POLITICS PRESIDES OVER ECONOMICS IN THE ANTARCTIC REGIME: NEED FOR A JURISPRUDENTIAL CHANGE IN THE GOVERNANCE OF ANTARCTIC WEALTH

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Abstract

The Antarctic is governed by the Antarctic Treaty and related Conventions and Protocols, popularly known as Antarctic Treaty System. The System stands as one of the glaring examples of duel between politics and economics due to the divergence of opinions between the claimant and non-claimant states. Though many states are in favour of the application of Common Heritage of Mankind (CHM) to the Antarctic, only a few elements of CHM can be seen in the Antarctic Treaty System. The politics of claimant states have made CHM almost redundant, and therefore, the basis of CHM, the sharing of benefits and the international management system, are not found in the regime. In the absence of two important elements of CHM, the regime imposes moratorium for the exploitation of mineral resources for a minimum period of 50 years (given the possibility of renewal after 50 years) from the entry into force of Protocol on Environmental Protection. While this moratorium on the one hand stands as a major disincentive for the private investments, on the other hand results in the ineffective utilization of vast Antarctic mineral resources, which could support several generations of human civilization. Thus the existing regime, with moratorium, fails to protect and further the interests of world community in the Antarctic resources.

Keywords: *Antarctic Treaty, Claimant State, Common Heritage of Mankind (CHM), Mineral Resources, Moratorium*

The Background

Ever since the advent of Antarctic, sovereign claims are made on different parts of it due to the whaling interests.[1] The conflicting claims of states coupled with the growing international interest in the Antarctic required the establishment of international regime to govern the Antarctic soon after the Second World War. The scientific activity undertaken by twelve states[2]

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[1] Britain (1908), New Zealand (1923), France (1924), Norway (1928), Australia (1933), Chile (1940) and Argentina (1943) are the seven prominent asserters of sovereignty over the Antarctic. Apart from these seven prominent asserters of sovereignty, Germany (1939 - 1945) and South Africa (1948) have also claimed sovereignty for a limited period of time.

[2] Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, Union of South Africa, United Kingdom, USSR and United States.

during the International Geophysical Year (1 July 1957 to 31 December 1958) formed the basis for cooperation in the establishment of Antarctic regime. The controversy over the territorial claims was put aside and the scientists worked together in the Antarctic, without being affected by the political differences. This spirit of scientific cooperation was continued and imbibed into the legal field resulting in the Antarctic Treaty 1959. The Treaty became *Magna Carta* in the governance of the Antarctic. The provisions of the Treaty are supplemented by the subsequent area specific instruments.[3]

One of the major areas of debate in the Antarctic regime is that of the legal status of mineral resources available in the Antarctic.[4] The application of the principle of *res nullius*[5] may trigger an Antarctic rush to exploit and monopolize the resources, which may also ultimately end-up in sabotage and crimes against each other. Therefore the considerations are going on for the application of the commons' regime[6] to make it suitable for the common use of bounty of the nature available at the Antarctic. In light of this, one of the most significant concepts within the realm of commons' regime for possible application to Antarctic and its resources is the concept of CHM.

The concept of CHM advocates for the equitable distribution of world's wealth, especially those untapped resources in the unexplored areas of the Universe. It contains five novel elements in the form of individual non-appropriation, establishment of international management systems, equitable sharing of benefits, sustainable use and conservation for the future generations, and peaceful uses of the resources. These elements can be seen in the writings and presentations of the founding father, Arvid Pardo as well as in the provisions of Law of the Sea Convention 1982.[7]

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[3] Agreed Measures for the Conservation of Antarctic Fauna and Flora 1964, Convention for the Conservation of Antarctic Seals 1972, Convention on the Conservation of Antarctic Marine Living Resources 1980, Convention on the Regulation of Antarctic Mineral Resource Activities 1988 and Protocol on Environmental Protection to the Antarctic Treaty 1991.

