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Common and Disputed Territories

At the Brink of Doomsday

In April 2018, an extraordinary initiative was launched in western Antarctica: the International Thwaites Glacier Collaboration (ITGC). The Thwaites Glacier is 3,900 feet thick, has a surface area equivalent to Great Britain, and is teetering on the brink of collapse due to global warming. Since the turn of the century, the glacier has lost over a billion tons of ice to the adjacent Amundsen Sea. With warming waters undermining the glacier's outer tongue from below and cracks expanding across its surface, scientists anticipate that the glacier could shatter like a broken windshield within the next five years. When this happens, it is expected to release thousands of towering icebergs into the Southern Ocean, causing global sea levels to rise by as much as twenty-six inches. If the glacier's collapse destabilizes neighboring glaciers, it could trigger a chain reaction of accelerated ice flow that would elevate sea levels by up to ten feet by the end of the century, with catastrophic consequences for coastal communities around the world. Seeking to better understand these potential dangers, the ITGC has assembled over a hundred scientists from seven countries to study the glacier using overflight imaging, seismometers, radar, ocean gliders, drill-implanted sensors, and submersible semi-autonomous probes. Researchers anticipate that technologies developed for the ITGC might eventually be used by national space agencies in the search for extraterrestrial life on Europa, Jupiter's ice-encrusted, oceanic moon. For now, however, the international community has more pressing concerns: determining how much time remains before this aptly nicknamed "Doomsday Glacier" inflicts a global sea level crisis.[1]

[1] See Ben Hurwitz, 'About the International Thwaites Glacier Collaboration', 16 November 2017, https://schmidt.eas.gatech.edu/about/about-the-international-thwaites-glacier-collab

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Located in a remote sector of western Antarctica that has yet to be claimed by any country, the Thwaites Glacier is effectively the last unclaimed land on earth. The legal status of the rest of Antarctica is hotly contested. Over the past two centuries, dozens of states have sent expeditions to Antarctica, often with the purpose of establishing or fortifying claims to territorial sovereignty. Some national claims to Antarctic territory overlap with other states' claims. To complicate matters further, two powerful states with permanent research stations in Antarctica – Russia and the United States – have refrained from asserting territorial claims but have reserved the right to do so in the future. Meanwhile, other states universally reject the territorial partition of Antarctica, insisting that the international community should instead work together through international institutions to preserve the continent's fragile natural environment.

This unresolved controversy has been placed on hold for the time being by the Antarctica Treaty of 1959 and associated instruments – known collectively as the "Antarctic Treaty System" (ATS).[2] The ATS safeguards Antarctica as a demilitarized and environmentally protected preserve for scientific study through at least 2048.[3] Legal scholars and political scientists tend to characterize the ATS as a pragmatic *modus vivendi* that appeals to states-parties' rational self-interest – that is, their shared concern for avoiding armed conflict and facilitating scientific cooperation.[4] As this chapter will show, however, the ATS also reflects legal requirements enshrined in the UN Charter obligating states to respect sovereign equality and resolve territorial disputes through peaceful cooperation rather than the use of force. In Antarctica, states cooperated to freeze the status quo and promote scientific expeditions pending development of a permanent and comprehensive legal framework to resolve the continent's disputed status. The ATS thus offers an important

oration/; Sarah Kaplan, 'Crucial Antarctic Ice Shelf Could Fail Within Five Years, Scientists Say', Washington Post, 13 December 2021.

[2] Antarctic Treaty, Washington, 1 December 1959, 402 UNTS 71, art. IV [hereinafter Antarctic Treaty]; Convention for the Conservation of Antarctic Seals, London, 1 June 1972, 29 UST 441 [hereinafter Seals Convention]; Convention for the Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980, 1329 UNTS 47 [hereinafter CCAMLR]; Protocol on Environmental Protection to the Antarctic Treaty, Madrid, 4 October 1991, 30 ILM 1455 [hereinafter Madrid Protocol].

[3] Antarctic Treaty, arts. II–III; Madrid Protocol, art. 25.

[4] Christopher C. Joyner and Ethel R. Theis, *Eagle Over the Ice: the U.S. in the Antarctic* (Hanover: University Press of New England, 1997), p. 31; David J. Bederman, 'Antarctica in International Law and Relations' (1999) 39 VJIL 467, 501.

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case study, illustrating how mandatory cooperation applies to territorial disputes even in the absence of a foreseeable permanent resolution.

This chapter also surveys other settings in which states are legally obligated to cooperate with one another to administer territory in accordance with equitable principles. Some territorial disputes do not implicate duties of mandatory cooperation because international law supplies a dispositive rule of decision or assigns decision-making authority exclusively to one party. For example, *Bolivia v. Chile* (discussed in Chapter 4) affirms that states are free to rebuff foreign offers to annex their territory.[5] When multiple states plausibly claim sovereignty over the same territory, however, international law does not authorize any single state to impose its will unilaterally; instead, states must consult with one another, share information relevant to their legal claims, and pursue a peaceful negotiated settlement or submit their dispute to arbitration or adjudication.[6] Mandatory cooperation also applies when territories are entrusted to the joint-stewardship of multiple states. In these contexts, pursuing cooperation in accordance with equitable principles is necessary to make sovereign equality meaningful under international law.

Res Communis

Long before the Antarctic Treaty, the international community addressed a similar territorial dispute at the opposite end of the world. Halfway between continental Norway and the North Pole in the extreme north of the Arctic Ocean lies an archipelago of rugged islands known today as Svalbard – "cold coast" in Old Norse.[7] Lacking pre-European indigenous people, Svalbard remained largely uninhabited until the seventeenth

[5] *See* Chapter 4 (discussing Obligation To Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, 2018 ICJ Rep. 507, 563 (1 October); UN Charter art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.").

