission in its efforts to deal with the problem of illegal, unreported and unregulated fishing in the Convention area, including adoption of a catch documentation scheme at the Commission's XVIII meeting in Hobart, 1999, and to consider further measures consistent with the obligations each contracting party has under CCAMLR'.

[51] Francioni, op cit, n 32, at 125

[52] Statement by Sir Esler Dening, reproduced in *Conference Documents, The Antarctic Treaty and Related Papers* (Washington: US Government Printing Office, 1960), *Doc No* 15.

[53] Hanessian, op cit, n 7, at 462.

[54] Berguño, op cit.

[55] *Final Report of the First ATCM, Camberra, July 10–24, 1961***,** Recommendation I-XIV.

[56] A factor that was noted on a number of occasions during the XIVth, XVth, and XVIth ATCMs by states who took the view that the establishment of a permanent secretariat was unnecessary. See the *Final Report of the Fourteenth ATCM, Rio*, 1987, paras 27–8; *Final Report of Fifteenth ACTM, Paris*, 1989 para 30; *Final Report of Sixteenth ATCM, Bonn*, 1991, para 39.

[57] Francioni, op cit, n 32, at 128.

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dissemination of documents.[58] At almost every meeting since 1985 the issue of a permanent secretariat has been raised for discussion. In 1987, in Rio, the proponents of the establishment of a secretariat further developed what they saw as possible functions of such a body, including general administrative support, the maintenance of archives, the provision of documents and information to both members and the general public, and communicating with other international organisations.[59] Support at this stage was however, by no means unanimous. In 1989, delegates in Paris pointed out that there were already a number of institutions within the Antarctic Treaty System and that further use could be made of SCAR and the depositary government. Moreover, they noted that the success of the Antarctic Treaty was in many ways due to its inherent flexibility and absence of institutional structure.[60] However, with the conclusion of the Environmental Protocol in 1991 it became clear to all the ATCPs that the new and complex system of environmental management within Antarctica had made the establishment of a centralised, permanent secretariat all but an inevitability. In expressing widespread support for the creation of such a body, delegates in Bonn in 1991, noted that the need for a secretariat was essentially based on three considerations: 'support for the increasingly numerous and complex operations of the Antarctic Treaty Consultative mechanism; circulation of information; and the facilitation of the implementation of the Protocol.'[61] General consensus was finally achieved in 1992 where a considerable proportion of ATCM time was devoted to a discussion of the future secretariat's location, functions, composition, legal status, and funding.[62]

Despite this unanimity of perspective, the formal decision to establish a permanent secretariat would not be taken for almost another decade. During this period the issue of a secretariat was discussed at every ATCM[63] and a number of parties produced working papers outlining their ideas regarding its functions, structure, and legal personality.[64] In addition, the matter was addressed within a working group chaired by Professor Francesco Francioni which produced a number of texts relevant to the foundation of the secretariat.[65] Progress, however, might aptly be described as glacial. Certain parties remained suspicious that the establishment of a secretariat might lead to the eventual internationalisation of Antarctica, challenging those who maintained a sovereign claim over the territory. Others harboured concerns over the financial implications which

