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**Critical Literature Review
(ANTA602)**

***Title [Organizational Tendency of Antarctic treaty System:
A Perspective of International Law]***

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Abstract (ca. 200 words):

[Antarctic Treaty system" means the Antarctic Treaty, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments. In the past 56 years, the Antarctic Treaty System take the responsibility to governance the Antarctic. From the very beginning, the treaty was signed to solve the historical problem instead of blueprint the future. With the development of new technology and international law system, the treaty system itself began to face the challenge not only from external but from the internal. The typical argument aroused in 1980s, which almost lead the Antarctic governance under United Nations' framework. Although the problem was settled down and lead to the development of the new instruments for regional governance, as the definition question about the Antarctic itself still exist in the international law system, the possibility of further conflicts still exist. On the other hand, further developments about the governance instruments also face the challenge about legality. The lack of conflict resolution mechanisms is also a problem needs to be focus, since this may leads to potential conflicts of jurisdiction but for the treaty system, still has no legal capability to solve. Since the Antarctic is a region without authority, the governance of this area is comprehensive, it should cover all the departments may related to, and not a single international law department could handle. Thus, in order to build a sustainable and reliable governance system, the organizational tendency may a possible direction for the Antarctic Treaty System further development.]

Key words:

Antarctic treaty system, governance, international law

Introduction :

We hereby refer to the Antarctic Treaty System including the 1959 Antarctic Treaty itself, along with the following protocols and agreements signed in the aim of accomplish the effective governance of the Antarctic. The Antarctic Treaty System basically including the 1959 "Antarctic Treaty System", 1964 " Agreed Measures for the Conservation of Antarctic Fauna and Flora," 1972 " Antarctic Seals Convention ," 1982 " Convention on the Conservation of Antarctic Marine Living Resources ," 1991 "The Protocol on Environmental Protection to the Antarctic Treaty " and a number of measures, agreements and resolutions that the Antarctic Treaty Consultative Parties adopted by the conference.

As a legal definition." Antarctic Treaty system" means the Antarctic Treaty, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments".¹

The Antarctic Treaty System shelve territorial disputes, aside resources development disputes, assign the scientific research as the main task in the hope of better the understanding about the global change especially the climate change's influences to the whole human society, governing the land and ocean over 60 degrees south latitude, and maintain the regional peace in Antarctic.

Antarctic treaty system is not an international organization from the perspective of international law system. Being banded by the international legal status of the Antarctic itself, the conflicts about Antarctic treaty system last for long.

Most people tend to believe that the Antarctic treaty system is the cornerstone for a sustainable and secure Antarctic. Others may critical the justifiability of the Antarctic treaty itself. These disputes developed into an international disputes being discussed under the United Nations frame work in 1980s.

Here, we will review some focal issues of the disputes:

The first one is what is the international law position of Antarctic? What is the Antarctic Treaty System's position under international law framework? In another word, will the organization transfer of the Antarctic governance mechanism the positive way for further development of Antarctic governance? What is the relations between the United Nations and the Antarctic international governance system?

Review:

The Washington Conference, at which the Antarctic Treaty was negotiated, was held from 15 October to 1 December 1959. The Antarctic Treaty was signed by Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom and the United States, in Washington DC, on 1 December 1959, and entered into force on 23 June 1961; text in United Nations Treaty Series, vol.402, pp.71ff.2

¹ <http://www.ats.aq/e/ep.htm>, The Protocol on Environmental Protection to the Antarctic Treaty

² Governing the Antarctic: The Effectiveness and Legitimacy of the Antarctic, Olav Schram Stokke , Davor Vidas

“The treaty’s purpose was, nevertheless, a limited one-to find some kind of solution to conflicts over sovereignty and to prevent conflict erupting in the future. It was intended to manage problem of the past rather than to provide any blueprint for the future “3”Four factors can be pinpointed as being influential in the creation of the Antarctic regime: the need to resolve sovereignty disputes, national security, the military and nuclear threat, and a desire to continue scientific cooperation”4

“The two cold war superpowers, the United States and the USSR, both had substantial historical and scientific interests in Antarctica but had not regime which sought to resolve the sovereignty issue was important if Antarctica was to remain free of territorial disputes. About the sovereignty, the related countries also get their own worries. Closely related to concerns over sovereignty were national security issues. There was also a fear that while Antarctic relations between the two superpowers may have been cordial, Cold War tension from other parts of the globe could always spill over in the Antarctic”5

“It was science which changed Antarctic politics and provided the ground-work for the Antarctic Treaty and the Antarctic regime.” 6With the compromise and consensus, the Antarctic treaty system reached some basic principle at the first beginning.