[6] Arbitration Between the Republic of Croatia and the Republic of Slovenia, PCA Case No. 2012–04, Final Award, p. 108, para. 334 (29 June 2017) (describing mutual state consent as "the fundamental principle applicable to the establishment of land boundaries between sovereign States"); Steven R. Ratner, 'Land Feuds and Their Solutions: Finding International Law Beyond the Trial Chamber' (2006) 100 AJIL 808, 811 ("[T]he belief by one state that it has legal title to the territory of another does not legitimate the unilateral use of force.").

[7] Christopher R. Rossi, '"A Unique International Problem": The Svalbard Treaty, Equal Enjoyment, and Terra Nullius: Lessons of Territorial Temptation from History' (2015) 15 *Wash. U. Glob. Stud. L. Rev*. 93, 113.

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century when European whalers began hunting its surrounding waters for walruses and Bowhead whales.[8] As the populations of walruses and whales dwindled, so too did European interest in Svalbard. Norwegians and Russians continued to visit Svalbard in small numbers during the eighteenth and nineteenth centuries, but under international law the islands remained *terra nullius*, which is to say, outside the jurisdiction of any particular state.

In 1871, the Swedish-Norwegian government directed diplomatic notes to several European powers, expressing interest in acquiring Svalbard. Russia pushed back, demanding that the islands be preserved as "*un domaine indécis*."[9] Through additional diplomatic exchanges, the two countries eventually agreed to preserve the status quo.[10] An 1872 treaty established Svalbard as an international commons or *res communis* open for exploitation but exempt from territorial acquisition. Adventurers and profit seekers of all nationalities were free to build settlements, perform scientific research, and conduct commerce.[11] They could hunt seals, set fur traps, and put down mine shafts in Svalbard. The one thing they could not do under the 1872 treaty was lay claim to Svalbard on behalf of their respective sovereigns.

The *res communis* approach began to show its flaws at the turn of the twentieth century when coal and other valuable mineral deposits were discovered on Spitsbergen, the largest island in the Svalbard archipelago. As commercial enterprises from Europe and the United States arrived to exploit the islands' resources, controversies over conflicting private claims to land and resources multiplied. Without any legal or institutional mechanisms for establishing or adjudicating title to property, companies and individuals were often at a loss to protect their interests from foreign encroachment. Making Svalbard an international commons turned out to be a recipe for incessant conflict, as well as enabling domination and exploitation by the most powerful commercial actors.[12] No public or private interests in Svalbard could be fully

[8] Ibid. pp. 113–115.
[9] Elen C. Singh, *The Spitsbergen (Svalbard) Question: United States Foreign Policy, 1907–1935* (Oslo: Universitetsforlaget, 1980), p. 24.
[10] A.N. Vylegzhanin and V.K. Zilanov, *Spitzbergen: Legal Regime of Adjacent Marine Areas* (W. E. Butler, transl., Utrecht: Eleven International Publishing, 2007), p. 7.
[11] Ibid. p. 9 (quoting R. V. Dekanozov, *Mezhdunanordnoe Pravovoe polozhenie Shpitsbergena morskoi mezhdunarodno-pravnoi spravochnik* (Sverdlovsk, 1956), pp. 199–201).
[12] Rossi, 'A Unique International Problem', pp. 118–119.

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secure while the territory lacked shared legal norms and institutions to ensure fair and equitable treatment.

Seeking to correct these deficiencies, Norway convened a series of diplomatic gatherings in Oslo between 1910 and 1914.[13] Norway's representatives initially proposed to place Svalbard under an international administrative regime that would facilitate unlimited access to the islands for all states on the basis of sovereign equality.[14] When other states gave the proposal a cool reception, however, efforts to break the resulting impasse faded with the onset of World War I.

Only toward the end of the war did the Svalbard question resurface as a subject of serious international discussion. Enjoying the good will of the victorious Allies and exploiting the Bolsheviks' eagerness to secure recognition for their new government, Norway succeeded in securing international support for its bid to annex Svalbard.[15] However, this historic achievement was subject to a major caveat: in exchange for international recognition, Norway agreed to guarantee full access to the islands for nationals of foreign treaty-parties, enabling them to hunt, fish, conduct scientific research, and exploit the islands' natural resources on an equal playing field with Norwegians.[16] Norway also agreed to establish mining regulations and to endorse the property claims of foreign nationals who had established proprietary interests in land by virtue of their past activities.[17] In the treaty's preamble, the states-parties expressed their hope that this framework would establish an "equitable regime" to facilitate the islands' cooperative "development and peaceful utilisation."[18]

In sum, Svalbard's human history reflects the territory's transition from a *res communis* to an equitable regime administered under Norwegian sovereignty. States ultimately opted for a cooperative legal order that would respect equitable principles, securing their practical

[13] Thor B. Arlov, *A Short History of Svalbard* (Oslo: Norsk Polarinstitutt, 1989), pp. 63–64; Robert Lansing, 'A Unique International Problem' (1917) 11 AJIL 763, 763.

[14] Méir Ydit, *Internationalised Territories: From the "Free City of Cracow" to the "Free City of Berlin"* (Leyden: A.W. Sythoff, 1961), p. 35.

[15] Rossi, 'A Unique International Problem', pp. 131–132.

[16] Treaty Concerning the Archipelago of Spitsbergen, Paris, 9 February 1920, 2 LNTS 7 [hereinafter Spitsbergen Treaty]; Geir Ulfstein, *The Svalbard Treaty: From Terra Nullius to Norwegian Sovereignty* (Oslo: Scandinavian University Press, 1995), p. 49.

[17] Spitsbergen Treaty, arts. 6–7.

[18] Ibid., pmbl.

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interests against foreign domination. For over a century, these features of the Spitsbergen Treaty have facilitated peaceful international cooperation in Svalbard.[19]

Who Rules Antarctica?

Concerns for international equity and multilateral cooperation have also shaped the legal regime for Antarctica. Like Svalbard, Antarctica has transitioned from an essentially unregulated *res communis* to a multilateral treaty-based regime that better guarantees respect for sovereign equality. In the case of Antarctica, however, this result has been achieved not by vesting sovereign jurisdiction in a particular state or group of states, but instead by providing a framework for international cooperation and environmental stewardship without resolving the underlying territorial disputes.