[58] Para 25 of the *Final Report of the Thirteenth ATCM, Brussels*, 1985.
[59] Para 26 of the *Final Report of the Fourteenth ATCM, Rio*, 1987.
[60] Para 30 of the *Final Report of the Fifteenth ATCM, Paris*, 1989.
[61] Para 35 of the *Final Report of the Fifteenth ATCM, Bonn*, 1991.
[62] See paras 41–50 of the *Final Report of the Seventeenth ATCM, Venice*, 1992.
[63] See *Final Report of the Eighteenth ATCM, Kyoto*, 1994 paras 64–70; *Final Report of the Nineteenth ATCM, Seoul*, 1995 paras 65–7; *Final Report of the Twentieth ATCM, Utrecht*, 1996, para 52; *Final Report of the Twenty-First ATCM, Christchurch* 1997, paras 85–6; *Final Report of the Twenty-Second ATCM, Tromso*, 1998, paras 23–33; *Final Report of the Twenty-Third ATCM, Lima*, 1999 paras 19–30.
[64] Documents were submitted by the Netherlands (XVII ATCM/ WP 7), Australia (XVII ATCM/WP 19), Uruguay (XVII ATCM/INFO 33) and USA (XVII ATCM / INFO 36) to the Venice ATCM in 1992; Australia (XVIII ATCM/WP 8), Belgium (XVIII ATCM/WP 15) and Italy (XVIII ATCM/WP 16) to the Kyoto ATCM in 1994; Argentina, Brazil, Chile, Ecuador, Peru, and Uruguay (XXI ATCM/INF 117) and Norway (XXI ATCM/INF 76) to the Christchurch ATCM in 1997; Australia (XXII ATCM/WP 8) and Argentina (XXII ATCM/WP28) to the Tromso ATCM in 1998.
[65] See Annex E of the *Final Report of the Seventeenth ATCM, Venice*, 1992 and Annex D of the *Final Report of the Eighteenth ATCM, Kyoto*, 1994.

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would arise from the establishment of a permanent administrative body.[66] Whilst the issues of function and legal personality gave rise to considerable debate within the ATCM arena, it was the prosaic but intensely political question of location which proved to be the ultimate impasse within the negotiations.

In 1992 at the Venice ATCM both Argentina and the USA offered to host the secretariat, in Buenos Aires and Washington DC respectively.[67] Despite the advantages of locating the secretariat at the site of the depositary government, a number of delegations declared themselves in favour of the Buenos Aires site, since it would have the effect of inserting Latin America into the institutional framework of the Antarctic Treaty System.[68] Although support for the Argentinian candidacy grew throughout the 1990s,[69] unanimity on the location for the secretariat proved elusive. Not surprisingly, the foremost cause of this division can be traced to the frosty relations which prevailed between Britain and Argentina during the 1980s and much of the 1990s as a result of the 1982 Falklands/Malvinas War.[70] In particular, Britain was concerned that Argentina would attach 'great symbolic importance to the location of such a body in their capital'.[71] In an attempt to break the apparent deadlock, Australia, proposed in 1998 that Hobart, Tasmania, which was already host to the CCAMLR Secretariat, be considered as a location for the Antarctic Treaty Secretariat.[72] This suggestion, though, gained little support. Ultimately, in July 2001, after almost a decade of rapprochement in Anglo-Argentine relations,[73] Britain withdrew its opposition to the Buenos Aires location of the Antarctic Treaty Secretariat.[74] With consensus achieved among the ATCPs on both the need to establish a secretariat, and its location in the Argentinian capital, the XXIVth ATCM decided that 'the Antarctic Treaty Secretariat shall be established in Buenos Aires following the development of necessary modalities and agreements, which the Parties shall urgently pursue'.[75] This decision undoubtedly marks a significant moment in the institutional evolution of the Antarctic Treaty System.

[66] Francioni, op cit, n 32, at 126.

[67] *Final Report of the Seventeenth ATCM, Venice,* 1992, at para 44.

[68] Ibid, at para 47.

[69] *Final Report of the Twenty-First ATCM, Christchurch,* 1997, at para. 86.

[70] On the impact of the Falklands/Malvinas War on British Antarctic policy see Peter J Beck, 'Britain's Antarctic Dimension' (1983) 59 *International Affairs* 429.

[71] Klaus J Dodds and Lara Manóvil, 'Recent Developments in Relations Between Argentina, Britain, and the Falkland Islands in the South Atlantic' (2002) 38(205) *Polar Record* 153, at 156.

[72] Working Paper XXII ATCM/EP8 introduced by Australia at the Tromso ATCM in 1998. See also *Final Report of the Twenty-Second ATCM, Tromso,* 1998, at para 25.

[73] See Dodds, 'Towards Rapprochement? Anglo-Argentine Relations and the Falklands/Malvinas in the Late 1990s' (1998) 74(3) *International Affairs* 617; Dodds and Manóvil, op cit, n 71.