[4] Since the Antarctic is said to be the part of super-continent called Gondwanaland, which also contained Africa, Latin America, India and Australia, it is assumed that all the minerals found in these countries could also be found in the Antarctic. Keith Suter, 'Saving the Antarctic', available at http://www.abc.net.au/radionational/programs/ockhamsrazor/saving-the-antarctic/3554470#transcript.

[5] *Res nullius* doesn't belong to anyone, but the first person to bring forward the claim gets property right over them. Yong-Ok Park, 'Res Communis Verses Res Nullius: The International Legal, Political and Strategic Context', *Journal of East and West Studies*, Vol. 5, Issue 1, 1976, pp. 77 - 97 at p. 77.

[6] Commons' regime advocates for the ownership of world community rather than the individuals over the *res communis*. See generally Charlotte Ku, 'The Concept of Res Communis in International Law', *History of European Ideas*, Vol. 12, Issue 4, 1990, pp. 459 - 477.

[7] See Arvid Pardo, 'An International Regime for the Deep Seabed: Developing Law or Developing Anarchy?', *Texas International Law Forum*, Vol. 5, No. 2, Winter 1969, pp. 204 - 217 at p. 211; Arvid Pardo, 'The Emerging Law of the Sea', in Don Walsh (ed.), *The Law of the Sea - Issues in Ocean Resource Management*, (New York: Praeger, 1977) pp. 33 -

While most of the states are in favour of the application of commons' regime, the claimant states and their private entrepreneurs have consistently opposed it.[8] This resulted in a compromised regime governing the Antarctic minerals. Though some of the elements of commons' regime like the peaceful uses, prohibition on new claims of sovereignty and conservation of the Antarctic for future generation are found in the Antarctic regime, it undeniably falls short of the CHM[9] due to three main reasons. First, seven states claim sovereignty over different parts of the Antarctic from the beginning of twentieth century. Such sovereign claims counter the very basis of the concept of CHM, which is based on the absence of sovereignty and individual appropriation.

Second, the Antarctic regime, in the absence of international authority representing the mankind, is devoid of an effective international management system. Though the efforts were made in the Convention on the Regulation of Antarctic Mineral Resource Activities to establish a universal management system, it was not realised due to the reluctance of claimant states. Third, the Antarctic regime fails to recognise the importance of distribution of the Antarctic wealth, especially the mineral wealth, in the common interest.[10] Since the international management system and benefit sharing are the central themes of CHM, any system of management, which is devoid of these elements, can never be equated with the concept of CHM.

Attempted Mineral Resources Regime and the Political Deathblow

The pressing need for a regime to govern the Antarctic minerals was found in the Eleventh Antarctic Treaty Consultative Meeting held in 1981. The subsequent negotiations resulted in one of the detailed agreements on mineral resources in the form of the Convention on the Regulation of Antarctic Mineral Resource Activities 1988. Article 3 of the Convention, while recognizing the interest of the international community in the Antarctic mineral resources, prohibited the Antarctic mineral activities outside the provisions of the Convention. Any

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76 at p. 62; Also see Art.s 137, 140, 141, 143 and 145 of the United Nations Convention on the Law of the Sea 1982.

[8] See Scott J. Shackelford, 'The Tragedy of the Common Heritage of Mankind', available at http://www.iew.unibe.ch/unibe/rechtswissenschaft/dwr/iew/content/e3870/e3985/e4139/e6410/sel-topic_5-shackleford_ger.pdf.

[9] See Jill Grob, 'Antarctica's Frozen Territorial Claims: A Meltdown Proposal', *Boston College International and Comparative Law Review*, Vol. 30, Issue 2, 2007, pp. 461 - 484 at pp. 476 & 477.

[10] Jonathan I. Charney, 'The Antarctic System and Customary International Law', in Francesco Francioni and Tullio Scovazzi (eds.), *International Law for Antarctica*, (The Hague: Kluwer Law International, 1996) pp. 51 - 102 at p. 80.