The story of humanity's engagement with Antarctica begins just two centuries ago. On January 28, 1820, one day after leading just the second maritime expedition across the Antarctic Circle, Russian naval commander Fabian Gottlieb von Bellingshausen sighted a "solid stretch of ice running from east through south to west."[20] Stretched out before his view was a vast continent roughly the size of Mexico and the United States combined.[21] Nearly all of Antarctica is concealed beneath an ancient ice dome that averages 6,600 feet in thickness and contains 90 percent of the world's freshwater reserves.[22] This icy mantle gives Antarctica the highest average elevation of any continent in the world – nearly twice the median height of Asia, the world's next highest continent. Blasted by ferocious winds, subfreezing temperatures, and total darkness during its long winter months, Antarctica ranks among the least hospitable environments for human habitation in the world.[23] After sighting this bleak polar desert, Bellingshausen and his crew reversed course without making landfall.

[19] Donald Rothwell, *The Polar Regions and the Development of International Law* (Cambridge: Cambridge University Press, 1996), p. 170. Some states have questioned, however, whether the Spitsbergen treaty empowers Norway to claim sovereign rights to the continental shelf and an exclusive economic zone around Svalbard.

[20] David Day, *Antarctica: A Biography* (Oxford: Oxford University Press, 2013), p. 22.

[21] Christopher C. Joyner, *Governing the Frozen Commons: The Antarctic Regime and Environmental Protection* (Columbia: University of South Carolina Press, 1998), p. 1; Joyner and Theis, *Eagle Over the Ice*, p. 11.

[22] Joyner and Theis, *Eagle Over the Ice*, p. 11.

[23] Joyner, *Governing the Frozen Commons*, pp. 3–4.

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Despite these extreme conditions, explorers, scientists, and sealers from around the world soon flocked to Antarctica in pursuit of adventure, profit, and glory. Some of these expeditions laid the groundwork for sponsoring states to stake claims to territorial sovereignty. Seven states would eventually lay claim to pie-slice sectors of Antarctica, beginning with the United Kingdom in 1908, followed by France, Norway, Chile, Argentina, Australia, and New Zealand.

Throughout the period of Antarctica's early exploration, international law permitted states to claim sovereignty over *terra nullius* unilaterally. This rule was designed by and for European nations to enable colonialism and mediate claims between colonial powers, with little or no regard for prior indigenous occupation.[24] To establish and maintain sovereignty, however, states were required to "effectively occupy" territory.[25] This meant taking actual possession and making a "continuous and peaceful display of sovereignty" by establishing a permanent administration *in situ* to govern the territory in the name of the claimant state.[26] Given the daunting challenges presented by Antarctica's inhospitable natural environment, none of the seven claimant states attempted to establish continuous sovereign governance in Antarctica prior to asserting territorial claims.[27] Instead, they argued that this was impractical and legally unnecessary to establish territorial sovereignty in the Antarctic context.[28] In support of this view, claimant states would later cite Max Huber's observation in the *Island of Palmas Case* (1928) that "[m]anifestations of territorial sovereignty" may vary depending

[24] See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), p. 103 (explaining how the doctrine of *terra nullius* was designed "to erase the non-European world from any subjectivity or personality").

[25] See Thomas Willing Balch, 'The Arctic and Antarctic Regions and the Law of Nations' (1910) 4 AJIL 265, 266 ("[D]iscovery alone is not sufficient to give a good title to a new, unoccupied land. The custom among nations for centuries, that gradually crystallized into a part of the Law of Nations, is that in order to perfect the right given by discovery, it must be followed by occupation.").

[26] The Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January 23, 1925 Between the United States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty over the Island of Palmas (or Miangas), 2 RIAA 829 (Perm. Ct. Arb. 1928), reprinted in (1928) 22 AJIL [hereinafter Island of Palmas Case].

[27] Balch, 'The Arctic and Antarctic Regions', pp. 267–268 (observing that "none of the nations who can bring forward the claim of discovery to various parts of that continent, have as yet perfected, or even attempted seriously, owing to the immense impeding power of nature, to perfect their respective titles of discovery by effective occupation").

[28] Note, 'Thaw in International Law? Rights in Antarctica Under the Law of Common Spaces' (1978) 87 YLJ 804, 819–822.

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on "conditions of time and place."[29] In view of Antarctica's extreme climate, claimant states asserted that what constituted effective occupation could be relaxed in this context. Some measures that would not suffice to create or maintain sovereign title elsewhere – including discovery, exploration, proximity to sovereign territory, scientific study, the erection of physical markers, or the construction of a permanent research station – might suffice to confer sovereign rights over the continent's expansive and largely unexplored hinterlands.[30]

By the mid-twentieth century, claimant states encountered three formidable obstacles to their efforts to carve up Antarctica. First, claimant states could not agree among themselves about how a flexible approach to effective occupation would apply to their Antarctic claims. For example, Argentina and Chile failed to persuade other states that large sections of Antarctica fell under their sovereignty because those sections were natural extensions of their sovereign territories in South America.[31] European claimants based their claims on their asserted first discovery of the sectors of the continent.[32] The United Kingdom, in particular, resisted the Argentine-Chilean claims, arguing that it had already established sovereignty over much of the same territory based on its first discovery.[33] These divergent positions proved to be irreconcilable.

Further complicating the state of play was the possibility that other states might assert competing claims to Antarctica in the future. By the 1950s, both the Soviet Union and the United States had engaged in significant expeditions in Antarctica. Although the Soviet Union and the United States refrained from formally asserting territorial claims in Antarctica, both asserted the right to do so in the future, and their political influence posed a major deterrent against claimant states advancing their claims with greater force.

[29] Island of Palmas Case, p. 877.

[30] Charles Cheney Hyde, 'Acquisition of Sovereignty over Polar Areas' (1933) 19 *Iowa L. Rev*. 286; Peter Kikkert, '*Grasping for the Ends of the Earth: Framing and Contesting Polar Sovereignty, 1900-1955*' (unpublished PhD dissertation, University of Western Ontario, 2016), pp. 468–469.