[74] 'UK Response to Argentine Defence Minister's Statement of 6 July 2001' reproduced in Appendix 3 of the *Final Report of the Twenty-Fourth ATCM, St. Petersburg,* 2001. The statement welcomed the Argentinian government's decision to strengthen the regulatory control of Argentinian Antarctic activities, the greater emphasis on Argentine civilians within both the Direccion Nacional Antarctic and Argentine Antarctic Stations, and the legislative initiatives that will allow Argentina to better meet its obligations under both CCAMLR and the Environmental Protocol. See also the statement by the Minister of Defence of Argentina of 6 July 2001 reproduced in Appendix 2 of the *Final Report of the Twenty-Fourth ATCM, St Petersburg,* 2001.

[75] Decision 1 (2001) reproduced in Annex B of the *Final Report of the Twenty-Fourth ATCM, St. Petersburg,* 2001. See further paras 20–9 of the above report.

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IV. THE SECRETARIAT: DESIGNATING AND DEFINING ITS ROLE WITHIN THE ATS

The expression 'secretariat' and its modern features has its origins in the League of Nations, although the first international secretariat in fact dates from 1905, with the foundation of the International Institute for Agriculture in Rome.[76] Today, Schermers and Blokker comment that '[s]ecretariats have become central organs in all international organisations.'[77] This is also true within the context of international environmental regimes. Almost all environmental treaties negotiated since 1972 (and a good many before that date), provide for the establishment of a permanent Secretariat,[78] and the success of the regime is to an extent dependent on the quality and ability of this body.[79] It has been noted that the influence of a secretariat is highly dependent upon the powers granted to it by the organisation in question, its budget, the degree of homogeneity between the interests of its member states and the quality of its personnel.[80] Although these issues have formed the basis of numerous working papers and provided themes for a number of ATCM debates,[81] they have not as yet been subject to official determination. The specific questions relating to legal personality, functions and budget are expected to be addressed by the ATCPs at the next ATCM, which is due to be held in September 2002.[82] The designation and definition of both personality and functionality are of paramount importance and will, in reality, define the nature of the secretariat and its position within the broader international environmental institutional context.

A. Legal Personality[83]

International legal personality has been defined as determining who is a 'subject of international law so as itself to enjoy rights, duties or powers established in international

[76] Henry G Schermers and Niels M Blokker, *International Institutional Law*, 3rd edn (The Hague: Kluwer Law International, 2001), at §435.

[77] Ibid. Footnote omitted.

[78] Among the many examples which could be cited here see the Convention on Wetlands of International Importance, Ramsar, 1971 (11 ILM (1972) 963) Art 8. It should be noted that the Secretariat of the Ramsar Convention is in fact termed the 'Bureau' and was maintained on an interim basis until 1988. See also the Convention on International Trade in Endangered Species of Wild Flora and Fauna 1973 (12 ILM (1973) 1055) Art XII; Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, 1972 (11 ILM (1972) 1294) Art XIV (2) and (3); Convention for the Protection of the Ozone Layer, Vienna, 1985 (26 ILM (1987) 1529) Art 7; Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Basel, 1989 (28 ILM (1989) 657) Art 16; UN Framework Convention on Climate Change 1992 (31 ILM (1992) 849) Art 8; UN Convention on Biological Diversity 1992 (31 ILM (1992) 822) Art 24. On the phenomenon of international environmental institutions see Robin R Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *American Journal of International Law* 623.

[79] A point made by Simon Lyster with specific reference to biodiversity regimes and Philippe Sands and Pierre Klein in relation to international organisations generally. See Simon Lyster, *International Wildlife Law* (Cambridge: Grotius Publications, Cambridge University Press, 1985), at 301–2 and Sands and Klein, *Bowett's Law of International Institutions*, 5th edn (London: Sweet & Maxwell, 2001), at 302.

[80] Schermers and Blokker, op cit, n 76, at §439.

[81] See nn 63 and 64 above.