Antarctic mineral resource activity that adversely affects the Antarctic environment and associated ecosystem is prohibited under the Convention.[11]

Article 8 of the Convention obligates the persons or agency undertaking any Antarctic mineral resource activity to take necessary and timely response action, including prevention, containment, clean up and removal measures, if the activity results in or threatens to result in damage to the Antarctic environment or dependent or associated ecosystem. Markedly, strict liability is imposed for any damage caused to the Antarctic environment or dependent or associated ecosystems arising from the Antarctic mineral resource activities. Any decision about the Antarctic mineral resource activities must be made by taking into account the need to respect other established uses of the Antarctic.[12] The Convention also stipulates that the area designated as a Specially Protected Area or a Site of Special Scientific Interest under Article IX (1) of the Antarctic Treaty must not be subjected to mineral resource activities.[13]

Provisions are made for the establishment of several bodies for the purpose of implementation of the Convention. It includes establishment of the Antarctic Mineral Resource Commission, Advisory Committee, Regulatory Committee and Secretariat.[14] The Convention also contains wide range of provisions regarding prospecting[15], exploration[16] and development[17] of the Antarctic mineral resources. However this wide range of provisions merely remained in text, as the Convention did not come into force due to its failure to acquire minimum number of ratification.[18] The large-scale difference of opinions (political) on the Convention between the claimants and non-claimants has served a death-blow to this effort.[19]

The major problem of the Convention, as advocated by the opponents, was that of insufficient safeguards against the degradation of the Antarctic environment.[20] However, it doesn't seem to be the actual reason, since a perusal of the Convention clearly shows sufficient provisions on the environmental protection. The obvious reason for negative response of the

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[11] Art. 4, Convention on the Regulation of Antarctic Mineral Resource Activities 1988.

[12] Art. 15, *Id.*

[13] Art. 13, *Id.*

[14] Chap. II, *Id.*

[15] Chap. III, *Id.*

[16] Chap. IV, *Id.*

[17] Chap. V, *Id.*

[18] See Colin Deihl, 'Antarctica: An International Laboratory', Boston College Environmental Affairs Law Review, Vol. 18, Issue 3, 1991, pp. 423 - 456 at p. 424.

[19] Christopher C. Joyner, 'The Evolving Minerals Regime for Antarctic', in Christopher C. Joyner and Sudhir K. Chopra (ed.s), *The Antarctic Legal Regime*, (Dordrecht: Martinus Nijhoff, 1988) pp. 129 - 159 at pp. 144 - 146.

[20] *Id.*, pp. 147 - 150.

claimant states is their self interest. Though they have accepted to compromise their interest regarding the living resources, which have been agreed to be available for everyone, they have not accepted to compromise their interest in the lucrative mineral resources available in the areas claimed by them. This political disagreement between the claimant and the non-claimant states resulted in the subsequent Protocol on Environmental Protection to the Antarctic Treaty 1991, which imposed a moratorium by prohibiting all activities relating to the Antarctic mineral resources sparing the scientific research.[21]

The moratorium imposed by the Protocol is for 50 years, since Article 25 of the Protocol opens the option to renew the ban only after 50 years from the date of entry into force of the Protocol. The provision was a compromise between those advocating a permanent ban on mineral resource activities and those supporting the regime established by the Convention on the Regulation of Antarctic Mineral Resource Activities 1988.[22] This means that the problem of the Antarctic mineral resource activities has merely been postponed rather than resolved completely.

The postponement of solution to the problem seems to further complicate the problem, since the claimant states, on the one hand, would ascertain their claims more authentically, and on the other hand, there is a fear of increase in the number of claims especially by non-parties to the Antarctic Treaty. Added to this, the human population in Antarctic is increasing year by year. Though there is no instance of permanent human habitation in the Antarctic, such possibilities in the future cannot be ruled out, especially in the light of shortage of space in other parts of the earth. Once the permanent human base is established in the Antarctic, there would be a race for land grab, resulting in sabotage, crimes and other hostile activities evidenced in the beginning of civilization. These ever increasing and conflicting private ownership rights would never allow the establishment of a suitable regime to govern the mineral resource activities in future.