Regarding to the decision making process, the Antarctic treaty system obtain the principle of consultation and consensus. This principle could be seen as decentralization, that means during the decision making process, all the parties have equal rights to sustain or objected a promotion, and even after the Antarctic treaty system developed the ATCM decision making mechanism, CCAMLA and ATS as the mechanism prototype of international organization, the principle of consultation and consensus still last.

It is an international practice to fix the international political negotiation outcomes with the international law form. The Antarctic is an extremely special place, where includes land, ocean, and the ice sheet, also with rich biological resources, mineral resources and water. At the very beginning, the treaty was settled in the hope of solve and solidify some historical disputes, and tried to form an effectively governance system. Here we need to clarify that the treaty itself is not only manage a certain legal department or a signal system, but to constructed a regional governance framework. This leads to two following situations, the first is instant of specific, the Antarctic Treaty itself needs to be general and principled, and the second is the Antarctic Treaty system needs to extend so that it could cover certain area in order to make the governance effective. So the Antarctic Treaty System is not a certain legal department in international law system, it refers to different law departments and not only an international law framework but also a framework of international relations.

As a treaty, the Antarctic Treaty has the required attributes of a treaty itself. But as a regime for the regional governance, the treaty system unavoidable set up obligations to a third country. For example, “Article V: any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited.

³ Elliott L M. International environmental politics: protecting the Antarctic [M]. Palgrave Macmillan, 1994.p25

⁴ Donald R.Rothwell, The Polar Regions and the Development of International Law, Cambridge: Cambridge University Press.1996.p.409.

⁵ see generally F.M.Auburn, Antarctic Law and Politics(London,1982)48-83

⁶ Lorraine M.Elliott, International Environmental Politics-Protecting the Antarctic, p.30

In the event of the conclusion of international agreements concerning the use of nuclear energy, including nuclear explosions and the disposal of radioactive waste material, to which all of the contracting parties whose representatives are entitled to participate in the meeting provided for under Article IX are parties, the rules established under such agreements shall apply in Antarctica. Arctic X, Each of the contracting parties undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principle or purposes of the present treaty.”⁷ We can see that these articles actually offer obligations to the third party, and limited the right of non-contracting parties as well. Thus cause the theoretical and political level debates.

In 1982, United Nations Convention on the Law of the Sea (UNCLOS) declares the international seabed area and its resources as "the common heritage of mankind" just as the outer space. After that ,the whole international society began to look at Antarctica,” the question of Antarctica was discussed during two rounds of united nations debates in 1983 and 1984, as well as in written observations submitted by governments. International interest in and knowledge of the continent and its legal regime have expanded to an extent that no one could have imagined three years ago.” “The question of Antarctica was presented to the united nations general assembly on September 29,1982, by the Prime Minister of Malaysia, Dr.Mahathir Bin Mohamad. In his address, the Prime Minister stated that, having successfully concluded the Third Conference on the Law of the Sea, the United Nations should focus its attention on Antarctica-the largest land area remaining on earth without natives or settlers. Stating that this area belonged to the international community, Dr,Mahathir suggested that the United Nations administer the area or that “the present occupants” act as trustees for the nations of the world”⁸.”The first resolution on this matter was adopted by the General Assembly on November 30,1983. It called for the Secretary-General to undertake a study of all aspects of Antarctica. Specifically, it requested the Secretary-General to prepare a comprehensive, factual and objective study on all aspects of Antarctica, taking fully into account the Antarctic Treaty System and other relevant factors.”⁹

Even in 1992 , Dr.keith Suter still proposed the legal issue, “the Antarctica: private property or public heritage”. “By private property, Suter means the preserve of 25 nations who are Antarctic Treaty Consultative Parties and who, he thinks have common desire to maintain control over the continent to the detriment of the interests of the rest of the world. He believes that the environment has a right to exist irrespective of its utility to Man; and that Antarctica should remain a wilderness, free from economic exploitation of any kind. It should be declared the public Heritage of Humankind; with an absolute bar on mining or fishing south of the 60th parallel. The governance of the continent should be undertaken by a new Antarctic Public Heritage Agency, funded by international subscription, with membership open to every nation. Its aim: the protection of Antarctica as a wilderness; allowing only peaceful scientific investigation and regulated ship-borne tourism. Resolutions, agreed through three voting levels supported, in turn, by all the world’s nations, richest nations, and most populous nations, would be binding and controlled through a system of satellite verification.”¹⁰

⁷ <http://www.ats.aq/e/ats.htm>.