[82] *Final Report of the Twenty-Fourth ATCM, St. Petersburg*, 2001, para 29.

[83] See generally, Sands and Klein, op cit, n 79, ch 15; Schermers and Blokker, op cit, n 76, ch 11; Nigel White, *The Law of International Organisations* (Manchester: Manchester University Press, 1996), ch 2.

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law, and, generally, the capacity to act on the international plane'.[84] In the context of international organisations, the key question is whether that organisation is a distinct legal entity from its constituent members.[85] The attribution of legal personality to international organisations has, in the past, given rise to considerable doctrinal debate.[86] It has been argued that the personality (international or otherwise) of an organisation must be expressly granted (or indeed denied) according to the will of its founder members.[87] Alternatively, others have suggested that where the organisation meets an established criteria, it may be objectively viewed as a legal person without reference to the will of its founders.[88] The modern prevailing view[89] represents in practical terms a compromise between these two positions. Under the doctrine of so-called 'implied powers' or 'presumptive' personality,[90] the legal personality of an organisation is granted either expressly or *implicitly* by its founding members.[91] Where no express statement is made, the designated functions of an organisation may, in effect, indirectly define its legal personality.[92] For example, Article 104 of the UN Charter famously provides only that the 'Organisation [the UN] shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.' However, this has not inhibited the ICJ from stating that '[I]t must be acknowledged that its members, by entrusting certain functions to it [the UN], with the attendant duties and responsibilities have clothed it with the competence required to enable those functions to be effectively discharged.'[93]

It is likely that the ATCPs will expressly state that the Antarctic secretariat will have legal personality. What is as yet unclear is whether the parties will grant international or domestic legal personality. No progress was made on this issue at an informal meeting of the ATCPs held in Buenos Aires in the summer of 2002, nor is it likely to be resolved at the forthcoming ATCM due to be held in Warsaw in September 2002. An early document produced for the 1994 ATCM suggested that the secretariat be invested with 'full legal personality'.[94] Furthermore, the designation of international legal personality was indirectly endorsed in a working paper submitted by Uruguay to the 2001 ATCM.[95] Article 4 of this document stated that 'the secretariat shall enjoy

[84] Robert Jennings and Arthur Watts, *Oppenheim's International Law, Volume* 1 (London: Longman, 1992), at 119.

[85] *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion,* ICJ Reports 1949, 174, at 178.

[86] Schermers and Blokker, op cit, n 76, at §1565.

[87] See Jan Klabbers, 'Presumptive Personality: The European Union in International Law', in Koskenniemi (ed), op cit, 231, at 234–8.

[88] F Seyersted, 'Objective Personality of Intergovernmental Organizations' (1964) 34 *Nordisk Tidsskrift for International Ret* 1; F Seyersted, 'The Legal Nature of International Organisations' (1982) 51 *Nordisk Tidsskrift for International Ret* 205. See also Ian Brownlie, *Principles of Public International Law*, 5th edn (Oxford: Clarendon Press, 1998), at 679–80.

[89] In the opinion of Schermers and Blokker op cit, n 76, at §1565.

[90] For an extended analysis of presumptive personality see Klabbers, op cit, n 87.

[91] Schermers and Blokker op cit, n 76, at §1565.

[92] *Reparations for Injuries Case*, op cit, n 85.

[93] Ibid, n 85 at 179.

[94] See Annex D of the *Final Report of the Twenty-Fourth ATCM, St. Petersburg*, 2001. This expression might be read as investing the secretariat with international legal personality, an interpretation supported by Gautier op cit, 29,at 36. This was an expansion on a text submitted to the ATCM one year earlier in Venice, where the approach of restricting personality to the host state was adopted.

[95] XXIV ATCM/WP036 submitted by Uruguay on behalf of Argentina, Brazil, Chile,and Peru.

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legal capacity as may be necessary to perform its functions' which included (*inter alia*), the conclusion (with the prior approval of the ATCM) of international agreements.[96] However, the grant of *international* legal personality to the Antarctic secretariat would be in many ways a radical innovation. It will not be an international organisation in the same sense as the United Nations or the European Community,[97] and it is unlikely that the performance of its functions will, in reality, require the designation of international personality.[98] It is also clear that the majority of the ATCPs do not as yet support the establishment of such a high profile body.