[31] See Joyner, *Governing the Frozen Commons*, p. 17 (explaining that Chile advanced a claim to part of Antarctica in 1940); Robert D. Hayton, 'The Antarctic Settlement of 1959' (1960) 54 AJIL 349, 350 ("The Chileans first put an expedition into the area in 1947."). At the time Chile gave notice of its claim, none of its nationals had ever set foot on the continent. Steve Heavens, 'Brian Roberts and the Origins of the 1959 Antarctic Treaty' (2016) 52 *Polar Record* 717, 718.

[32] Note, 'A Thaw in International Law?', pp. 816–817.

[33] Joyner, *Governing the Frozen Commons*, p. 14.

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The third challenge confronting claimant states was the absence of international political or diplomatic recognition for their claims. Non-claimant states uniformly rejected Antarctic territorial claims. Legal commentators agreed that claimant states had not established the kind of effective occupation necessary to establish territorial jurisdiction.[34] By the 1920s, the US government threw its weight behind the view that Antarctic claims must be accompanied by actual settlement to be effective under international law.[35] Other non-claimant states argued that none of the claimants had established the kind of functioning government in Antarctica that could ground a plausible claim to effective occupation.

As long as the legal rules governing Antarctica remained unsettled, no state claim could be secure from foreign interference. This was not merely a hypothetical concern. In 1952, Argentineans at Hope Bay fired warning shots over the heads of a British group that was attempting to establish a research station in the disputed area. The following year, an Argentinean expedition erected a hut on Deception Island a short distance away from a new British base. The British Colonial Office characterized this move as an act of "aggression" against its territorial sovereignty that justified the responsive use of force in self-defense.[36] The United Kingdom dispatched Falkland Islands Governor Colin Campbell aboard the H.M.S. Snipe, accompanied by fifteen marines and two police officers, to dismantle Argentina's hut and arrest its two occupants. When news of this action reached Argentina, protests erupted in the streets of Buenos Aires.[37]

Skirmishes like these raised fears that Antarctica might become a flashpoint for international conflict during the second half of the twentieth century. That these fears were not realized is a testament to the power of international cooperation. During the 1950s, an era otherwise defined by bitter Cold War rivalries, Antarctic states succeeded in establishing the ATS – a multilateral regime that has facilitated peaceful scientific cooperation ever since.

[34] E.g., Balch, 'The Arctic and Antarctic Regions', p. 266 (explaining that "discovery alone is not sufficient to give a good title to a new, unoccupied land").
[35] Day, *Antarctica: A Biography*, p. 144.
[36] Kikkert, *Grasping for the Ends of the Earth*, p. 457.
[37] Ibid.

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The Miracle on Ice

This happy result was hardly inevitable. During the first half of the twentieth century, many proposals to resolve the Antarctica question were promoted and debated, but none was deemed acceptable to all interested states. Some advocated internationalizing Antarctica under the administration of the League of Nations or the United Nations, perhaps as a trusteeship under the UN Trusteeship Council.[38] Another proposal would have placed the whole continent under a joint condominium for the collective benefit of the claimant states.[39] However, some of the claimant states adamantly opposed any measures that would extinguish or dilute their asserted entitlements to territorial sovereignty.[40]

Stymied on the negotiation front, the United Kingdom on several occasions attempted to take its disputes with Argentina and Chile to the International Court of Justice (ICJ), but the South Americans repeatedly refused to cooperate in submitting a joint-application to the ICJ.[41] The United Kingdom eventually gave up and submitted a unilateral application to the Court in May 1955,[42] but Argentina and Chile successfully contested the ICJ's jurisdiction, prompting the Court to remove the case from its list.[43] This result reverberated beyond the instant dispute. Had the Court addressed the case on the merits, it might have clarified how the international law of territorial acquisition applied to Antarctica. Once it became clear that an authoritative statement from the Court would not be forthcoming, and with no realistic prospect that Argentina and Chile would submit to adjudication or arbitration elsewhere, the international community confronted the unsettling possibility that the international law governing Antarctica would remain unsettled indefinitely. This state of affairs cast a shadow over all claims to Antarctic territory.

At this moment of uncertainty, an ambitious scientific initiative laid the groundwork for the international community to establish a new legal

[38] Joyner and Theis, *Eagle Over the Ice*, p. 30.
[39] Kikkert, *Grasping for the Ends of the Earth*, p. 447.
[40] Ibid.; Heavens, 'Brian Roberts and the Origins', p. 726.
[41] Kikkert, *Grasping for the Ends of the Earth*, pp. 449–463.
[42] Antarctica Case (UK v. Chile), 1956 ICJ Rep. 15, 15–16 (16 March); Kikkert, *Grasping for the Ends of the Earth*, pp. 458–62. At the time, Argentina and Chile expressed concern that the ICJ showed "no guarantees at all to small powers." Kikkert, *Grasping for the Ends of the Earth*, p. 449.
[43] Antarctica Case, 1956 ICJ Rep. at 17.

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regime for Antarctica. Beginning in 1950, scientists championed a plan to designate 1957–1958 as an "International Geophysical Year" (IGY) to study holistically how the earth operates as a system. With phenomena like geomagnetism, meteorology, and polar auroras featuring prominently in the IGY's research agenda, it was evident from the start that Antarctic research would be critical to the initiative's success. International negotiations led eventually to a simple solution: for the duration of the IGY, states would suspend their territorial disputes so that scientists from all over the world could engage in Antarctic research. Activities conducted during the IGY, including the construction of scientific research stations, would not have any bearing on preexisting territorial claims.[44]

In preparation for the IGY, the United States and the Soviet Union both established permanent bases in Antarctica. The United States placed one of these research bases – the Amundsen-Scott South Pole Station – at the South Pole itself, the strategic intersection point for all seven preexisting territorial claims. The Soviet Union established a base at the "pole of inaccessibility," the central point of the continent where temperatures fall as low as −70 degrees Celsius.[45] By the end of the IGY, over fifty research stations had been established in Antarctica by twelve different states.[46]

As the IGY came to a close, US President Dwight D. Eisenhower gathered representatives of the twelve IGY states in Washington, DC, to discuss building on the initiative's success by continuing to cooperate for the peaceful, nonpolitical study of Antarctica.[47] The discussions that followed produced the Antarctic Treaty of 1959, which entered force two years later when the final three signatories – Argentina, Australia, and Chile – deposited their instruments of ratification.[48] Fifty-eight states have now become parties to the treaty.[49]

[44] Sir Arthur Watts, *International Law and the Antarctic Treaty System* (Cambridge: Grotius Publications, 1992), p. 4.