More importantly, the moratorium is not serving any useful purpose. It has made both the state and private sector to lose interest in the Antarctic. In the absence of any incentive, neither the private investors nor the states are interested to explore the Antarctic resources. This is evident from the fact that the existence of mineral resources in the Antarctic itself is not ascertained till date. In simple economic terms, the present deadlock unveils a clear-cut failure to utilise the resources of the Antarctic for the betterment of world community.

In the wake of moratorium, Antarctic is also moving in the direction of being an example of 'tragedy of commons'.[23] The rights and duties always go hand in hand. Mere imposition of obligations without conferring any sort of right would not work in practice. Therefore in the

[21] Art. 7, Protocol on Environmental Protection to the Antarctic Treaty, 1991.

[22] Catherine Redgwell, 'Antarctic', *International and Comparative Law Quarterly*, Vol. 40, No. 4, October 1991, pp. 976 - 981 at p. 977.

[23] Tragedy of commons denotes the use of the common resources by all without any responsibility to protect them, leading to the gradual depletion of the resources. See Garrett Hardin, 'The Tragedy of the Commons', *Science*, Vol. 162, No. 3859, 1968, pp. 1243 - 1248.

absence of right to carryon mineral resource activities, obligations to protect, preserve and develop those resources would merely remain as theory. As aptly pointed out by Sudhir K. Chopra, the Antarctic regime "is not an ideal regime from the perspective of the vast majority of States, for it does not fulfill the dream of a true 'commons regime'. At best, this is a regional regime serving the interests of a select few".[24] These factors show that the present moratorium regime has to be reconsidered immediately in the interest of the world community as well as that of the Antarctic.

CHM as an Economic Approach

In light of the above political deadlock on the regime for exploitation of Antarctic mineral resources, an urgent need for an economic approach is felt by many, if not all. There has been a longstanding debate over the applicability of concept of CHM to the Antarctic and its resources with a view to have sustained development and exploitation of the Antarctic.[25] While the third world has always asserted the applicability of CHM to Antarctic, the claimant states have vehemently opposed such assertion.[26] The claimant states' opposition has gone to the extent of pressurizing the United Nations Environmental Program (UNEP) and Food and Agricultural Organization (FAO) to abandon their proposed massive program for the development of the Antarctic Ocean resources for the benefit of the world as early as in 1976. The deliberations in the Antarctic Treaty Consultative Meetings have also been influenced by the politics of the claimants resulting in desertion of the plans for application of CHM to the Antarctic.[27]

Thus on the one hand, the CHM had gained support for application to Antarctic among the majority non-claimant states. However, the politics of the minority claimant states could sideline the majority arguments and continue the *status quo*. The fact that the claim of sovereignty did not result in major conflicts, barring the conflict between Argentina and Chile[28], is used by the claimants to supplement their argument against CHM and also to assert their sovereignty.

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[24] Sudhir K. Chopra, 'Antarctica as a Commons Regime: A Conceptual Framework for Cooperation and Coexistence', in Christopher C. Joyner and Sudhir K. Chopra (ed.s), *The Antarctic Legal Regime*, (Dordrecht: Martinus Nijhoff, 1988) pp. 163 - 186 at p. 172.

[25] See generally Mark W. Janis and John E. Noyes, *Cases and Commentary on International Law*, (St. Paul Minn.: West Group, 1997) pp. 515 - 523.

[26] F. M. Auburn, 'Consultative Status Under the Antarctic Treaty', *International and Comparative Law Quarterly*, Vol. 28, No. 3, July 1979, pp. 514 - 522 at p. 521.

[27] *Id.*

[28] See generally Phillip C. Jessup and Howard J. Taubenfeld, *Controls for Outer Space and the Antarctic Analogy*, (New York: Columbia University Press, 1961) pp. 145 - 148.

Going by this never-ending debate of the claimant and non-claimant states, the scholars are also divided in their opinions regarding the applicability of CHM to the Antarctic.