⁸ The Antarctica question in the United Nations, Moritaka Hayashif,Cornell Int'l LJ, 1986,pp.275-276

⁹ U.N.G.A.Res.38/77 on The Question of Antarctica(Dec.15,1983), See R.Berstein,U.N. Urges a study of Antarctica,N.Y.Times,Dec.1,1983,at A2,See Emilio J.Sahurie ,The International Law of Antarctica, ,p71

¹⁰ Reviewed Work: Antarctica: Private Property, or Public Heritage? by Keith Suter;Review by: B. K. Reid

All these disputes are actually based on the legal position argument about Antarctic. Although all the nations seemed to get a consensus after 1980s, but it is just freeze the debate not to solve it absolutely. As a part of the world, take the Antarctic to the United Nation's frame work could make sense through the theoretical position.

There are two points the objective nations proposed during the argument, that is to clarify the Antarctica as "the common heritage of mankind", "the present occupants" act as trustees for the nations of the world, so that all the nations of the world could have the same rights of this area, and the second thing being denounced is the decision-making mechanism of Antarctica governance system, assume it undemocratic and exclusive of other parties.

See from the positive side, it is actually the decision-making mechanism and the rights allocation methods being critical, the purpose and principles settled by the Antarctica Treaty are still get the general agreement among different nations. Antarctic neutrality, demilitarization, denuclearization and freedom of scientific research, focusing on environmental protection principles, also met other nations' Antarctic value pursuit.

This may partly explain the Antarctic treaty system extend and remaining take the governance responsibility in Antarctic area even face to these changelings. just as some exporter mentions" from a legal and political perspective ,in the time that has passed since the first edition of this book there has been a change in the relations between the Antarctic Treaty Parties and the United Nations. The ideological overtones surrounding the early denunciation of the ATS as a closed club have subsided. The challenge has been effectively met by the patient work of Antarctic Treaty Parties at the UN."¹¹ And Francesco mentioned that "this change of attitude is due primarily to the shift in policy regarding exploration and exploitation of Antarctic mineral resources. The negotiations undertaken in the Eighties by the Consultative Parties with a view to adopting a mineral regime were the main source of friction between the ATS and those countries in the General Assembly which favored the adoption for Antarctica of the common heritage model"¹²

But as long as the issue still exist, we need to face that the conflicts problem still there, and with the development of governance system and international law system, the conflicts between different treaties also appears.

"Another specific problem that is likely to surface with regard to the operation of the Law of the Sea Convention concerns the status of the continental shelf in the Antarctic area. Theoretically, no legal concept of continental shelf may apply to Antarctica since there are no recognized coastal States in the area that may assert economic rights over it. However, it is no mystery that some claimant countries have taken a different view and maintain that the freezing of claims under Art.4 of the Antarctic Treaty does not foreclose the extension of coastal jurisdiction which is guaranteed under general international law"¹³

The Geographical Journal.Vol. 158, No. 1 (Mar., 1992), pp. 93-94

¹¹Francesco Francioni,Tullio Scovazzi, International law for Antarctica, ,1996 Kluwer Law International,p2

¹² For an overview of the attitude of various countries toward Antarctica, see Questions of Antarctica.Study Requested under General Assembly Resolution 38/77,Report of the Secretary General,UN GAORAnnex(agenda item 66),UN Doc.A/39/583,III,1984,P.126 ,see International law for Antarctica,Francesco Francioni,Tullio Scovazzi,1996 Kluwer Law International,p2

¹³ Ibid.,p.4

Compared with the critical from outside, this conflict may fundamentally affect the stability of the Antarctic Treaty System. No wonders the argument about which treaty should get priority apply will come to an end of jurisdiction conflicts. All these may potentially lead the Antarctic governance issues back to UN discussion again.