[45] Charlotte Connelly, 'How Antarctica Became Home to a New Kind of Scientific Diplomacy', The Guardian, 1 July 2017.

[46] Kikkert, *Grasping for the Ends of the Earth*, p. 464.

[47] Robert D. Hayton, 'Polar Problems and International Law' (1958) 53 AJIL 746, 756 (discussing 38 Dep't of State Bulletin 910–911 (1958) (White House Press Release, 3 May 1958)).

[48] Joyner and Theis, *Eagle Over the Ice*, p. 33.

[49] 'The Antarctic Treaty', Secretariat of the Antarctic Treaty, www.ats.aq/devAS/Parties?lang=e.

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For an agreement that governs an entire continent, the Antarctic Treaty is remarkably short, with only fourteen brief articles. The preamble affirms that "international cooperation in scientific investigation in Antarctica" has benefited humankind, and it asserts that "it is in the interest of all mankind that Antarctica shall continue for ever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord."[50] The centerpiece of the treaty is Article IV, which freezes Antarctic territorial claims by declaring that "[n]o acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica."[51] Article IV does not require claimant states to renounce their sovereignty claims, but it does not validate those claims either; it simply sets aside for the time being whether any of the claims or potential claims are effective under international law. In the meantime, the treaty opens the continent to continued scientific investigation (Article II), requires states to cooperate and share the fruit of their scientific activities (Article III), and prohibits states-parties from militarizing and nuclearizing the continent (Articles I and V). The treaty thus allows international scientific cooperation to continue apace without resolving the sovereignty controversy. In short, the Antarctic Treaty establishes Antarctica as a *res communis*, but rather than deploying this legal form for the sake of resource exploitation, as occurred in pre-1917 Svalbard, the Antarctic Treaty sets up a joint-stewardship regime to facilitate scientific cooperation.

Over the years, states-parties have supplemented the Antarctic Treaty with a variety of other agreements, including a convention to conserve Antarctic seals and marine living resources[52] and a comprehensive environmental protocol, known as the Madrid Protocol.[53] Antarctic states have committed to guarantee "the comprehensive protection of the Antarctic environment and dependent and associated ecosystems," thereby preserving "Antarctica as a natural reserve, devoted to peace and science."[54] To this end, the Madrid Protocol bans mining and drilling activities except for scientific purposes.[55] States-parties must "cooperate in the planning and conduct of activities in the Antarctic Treaty

[50] See Antarctic Treaty, pmbl.
[51] Ibid. art. IV(2).
[52] See generally Seals Convention; CCAMLR.
[53] See generally Madrid Protocol.
[54] Protocol on Environmental Protection, art. 2.
[55] Ibid. art. 7.

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area," conduct environmental impact assessments for their activities, and "share information that may be helpful to other Parties in planning and conducting their activities in the Antarctic Treaty area, with a view to the protection of the Antarctic environment and dependent and associated ecosystems."[56] When disputes arise concerning the Protocol's "interpretation or application," states-parties must "consult among themselves as soon as possible with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, or other peaceful means to which the parties to the dispute agree."[57] These requirements are to remain in place until at least 2048.[58]

Some scholars have characterized Antarctic cooperation as "the closest thing to a 'world order miracle' that the world has known."[59] In truth, however, under international law states had no lawful alternative other than to pursue a peaceful solution to the Antarctic sovereignty question through negotiation or third-party dispute resolution.[60] Concerns of national self-interest also supported this result. It was not apparent at the time that claimant states stood to gain much from attempting to enforce their territorial claims unilaterally. Antarctica's natural resources were largely unknown, concealed beneath two kilometers of ice. Moreover, pressing Antarctic territorial claims would mean risking confrontation with the two global superpowers, the Soviet Union and the United States, which threatened to assert their own claims. Thus, at the time states concluded the Antarctic Treaty, both international law and concerns for national self-interest supported moving territorial claims to the back burner so that scientists could conduct research on the continent.

The Antarctic "miracle" of peaceful cooperation has been replicated in some other contexts, from the Beaufort Sea controversy between Canada and the United States[61] to the pending case in the ICJ between Gabon and

[56] Ibid. arts. 6, 8.
[57] Ibid. art. 18.
[58] Ibid. art. 25(5).
[59] Rothwell, *The Polar Regions*, p. 457 (quoting with approval Richard Falk, 'The Antarctic Treaty System: Are There Viable Alternatives?', in Arnfinn Jorgensen-Dahl and Willy Østreng (eds.), *The Antarctic Treaty System in World Politics* (New York: Palgrave Macmillan, 1991), p. 399).
[60] UN Charter art. 2(3) (declaring that states must "settle" their disputes "by peaceful means").
[61] Betsy Baker, 'Filling an Arctic Gap: Legal and Regulatory Possibilities for Canadian-US Cooperation in the Beaufort Sea' (2009) 34 *Vt. L. Rev.* 57.