Addressing the question of effective regime to govern the Antarctic mineral resource activities in the 79th Annual Meeting of American Society of International Law, William R. Mansfield stated that

> It is not only possible to develop a regime for effective mineral resources management in Antarctica without settling the sovereignty issue, but it must be done without resolving that issue. There is no prospect of its being settled. It is for this reason that there is no real possibility of Antarctica or its resources being established as part of common heritage of mankind.[29]

He supplemented his argument by putting forward the view that analogy cannot be drawn from the outer space and the deep seabed because they were not subject to sovereignty claim. But the Antarctic has been a subject of substantial human activities as well as sovereignty claims for 75 years or more. Therefore the CHM concept is not applicable to the Antarctic.[30]

Roland Rich, while distinguishing the regime of outer space and deep seabed from the Antarctic, asserts that

> Unlike outer space, Antarctic is a continent and therefore subject to territorial sovereignty. Unlike the deep seabed territorial claims, dating from the beginning of the century, have been made and continue to be asserted and acted upon. Indeed if there was an area of the world analogous to Antarctic it would be Greenland over which Denmark was held to have a valid territorial claim. The "common heritage" concept cannot readily be applied to Antarctic by way of legal analogy.[31]

He goes on to state that the state practices also do not link the interests of developing countries to the Antarctic and its resources because of the fact that the assertion of Third World interest in the Antarctic has been occasional, timid and haphazard.[32] Further those who oppose the application of CHM to the Antarctic also state that the sovereign claims over the Antarctic cannot be dismissed because of the strong public opinion in the claimant countries. According to

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[29] William R. Mansfield, 'Who has the Right of Exploitation, and the Right to Prevent Exploitation, of the Minerals in Antarctic?', *American Society of International Law - Proceedings of the 79th Annual Meeting*, 25 - 27 April 1985, Published in 1987, pp. 59 - 62 at p. 61.

[30] *Id.*

[31] Roland Rich, 'A Minerals Regime for Antarctic', *International and Comparative Law Quarterly*, Vol. 31, No. 4, October 1982, pp. 709 - 725 at p. 714.

[32] *Id.*

Robert D. Hayton "intense feeling in some nations, particularly Chile and Argentina, will not permit governments to slight the territorial issue".[33]

However these views are not acceptable in the modern world, which depends on the international cooperation and mutual coexistence. The assertion of sovereignty over the Antarctic did not result in major conflict owing to the fact that not much is known about the existence of commercially profitable mineral deposits in the Antarctic. Once they are discovered, conflict is bound to occur. The fact that few states have maintained territorial claims over the Antarctic from long period of time should not be considered as a valid ground for legalizing such claims. We must keep in mind that such claims are not recognised by other states. Some states have also opposed the claim of sovereignty over the Antarctic,[34] which is evident from the fact that they have consistently refrained from seeking the consent of territorial claimants to undertake activities in the claimed areas. Moreover, when such activities were protested by the claimants alleging infringement of their sovereignty, the non-claimants have refused to accept the protest.[35]

Further the view that the public opinion in the claimant countries would not permit the claimants from renouncing their claims is too vague. If at all we take into consideration the public opinion, the opinion of the non-claimant states, especially the Third World, would represent the larger interest when compared to the public opinion of the not even handful of claimant states. As we all know that the smaller interest must always give way to the larger interest, importance must be given to the public opinion of the non-claimant states rather than to that of claimant states. Therefore the notion of sovereignty in the Antarctic needs to be replaced by notions that are in conformity with CHM.

The need for the applicability of CHM to govern the Antarctic can also be gathered from the opinions of some leading scholars. An early example of such thought can be cited in the call of Sri Lankan Ambassador Pinto in 1977 for subjecting the living and non-living resources of the Antarctic to a management regime to secure optimum benefit for mankind as a whole and particularly for the developing countries in accordance with appropriate global arrangements and within the framework of the New International Economic Order.[36] In September 1982, the Malaysian Prime Minister, speaking about the Antarctic, stated that "...those uninhabited lands belong to the international community. The countries claiming them must give them up so that

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[33] Robert D. Hayton, 'The Antarctic Settlement of 1959', *American Journal of International Law*, Vol. 54, No. 2, April 1960, pp. 348 - 371 at p. 369.