The Final Report of the XXIVth ATCM held in July 2001 notes in relation to legal personality that the ATCPs will have to consider whether the secretariat should be invested with legal capacity within the host country only.[99] This position was advocated in the two further working papers which were submitted to the same meeting.[100] Furthermore, both papers omitted the responsibility of concluding international agreements from among the list of designated functions. Both XXIV ATCM/WP035 and XXIV ATCM/WP037 stated that 'the secretariat shall enjoy, in the capacity of its host State, such legal capacity as may be necessary to perform its functions'.[101] The former paper which was noted by the 2001 ATCM as a document which could provide a useful reference for further discussions,[102] further specified that the secretariat in particular, shall enjoy the legal capacity to (i) contract; (ii) acquire and dispose of immovable and movable property; (iii) institute administrative and legal proceedings and; (iv) conclude a Headquarters Agreement with the Host State, with the prior approval of the ATCM.

The difficulty with the designation of domestic legal personality restricted to the *host* state is that this could in fact prevent the Secretariat from carrying out many of its specified functions. In particular, the rotating nature of the ATCM[103] will mean that the secretariat in practical terms, will require the legal capacity to operate within the territory of *all* the ATCPs. Although this situation might be argued to support the designation of *international* personality, it does not make it an imperative. An alternative solution is, in fact, already operational within the Antarctic Treaty system. The CCAMLR Commission does not have international legal personality but operates on occasions beyond its host state (Australia). Article VIII of CCAMLR states that the 'Commission shall have legal personality and shall enjoy in the territory of *each* of the State parties such legal capacity as may be necessary to perform its functions and achieve the purposes of this Convention.'[104] It is therefore suggested that granting the Antarctic secretariat legal capacity in *each* of the Member States of the Antarctic Treaty rather than restricting it to the *host* state as has been advocated recently, will not

[96] The assignment of such a function to the secretariat may indirectly support advocates of international legal personality by means of an inductive analysis as articulated by the ICJ in the *Reparations Case*, op cit, 85. Whilst it is not impossible to argue that the reasoning in the *Reparations Case* may be applied to organisations such as the Antarctic Secretariat by analogy, it should be noted such an application would represent a relatively radical step.

[97] On the possibility of founding an Antarctic Organisation see below n 105 and accompanying text.

[98] For a discussion of its functions see below.

[99] At para 28.

[100] XXIV ATCM/WP035 was submitted by Italy and New Zealand. XXIV ATCM/WP037 submitted by Argentina, Brazil, Chile, New Zealand, Peru,and Uruguay.

[101] XXIV ATCM/WP035, Art 5; XXIV ATCM/WP037, Art 4.

[102] XXIV ATCM/WP037. See the *Final Report of the Twenty-Fourth ATCM*, at para 29.

[103] Art IX(1) Antarctic Treaty.

[104] Emphasis added.

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only facilitate the body in the performance of its functions, but also maintain institutional consistency within the wider Antarctic Treaty System.

An alternative solution which would avoid these thorny issues altogether, lies in the foundation of an Antarctic Organisation with legal personality to which a secretariat might be appended. This is the model adopted by CCAMLR which establishes a Commission enjoying legal personality and to which each party is a member, with the power to appoint an Executive Secretary and secretariat.[105] Moreover, it is not an uncommon institutional arrangement within the international environmental context.[106] Despite the general hostility of the ATCPs towards any developments which might gravitate towards the internationalisation of Antarctica, this proposal was (perhaps surprisingly) advocated at an informal meeting of the ATCPs in Buenos Aires during the summer of 2002. Notwithstanding the support of the UK, Norway, and Chile for the establishment of an Antarctic Organisation, the proposal did not appear to gain any further momentum.[107] The fact that the decision to establish a secretariat took 16 years from when it was initially formally raised, and that its execution is unlikely to be immediate, suggests that the establishment of an Antarctic Organisation, with its greater institutional and financial implications, would be most unlikely to garner sufficient support in the immediate or even the near future.