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Equatorial Guinea over islands in the Gulf of Guinea.[62] Even some bitter enemies have managed to handle territorial disputes through cooperation. For example, India and Pakistan have committed to manage their acrimonious contest over Kashmir in accordance with the UN Charter "through bilateral negotiations or by any other peaceful means mutually agreed upon between them," respecting "each other's national unity, territorial integrity, political independence and sovereign equality."[63] Under the 1972 Simla Agreement, India and Pakistan have agreed that, "[p]ending the final settlement of any of the problems between the two countries, neither side shall unilaterally alter the situation and both shall prevent the organization, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious relations."[64] Although these commitments have been sorely tested by a limited war in 1999, sporadic violence along the border that continues into the present, and political maneuvering on both sides, thus far the legal framework of mandatory cooperation has prevented hostilities between India and Pakistan from spiraling out of control. Ultimately, international law and national self-interest have combined in these settings to promote international peace and security.

Granted, it is not realistic to expect that states will always respect their legal obligations to manage territorial disputes peacefully through negotiation or third-party dispute resolution. Too often, states assert the prerogative to determine their own borders unilaterally. Beyond Russia's controversial annexation of Crimea in 2014 (discussed in Chapter 1), prominent examples of unilateral territorial settlement include Azerbaijan's occupation of the Nagorno-Karabakh region, Israel's expanding settlements in the West Bank, and Morocco's longstanding presence in Western Sahara. Territorial settlements like these reproduce the wrongs of colonialism: states claim territorial sovereignty unilaterally without regard to the rights and legitimate interests of indigenous political communities. Unilateral territorial settlement essentially treats disputed territories as *res nullius*, ignoring the principle of sovereign equality and the right to self-determination under contemporary international law. Mandatory cooperation outlaws this form of neocolonialism. Whenever states delimit their shared borders on land or at sea,

[62] See 'Land and Maritime Delimitation and Sovereignty Over Islands (Gabon/Equatorial Guinea)', International Court of Justice, www.icj-cij.org/en/case/179.

[63] Agreement on the Bilateral Relations between the Government of India and the Government of Pakistan (Simla Agreement), Simla, 2 July 1972, 858 UNTS 71, art. 1.

[64] Ibid. para. 1(ii).

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they must resolve disputes through negotiation or third-party dispute resolution in accordance with equitable principles.[65] Although embittered rivals cannot always be convinced to meet at the negotiating table or submit their disputes to arbitration or adjudication, international law nudges them in that direction by denying legal validity and legitimacy to territorial settlements achieved through unilateral action such as aggression and occupation.

Internationalization

Mandatory cooperation also applies when states internationalize territory. A territory is considered to have been "internationalized" when it is removed from national jurisdiction, in whole or in part, in favor of international administration.[66] During the twentieth century, states experimented with internationalization in a variety of settings, with mixed success. For example, at the conclusion of World War I, the Allied Powers designated the port city of Danzig (currently Gdańsk) as an independent "Free City."[67] From its establishment in 1920 until the Nazi annexation of 1939, Danzig enjoyed local democratic government subject to the League of Nations' authority to supervise the city's administration and guarantee compliance with its Constitution.[68] In virtue of Danzig's internationalized status, members of the League of Nations were legally obligated to cooperate with efforts to guarantee the city's autonomous legal status and government.

Unlike the internationalization of Danzig, most exercises in international territorial administration have been designed as temporary solutions to aid conflict resolution, protect human rights, and pave the way for national self-determination. For instance, the Mandate System of the League of Nations authorized selected states to serve as "Mandatories

[65] See North Sea Continental Shelf Cases (Fed. Rep. Germ./Den; Fed. Rep. Germ./Neth.), Merits, 1969 ICJ Rep. 3 (20 February) (maritime boundaries); Case Concerning the Frontier Dispute (Burk. Faso/Mali), 1986 ICJ Rep. 554, 633, paras. 149–150 (22 December) (land borders).

[66] For similar definitions of "internationalized territory," see Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge: Cambridge University Press, 2010), pp. 538–539; Ydit, *Internationalised Territories*, p. 21.

[67] Treaty of Peace with Germany (Treaty of Versailles), Versailles, 28 June 1919, 1919 UST 7, art. 100.

[68] Stahn, *The Law and Practice of International Territorial Administration*, p. 7; Ydit, *Internationalised Territories*, pp. 50–51.

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of the League" in administering territories that had been wrested from Germany and the Ottoman Empire during World War I.[69] The UN Charter later replaced the Mandate System with a Trusteeship System that commissioned some states to administer former mandates and colonial holdings of the defeated Axis Powers.[70] Subsequently, the Security Council has authorized the Secretariat to conduct territorial administration on an ad hoc basis in countries such as Cambodia (1992–1993), Somalia (1993–1995), Eastern Slavonia (1996–1998), East Timor (1999–2002), and Kosovo (1999–present).[71] Across these and other contexts, international law requires states to cooperate with one another and with international organizations to ensure the success of international territorial administration.[72]

Between the Moon and the Deep Blue Sea

Within the past half century, technological advances have opened new frontiers for human exploration and exploitation. From the deep ocean floor to the surface of the moon, it is now possible to imagine humanity exploiting natural resources in environments that were previously inaccessible. These developments raise important legal questions. Are such spaces *terra nullius* subject to national acquisition? Should they be understood as an international commons or *res communis* similar to the high seas or Svalbard at the turn of the twentieth century – that is, subject to exploitation but not state sovereignty? Should the international

[69] League of Nations Covenant, 28 April 1919, art. 22; Aaron M. Margalith, *The International Mandates* (Baltimore: Johns Hopkins Press, 1930), p. 31.

[70] UN Charter art. 76. Many have argued that the Mandate and Trusteeship Systems merely perpetuated colonial domination. Antony Anghie, *Imperialism, Sovereignty, the Making of International Law* (Cambridge: Cambridge University Press, 2012), ch. 3. The last UN trusteeship – the Trust Territory of the Pacific Islands (Palau) – was dismantled in 1994. The United Nations and Decolonization: International Trusteeship System, www.un.org/dppa/decolonization/en/history/international-trusteeship-system-and-trust-territories.

[71] UNMIK Fact Sheet: 'United Nations Interim Mission in Kosovo', https://peacekeeping.un.org/en/mission/unmik#:~:text=Originally%2C%20the%20Security%20Council%2C%20by,under%20which%20the%20people%20of; Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford: Oxford University Press, 2008), p. 155.