“As we can see, the authority of the Consultative Meetings has continued to expand, unwittingly transforming them into a kind of legislative body for Antarctica. The rule of double unanimity-first for the recommendations themselves and then for their entry into force after approval by the States-which was strictly observed for ordinary meetings, certainly contributed to giving the meetings global competence”¹⁴From the Antarctic Treaty System perspective, it is actually a good sign, because it means that the treaty system began to have the organization tendency, for regional governance it may more effective and especially could solve the authority issue about the relations between different parties in Antarctic Treaty System, and well organized the ATCM,CCMLAR position in the governance system.

In the past fifty years, the Antarctic Treaty System runs smoothly, and well managed the regional area. Part of the reason may also related to the extremely environment situation limited human beings' activity in this area. Just as 1980s debates occurred right after the international law system became more specific and focus as Emilio J.Sahurie mentioned” a new period is now characterized by the organization of resources and by broader international awareness of Antarctica; in fact, one has led to the other. Because it was considered unfeasible to exploit resources in Antarctica, and because it was a matter in which the position of claimants and non-claimants seemed irreconcilable, the Antarctic Treaty is silent on resource”¹⁵, the thought of the resource may approachable lead to the challenge of the treaty system, the climate change we experience in recent years and the technology developments may also lead the Antarctic Treaty System face new challenge.

“All law, indeed all politics, is a process of decision which allocates the use and enjoyment of resources for which demand exceeds supply”¹⁶Examine the Antarctic Treaty System, the resource management and the environment management are two focal issues for the regional governance system.

Such as CCAMLR manage the fishery resource in Southern Ocean, and as it has own decision making procedure and own working process, it could be seen as more like an international organization as it may satisfy most elements as an international organization.

This may lead to another consideration about Antarctic Treaty System, shall we just let it operates separately? Or coordinate different instruments effectively, to build an Antarctic Organization in the future which has the function to governance different departments of these area, and also could take the responsibility to deal with the conflicts by legal system. The question is not only related to how to set this model but also what to do as following steps.

¹⁴ Alfred van der Essen, *The Origin of the Antarctic System*, translated from French by Susan Fisher, see editor Francesco Francioni, Tullio Scovazzi *International law for Antarctica*, 1996 Kluwer Law International, p29

¹⁵ Emilio J.Sahurie *The international law of Antarctic*, New Haven Press 1991, introduction, XXIV

¹⁶ W.Michael Reisman, *The international law of Antarctic*, Emilio J.Sahurie, forward, New Haven Press 1991

Conclusion:

“Individual insanity is rare, but in groups, parties, nations, and epochs it is the rule.”¹⁷ That is partly explain the relation between Antarctic Treaty System and the international law system.

“Antarctica, the last great wilderness on earth, is a continent of extremes. It is the coldest, highest, driest, windiest, remotest, most desolate place on the planet. Yet, in spite of these profoundly inhospitable and forbidding natural characteristics, the Antarctic has increasingly attracted political, economic and diplomatic attention over the past decade.”¹⁸ Unlike other parts of the world, no real nation exist in this area and it is a region where no actual authority exist, while the governance system itself is so comprehensive. Without the legally definition of this area, the challenge about the treaty itself and the conflict about the governance system may not only from external, the pressure may from the internal system, such as how to coordinate the instruments under the system also need to be examined.

Just as the treaty was intended to manage problem of the past at the first beginning, the birth defects lead the treaty doesn't construct the framework of the specific governance details. . On the other hand, further developments about the governance instruments also face the challenge about legality. The lack of conflict resolution mechanisms is also a problem needs to be focus, since this may leads to potential conflicts of jurisdiction but for the treaty system, still has no legal capability to solve.

With the whole development process, a sustainable, reliable governance system is more necessary for the future. Not only related to the resource, but also related to all the elements maintain the Antarctic peaceful, the law system may an effective way to build a certain organization that could coordinate all the relevant departments and also take certain responsibility to solve possible legal issues in the future. From this perspective, organizational tendency of Antarctic treaty system may an effective way for the further governance of Antarctic.

¹⁷ F,Nietzsche,Beyond Good and Evil 90(W.Kaufmann trans.,1966)

¹⁸ Christopher C.Joyner,Antarctica and the Law of the Sea,Martinus Nijhoff Publishers,1992,preface ix