B. Functions

As with the issue of legal personality, there is as yet little consensus on the likely duties and responsibilities to be undertaken by the secretariat. Some states are in favour of beginning with a definition of functions that would in turn determine the size and financial demands of the secretariat. In contrast, other parties endorse the approach whereby the size and budget of the secretariat is established, and its functions are tailored accordingly. Regardless of whichever strategy is eventually pursued, all the ATCPs are agreed that the primary function of the secretariat will be to provide the host state of the ATCM with administrative support.[108] This is likely to include the collation, translation, and distribution of documents prior to the meetings, both electronically and by more traditional means, and the production of the Final Report of the Meeting. The importance of such administrative support cannot be underestimated. Currently, the host state is responsible for the handling of all documents for an ATCM meeting. In 1999 at the Lima ATCM, Peru for example, was responsible for distributing in excess of 31,680 pieces of official documentation.[109] Hosting an ATCM and providing its administration plainly represents a considerable challenge to ATCPs. In 2000 no ATCM took place, and in 1992, Italy hosted the XVIIth ATCM after India declined the

[105] Arts VII, VIII, and XVII of CCAMLR,1980.

[106] Such an arrangement features within *inter alia* the 1946 International Convention for the Regulation of Whaling (161 UNTS 72), the 1992 Convention for the Protection of the Marine Environment of the North East Atlantic (OSPAR) (32 ILM (1993) 1068) and the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki) (BNA 35:0401).

[107] New Zealand and Uruguay in particular appeared to oppose the proposition.

[108] This function was noted in Annex E of the Seventeenth Final Report, Venice, 1992, Annex D of the Eighteenth Final Report, Kyoto, 1994,and in all of the working papers submitted to subsequent ATCMs.

[109] Davor Vidas and Birgit Njåstad, 'The ATS on the Web: Introducing Modern Information Technology in Antarctic Affairs', in Vidas (ed), op cit, 141, at 145.

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responsibility.[110] There is no doubt that the secretariat will, to a great extent, ease the administrative burden on host states.

There is also consensus that the secretariat will have responsibility for maintaining the administration of the Antarctic Treaty System in between the ATCM meetings. Such responsibilities are likely to include the maintenance of an archive of Antarctic documents, the creation of databases for Antarctic information and the facilitation of communication between parties, observers, and indeed the general public.[111] Of particular importance and, arguably, the function which persuaded the ATCPs of the need for such a body, the secretariat will also provide administrative support for the Committee on Environmental Protection established under the 1991 Environmental Protocol. The Secretariat is likely to coordinate the exchange of information, facilitate the circulation of documents relating to environmental impact assessment, and maintain an environmental archive, especially in relation to protected areas. The maintenance of an Antarctic Treaty website which will facilitate easier access to information and documents by parties, NGOs and the general public is a further function which is also likely to be provided by the secretariat.[112] The Norwegian Polar Institute currently provides the CEP website, but it is likely that this too will be ultimately managed by the secretariat.

Other functions provided for in a recent working paper include the facilitation of coordination between Antarctic Treaty System components and other international institutions.[113] The formation of official networks between environmental treaty institutions has been a significant development in the recent history of environmental regime creation, and is a standard function of secretariats established pursuant to a number of international environmental agreements such as the Ozone Treaty, the Climate Change Convention, and the Biodiversity Convention.[114] The Ramsar Convention and the Biodiversity Convention are both particularly notable in having concluded Memoranda of Cooperation/Understanding with a number of treaty institutions, international and non-governmental organisations.[115] This formalisation of the

[110] Francioni, op cit, n 32, at 128.

[111] See XXIV ATCM/WP037, Art 2.