[72] The ICJ affirmed this responsibility for mandatory/trustee powers, in particular, in the South-West Africa Cases. See, e.g., Namibia, 1971 ICJ Rep. 16 (21 June); South West Africa Cases (Ethiopia v. South Africa, Liberia v. South Africa), Second Phase (SWA Second Phase), 1966 ICJ Rep. 6 (July 18).

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community entrust these spaces to international institutions? Or would a different legal regime be preferable?

In 1963, the UN General Assembly addressed some of these issues in a *Declaration of Legal Principles Concerning the Activities of States in the Exploration and Use of Outer Space*.[73] "Desiring to contribute to broad international cooperation in the scientific as well as in the legal aspects of exploration and use of outer space for peaceful purposes," the General Assembly "[s]olemnly declare[d] that in the exploration and use of outer space States should be guided by the following principles":

1. The exploration and use of outer space shall be carried on for the benefit and in the interests of all mankind.
2. Outer space and celestial bodies are free for exploration and use by all States on a basis of equality and in accordance with international law.
3. Outer space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.
4. The activities of States in the exploration and use of outer space shall be carried on in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding.[74]

Through these principles, the General Assembly envisioned a new legal paradigm for outer space territory and resources. Like Svalbard in the late-nineteenth and early-twentieth centuries, resources in outer space would be "free for exploration and use" by all states without being subject to national appropriation. Unlike Svalbard, however, states would not be permitted to exploit resources in outer space exclusively for their own national gain. Any activities conducted in outer space would have to "be carried out for the benefit and in the interests of all mankind."[75]

A few years later, these principles were incorporated into the "Magna Carta of space law"[76] – the Outer Space Treaty of 1967.[77] The Outer Space

[73] Declaration of Legal Principles Concerning the Activities of States in the Exploration and Use of Outer Space, 13 Dec. 1963, UNGA Res 1962 (XVIII), A/RES/18/1962.
[74] Ibid. (one principle omitted).
[75] Ibid.
[76] Tanja Masson-Zwaan and Mahulena Hofmann, *Introduction to Space Law*, 4th ed. (Alphen aan den Rijn: Wolters Kluwer, 2019), p. 3.
[77] Treaty on Principles Governing the Activities of States in the Exploration and the Use of Outer Space, Including the Moon and Other Celestial Bodies, 27 January 1967, 610 UNTS 205 [hereinafter Outer Space Treaty].

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Treaty declares "outer space, including the Moon and other celestial bodies," to be "the province of all mankind."[78] It affirms that outer space resources are "not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[79] Like the General Assembly principles, it also authorizes states to engage in "free . . . exploration and use" of outer space resources on the basis of equality, while emphasizing that that these activities "shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development."[80] As of January 2025, the Outer Space Treaty has 116 states parties.[81]

International lawyers have debated what it means for states to explore and use the moon and other celestial bodies "for the benefit and in the interests of all countries," as required under the Outer Space Treaty. Some argue that resources harvested from outer space are the "common heritage of mankind" and therefore must be shared equitably with the rest of the international community.[82] The 1979 Moon Agreement endorses this position, declaring that resources from the moon are subject to "equitable sharing by all States Parties," including developing countries.[83] The Moon Agreement's legal authority is limited, however, by the fact that only seventeen states have ratified it and few states have accepted its contents as expressive of customary international law.[84] Some other international lawyers contend that the Outer Space Treaty declares space resources to be "the province of mankind" only with respect to "exploration and use," not exploitation. On this interpretation, outer space is a *res communis* comparable to the high seas, where states are free to take resources without sharing the benefits with other states as long as they respect other states' freedom to do likewise.[85] An

[78] Ibid. art. I.
[79] Ibid. art. II.
[80] Ibid. art. I.
[81] 'Status of International Agreements Relating to Activities in Outer Space', United Nations Office for Outer Space Affairs, www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/status/index.html.
[82] Stephan Hobe and Kuan-Wei Chen, 'Legal Status of Outer Space and Celestial Bodies', in Ram S. Jakhu and Paul Stephen Dempsey (eds.), *Routledge Handbook of Space Law* (London: Routledge, 2017), pp. 25, 30 (asserting that customary international law "prohibits claims to ownership in outer space, unless an international regime for exploitation of the resources of the Moon and other celestial bodies is established").
[83] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 5 December 1979, 1363 UNTS 3, art. 11(1), 11(7).
[84] Status of International Agreements; Joyner and Theis, *Eagle Over the Ice*, p. 164.
[85] Masson-Zwaan and Hofmann, *Introduction to Space Law*, pp. 35–36, 99. Under President Donald J. Trump, the United States rejected the common heritage position and essentially

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intermediate view is that states are obligated to share benefits derived from their activities in outer space but it is up to them, and them alone, to determine how to do so in accordance with equitable principles.[86]

Regardless of how the international community defines the "common province of mankind," it is clear that the concept activates legal duties of international cooperation. States with active space programs cannot respect sovereign equality without recognizing the equal right of other states to explore, use, and benefit from outer space. At a minimum, this means that states may not interfere arbitrarily with other states' peaceful space programs. But the requirements of mandatory cooperation do not end there: states must also notify and consult with one another about their space activities, share information, render assistance, and seek to resolve disputes through peaceful cooperation. In this spirit, the Outer Space Treaty requires states-parties to practice "cooperation and mutual assistance" and "conduct all their activities . . . with due regard to the corresponding interests of all other States Parties."[87]

The "common heritage of humanity" concept has achieved broader acceptance in another area: the deep seabed. In 1966, US President Lyndon Johnson gave a speech in which he argued that "the prospects of rich harvest and mineral wealth" from the deep seafloor should not be allowed "to create a new form of colonial competition among maritime nations . . . We must ensure that the deep seas and ocean bottom are, and remain, the legacy of all human beings."[88] A year later, Maltese Ambassador Arvid Pardo echoed these sentiments in a celebrated address to the General Assembly, proposing that resources in the deep seabed be

endorsed the *res communis*/high seas position. Donald J. Trump, 'Executive Order on Encouraging International Support for the Recovery and Use of Space Resources', White House Press Release, 6 April 2020 (rejecting the Moon Agreement and declaring that "it shall be the policy of the United States to encourage international support for the public and private recovery and use of resources in outer space, consistent with applicable law").