[34] United States, Russia, Japan, Belgium, Poland etc. assert the principle of open use as opposed to the principle of territorial sovereignty over the Antarctic.

[35] Steven J. Burton, 'New Stresses on the Antarctic Treaty: Toward International Legal Institutions Governing Antarctic Resources', *Virginia Law Review*, Vol. 65, No. 3, April 1979, pp. 421 - 512 at p. 472.

[36] J. R. Rowland, 'The Treaty Regime and the Politics of the Consultative Parties', in Christopher C. Joyner and Sudhir K. Chopra (ed.s), *The Antarctic Legal Regime*, (Dordrecht: Martinus Nijhoff, 1988) pp. 11 - 31 at p. 14.

either the United Nations administers these lands or the present occupants act as trustees for the nations of the world".[37]

Edvard Hambro goes a step forward and asserts the third world view by stating that one of the possible solutions to the problems of the Antarctic "is to declare the continent the common heritage of mankind and to establish the same kind of authority that is envisaged for the seabed and the ocean floor".[38] The legal writers like Rajmah Hussain[39] and Eric Suy[40] share similar opinions.

Concluding Remarks

There remains no doubt about the fact that the existing moratorium on the exploitation of the Antarctic mineral resources serves no purpose. The politics of the states already claiming sovereignty over the Antarctic has come in the way of having a justifiable regime governing the exploitation of the mineral resources. As the application of CHM to the Antarctic directly contravenes the interests of the Antarctic Treaty Consultative Parties, they have vigorously resisted efforts in different forums that might have produced such a result. It is obvious for them to believe that the existing system provides best arrangement for the Antarctic. However the fact remains different. As discussed above, the moratorium can never be viewed as a solution to the mineral resources problem, but it is merely postponement of the solution. This postponement of solution would be fatal for the establishment of a just regime in the future, especially in the light of shortage of land and resources available in the inhabited parts of the earth.

These factors show that there is an urgent need for substituting the political considerations with that of economic considerations in establishing a just and equitable regime to govern the Antarctic mineral resources in order to further the interests of mankind. Resorting to the commons' regime is the best available economic alternative. Unfortunately, the application of CHM to the exploitation of Antarctic resources has been denied by some of the states due to the misinterpretation of the concept. They have always considered CHM as an obstacle in the commercial exploitation of the resources. However the mandate of CHM is only the equitable

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[37] Christopher C. Joyner, (Remarks), 'Who has the Right of Exploitation, and the Right to Prevent Exploitation, of the Minerals in Antarctica?', *American Society of International Law - Proceedings of the 79th Annual Meeting*, 25 - 27 April 1985, Published in 1987, pp. 62 - 67 at p. 63.

[38] Edvard Hambro, 'Some Notes on the Future of the Antarctic Treaty Collaboration', *American Journal of International Law*, Vol. 68, No. 2, April 1974, pp. 217 - 226 at p. 225.

[39] See Rajmah Hussain, 'The Antarctic: Common Heritage of Mankind?', in Joe Verhoeven, Philippe Sands and Maxwell Bruce (ed.s), *The Antarctic Environment and International Law*, (London: Graham & Trotman, 1992) pp. 89 - 92 at p. 92.

[40] Eric Suy, 'Antarctica: Common Heritage of Mankind?', in Joe Verhoeven, Philippe Sands and Maxwell Bruce (ed.s), *The Antarctic Environment and International Law*, (London: Graham & Trotman, 1992) pp. 93 - 96 at p. 96.

distribution of benefits derived out of the exploitation and not halting the commercial exploitation. Therefore on the one hand it ensures the protection of interests of the commercial entities involved in the exploitation and on the other hand it caters to the needs and interests of rest of the world. This rule of equity is indispensible to achieve the world order based on cooperation, peace and prosperity. Hence there is a need for the substitution of moratorium regime (political approach) with that of a regime based on CHM (economic approach) for the exploitation of Antarctic mineral resources.