[112] For further information on the history of the web presence of the Antarctic Treaty see Davor Vidas, and Njåstad, op cit, n 116. The host state of each ATCM has, since 1999 maintained an Antarctic Treaty website containing information on, and documents related to the current plenary session. Access to documents by the general public is though limited, and to an extent, sporadic. The site of the XXVth ATCM is currently available at: <http://www.25atcm.gov.pl/>.

[113] This responsibility was provided for XXIV ATCM/WP037, Art 2(iv), but omitted from XXIV ATCM/WP035. A wider responsibility to conclude international agreements was also provided for in XXIV ATCM/WP036, Art 4(iv), although this is unlikely to receive the support of a number of the ATCPs, notably the UK and Italy.

[114] Convention for the Protection of the Ozone Layer, Vienna, 1985, Art 7(1)(e); UN Framework Convention on Climate Change 1992, Art 8(2)(e); UN Convention on Biological Diversity 1992, Art 24(1)(d). See also the Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 1979, Art IX(4)(b); Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Basel, 1989, Art 16(1)(d).

[115] The Convention on Wetlands of International Importance, Ramsar, 1971 has concluded Memoranda with five conventions (including the Biodiversity, Migratory Species and World Heritage Conventions), and twelve non-governmental organisations. See Resolution VII.3 on Partnerships with International Organisations. Texts are available at <http://www.ramsar.org/>. The Convention on Biodiversity 1992 has concluded Memoranda with three conventions (including the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973) and seven international organisations. See Decisions I/9 and II/13 available online at <http://www.biodiv.org/>.

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channels of cooperation and communication within the international environmental institutional arena is an extremely positive development. It is important for the Antarctic secretariat to be able to participate fully within this emerging environmental network as a representative of the Antarctic Treaty Consultative Meeting. This could prove to be of particular benefit to organisations and regimes which address issues that impact on the Antarctic ecosystem such as climate change, the conservation of ocean biodiversity (including fish stocks and whales) and the prevention of vessel pollution. However, not all states support investing the secretariat with such a high profile. Part of this reluctance results from the persistence in viewing the Antarctic Treaty system through the lens of a very traditional cognisance of what constitutes an international institution. Within the alternative context of the modern environmental regime, which in fact represents a far more pertinent analogy to the Antarctic Treaty, the designation of such functions is in fact, a quotidian occurrence.

There is of course a number of other, perhaps further reaching functions, which might be considered appropriate for the Antarctic secretariat. A particularly proactive secretariat, provided it was endowed with international legal capacity, might for example maintain a coordinating or even an enforcement role in relation to the system of inspections which take place under Article VII of the Antarctic Treaty, or indeed under the 1991 Environmental Protocol. Similarly, such a secretariat might be afforded a role within the prospective liability regime as, for example, administrator of any fund which is established pursuant to such a regime.[116] Finally, it should be noted that interest in Antarctica is not confined to governments, scientists, and environmentalists. The impact of tourism has increased significantly over the last decade.[117] The International Association of Antarctic Tour Operators already liaises with the ATCM,[118] and the secretariat could well perform a valuable function in facilitating the provision of information to Antarctic operators, or even participating in their regulation or licensing.[119]

Important though issues of legal personality and functions are, they are not of course the only questions that need to be decided upon in order to establish the secretariat. Over the next year or so, the ATCPs will have to decide what rights and privileges should be afforded to the secretariat, how staff should be appointed and how it will be funded. Additionally, the parties will also have to determine what type of legal instrument will be used to establish the secretariat. Of the four possible options, namely a Decision, Measure, Protocol or Headquarters Agreement, it seems that the instrument is likely to take the form of either a Measure and Headquarters Agreement or a

[116] The obligation to negotiate a liability regime (or regimes) is provided for in Art 16 of the 1991 Environmental Protocol and negotiations are currently ongoing. See generally René Lefeber, 'The Legal Need for a Liability Regime', at 181, ead, 'The Prospects for an Antarctic Liability Regime' at 199, and Skåre, 'Liability Annex or Annexes to the Environmental Protocol: A Review of the Processes within the Antarctic Treaty System' at 163, all in Vidas (ed), op cit. On the prospects of a liability fund see Francioni, 'Liability for Damage to the Antarctic Environment', in Francioni and Scovazzi (eds), op cit, 581, at 595–7.