[86] Jennifer Frakes, 'The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space and Antarctica: Will Developed and Developing Nations Reach a Compromise?' (2003) 21 *Wisc. J. Int'l L.* 409, 412.

[87] Outer Space Treaty, art. IX. The General Assembly has reaffirmed these principles repeatedly, placing particular emphasis on the need for "exploration and use of outer space" to proceed "on an equitable and mutually acceptable basis," affording due regard to the interests of other states, including developing nations. Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries, 4 February 1997, UNGA Res. 51/122, A/RES/51/122, para. 1.

[88] Joyner and Theis, *Eagle Over the Ice*, p. 163.

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recognized as the common heritage of humanity.[89] The General Assembly unanimously endorsed this proposal in 1970, declaring the deep seabed the common heritage of humanity and therefore not subject to national appropriation. To facilitate the seabed's exploitation, the General Assembly called for an international regime that would "ensure equitable sharing by States in the benefits derived therefrom."[90] All of these elements of Part XI of the General Assembly's proposal would later be incorporated into the 1982 UN Convention on the Law of the Sea (UNCLOS).[91] Once the international community designated the deep seabed as the common heritage of humanity – a resource vested in humanity "as a whole" and exempt from national appropriation – the necessary consequence was that states were obligated to cooperate with one another to achieve mutually acceptable solutions in accordance with equitable principles.

One final example of common heritage resources deserves special mention: cultural heritage sites. Under contemporary international law, significant cultural sites and natural wonders, such as India's Taj Mahal, the Great Wall of China, and Victoria Falls in Zambia/Zimbabwe, are governed by a series of international agreements that include UNCLOS[92] and various treaties adopted under the auspices of the UN Educational, Scientific, and Cultural Organization (UNESCO).[93] These conventions require states not only to protect cultural heritage sites, but also to cooperate with one another for this purpose, suggesting that the preservation of cultural heritage is a joint-stewardship responsibility of the entire international community.[94] Duties to cooperate in preserving cultural heritage do not deprive states of their sovereign authority over sites within their territory. Instead, they constrain how national authorities may exercise their sovereign rights over cultural heritage sites to

[89] Ibid.

[90] Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, 17 December 1970, UNGA Res. 2749 (XXV).

[91] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, 1833 UNTS 397, part. XI [hereinafter UNCLOS].

[92] Ibid. arts. 149, 303.

[93] Convention for the Protection of Cultural Property in the Event of Armed Conflicts, 14 May 1954, 249 UNTS 240; Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 27 UST 37, pmbl. [World Heritage Convention]; UNESCO Convention on the Protection of the Underwater Cultural Heritage, 2 November 2001, 41 ILM 40 [hereinafter Underwater Cultural Heritage Convention].

[94] UNCLOS art. 303(1); Underwater Cultural Heritage Convention, art. 19(1); World Heritage Convention, art. 6.

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ensure that they fulfill their joint-stewardship responsibilities and respect the interests of humanity as a whole. In this sense, states' duties to cooperate for the preservation of cultural heritage sites are similar to the equitable obligations that govern international rivers (see Chapter 2) and landlocked states (see Chapter 4).

Looking to the Future

Each of the case studies discussed in this chapter reflect a transition from legal frameworks involving unilateral state action (e.g., *terra nullius*, unregulated *res communis*) to legal frameworks that require multilateral cooperation (e.g., agreements guaranteeing equitable use and apportionment of resources). In Antarctica, states embraced multilateralism, in part, because international law did not permit them to resolve disputed claims or potential future claims unilaterally. Given the serious uncertainty over what constitutes effective occupation for Antarctica, no state could establish its territorial sovereignty unilaterally without violating the principle of sovereign equality. A lawful and legitimate solution to the Antarctica controversy therefore required cooperation. Similarly, once the international community designated the moon and other celestial bodies, the deep seabed, and cultural heritage sites as common concerns of humanity, it followed that states were required to cooperate with one another to regulate these spaces in accordance with equitable principles.

Time will tell whether this shift in international law is durable. A common characteristic of Antarctica, the deep seabed, and the moon is that they are all extreme environments where the commercial exploitation of natural resources is not yet financially viable on a large scale. As technology advances, humanity may well face conditions that invite a new colonial era of unilateralism at the South Pole, on the ocean floor, or in outer space. With the ATS's expiration date on the horizon and global warming exposing more of the continent and its surrounding waters to drilling and mining, the future of Antarctica hangs in the balance. If states simply allow the ATS to lapse without replacing it with a new legal framework, this could spark a race to establish territorial control through unilateral displays of force and occupation, undermining international peace and security. Alternatively, the international community could pursue other options that would better respect sovereign equality under international law. For example, claimant states could cooperate with non-claimant states to recognize Antarctica as the common heritage of humanity, designating it as a "world park" under the

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administration of an international organization. This is the preferred outcome of the Organization of African Unity and G-77 developing states.[95] Whatever the future holds, the key point for present purposes is that international law obligates states to resolve the Antarctic sovereignty question through peaceful cooperation in accordance with equitable principles.

[95] See Moritaka Hayashi, 'The Antarctica Question in the United Nations' (1986) 19 *Cornell Int'l L.J.* 275 (discussing the OAU's 1985 declaration proclaiming Antarctica a "common heritage of mankind"); Michael T. Kyriak, 'The Future of the Antarctic Treaty System: An Examination and Evaluation of the "Common Heritage" and "World Park" Proposals for an Alternate Antarctic Regime' (1992) 7 *Auckland U. L. Rev.* 105 (discussing the G-77 proposal to designate Antarctica as a "World Park").

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