[117] During the 2000/1 season 12,248 tourists visited the continent, a substantial increase from 6,704 tourists who visited in the 1992/3 season. Source: International Association of Antarctica Tour Operators. Statistics available online at <http://www.iaato.org/tourismstatistics/index.html>.

[118] The IAATO tabled a report (XXIV ATCM IP/73) and working paper (XXIV ATCM/IP72) at the Twenty-Fourth ATCM in St Petersburg 2001.

[119] On Antarctic tourism see Mike G Richardson, 'Regulating Tourism in the Antarctic: Issues of Environment and Jurisdiction', in Vidas (ed), op cit, 71 and Shirley V Scott, 'How Cautious is Precautious?: Antarctic Tourism and the Precautionary Principle' (2001) 50 *ICLQ* 963.

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Decision and Headquarters Agreement.[120] The principal difference between a Decision and a Measure[121] is that whilst the former is operative from the time of adoption, the latter will only be legally binding once it has been approved by all the ATCPs.[122] Whilst a number of states favour the adoption of a Measure,[123] others, including the UK, have expressed concerns over the potential delay which might occur between the adoption of a Measure and its becoming legally binding.[124] The UK, amongst others, is therefore in favour of the adoption of a Decision and the conclusion of a Headquarters Agreement as the foundation instruments of the Antarctic Secretariat. Finally, the ATCPs will also have to decide which body will enter into the headquarters agreement with Argentina. Although it has been suggested that such an agreement can be concluded between the host state and the ATCM, or with an Antarctic Treaty Organisation with legal personality, the most pragmatic solution would be to establish a secretariat with legal capacity to enter into such an agreement.[125]

V. CONCLUSION

Whilst the decision to establish a permanent Antarctic Secretariat marked a historic moment in the evolution of the Antarctic Treaty, there are two phases which will mark its transformation from abstraction to actuality. First, the negotiating phase. Although as indicated in the above discussion that there are many issues which have not yet achieved consensus among the ATCPs, it is possible that significant progress can be made relatively quickly, perhaps even by the 2003 Madrid ATCM. It is recommended that the ATCPs be bold when defining the rights and obligations of the secretariat. This body should be granted legal capacity to operate within *all* member states rather than just the host state. Furthermore, the forging of networks between international environmental organisations is an important function of the modern secretariat and should not be overlooked. Moreover, the ability of the Antarctic secretariat to expand its role in the future should not be unduly inhibited at this early stage. The second phase, that of implementation, could take longer, particularly if a Measure rather than a Decision is used to establish the Secretariat. Nevertheless, the 2001 Decision to establish a Secretariat is an extremely positive one, not only within the institutional arena of the Antarctic Treaty, but also within the broader context of international environmental protection.

KAREN SCOTT*

[120] For a discussion of these options, see Francioni, op cit, n 32, at 132–5 and Gautier, op cit, n 29, at 36–40.

[121] Which may be adopted pursuant to Art IX(1) of the Antarctic Treaty 1959.

[122] This distinction was made in Decision XIX-I.

[123] As does Francioni who points out that a Decision that relates to an internal organisational matter would be a very narrow instrument with which to establish a secretariat capable of influencing external matters, op cit, n 32, at 133.

[124] The approval of Antarctic Measures has been described as 'a notoriously slow process'. Francioni, op cit, n 32, at 133.

[125] Such legal capacity was suggested in XXIV ATCM/WP037 submitted to the Twenty-Fourth ATCM in 2001.

* Lecturer in Law, University of Nottingham. I would like to thank Professor Nigel White, Mr Michael Bowman, and Mr Peter Davies of the University of Nottingham and Ms Catherine Redgwell of the University of Oxford for comments on earlier drafts of this article. Any remaining errors remain, of course, mine alone. Information on recent developments in relation to the Antarctic secretariat was obtained from sources within the Foreign and Commonwealth Office.

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