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# Antarctic mineral exploitation

THE EMERGING LEGAL FRAMEWORK

FRANCISCO ORREGO VICUÑA

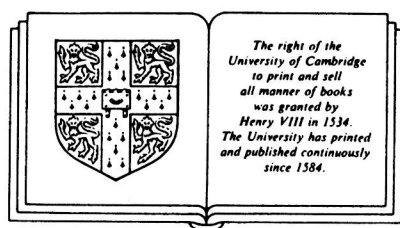


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## **Antarctic mineral exploitation**

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## Preface

Since the Antarctic Treaty was signed in 1959, co-operation in the Antarctic has been the subject of continuing evolution and rapid change. The negotiation and subsequent enactment of various regimes for the conservation and management of Antarctica's natural resources has been a particularly important cornerstone in this process of adaptation to, and regulation of, new activities in Antarctica. The aggregate of treaties, recommendations and other instruments and procedures which have come to be known as the Antarctic Treaty system, contribute today to an impressive body of emerging law which governs the activity of men in that continent and in the Southern Oceans.

The first part of this book examines the main characteristics of the international legal framework governing the co-operation of States in Antarctica, with particular reference to the problems of conservation of resources in the area, inquiring into the evolution of this process of co-operation at different stages of activity in Antarctica and the new problems and requirements which the system has had to address as a consequence of the changing conditions. The expansion of the system into new fields of co-operation has been a central feature of this evolutionary process, giving place not only to increased law-making by the Treaty parties but also to important institutional developments.

The key question which any Antarctic regime has had to face either directly or indirectly is that of the exercise of jurisdiction and the legal bases on which it could be founded. While the differing views existing on the issue of claims to sovereignty in the Antarctic continent and the relative uncertainty surrounding the exercise of jurisdiction in international law, whether on land or at sea, have made the answer to the above-mentioned question difficult, the system of Antarctic co-operation developed by the Treaty Parties has devised ingenious approaches to the

matter. These approaches are also examined in the light of the existing law and the available practice, with particular reference to the existence of concurrent bases of jurisdiction and to the methods by which the system has managed to avoid potential conflicts in this context.

A new dimension of the jurisdictional problem has emerged with the development of the new Law of the Sea during and following the Third United Nations Conference on the Law of the Sea. The discussion about possible claims to a territorial sea in the Antarctic and the meaning of safeguarding rights in the high seas, which were paramount in the first years of co-operation under the 1959 Treaty, have today been supplemented by the question whether the concepts of the Exclusive Economic Zone, the Continental Shelf and other maritime zones are applicable to the Antarctic and if so what is their legal nature in the light of the legal and political realities of that continent. This set of problems is itself the subject of inquiry in relation to interpretation and application of the 1982 Convention on the Law of the Sea and the relevant developments of customary international law in the field.

Against the background of the legal framework of co-operation in the Antarctic, the regime for mineral resources is discussed in sufficient detail to identify the basic issues and interests which have to be accommodated in order to attain a convention which addresses this important area of potential Antarctic activity. The current negotiations and draft texts that have been prepared on the subject are examined in conjunction with the points of view of governments and authors in the context of their attempt to find solutions acceptable to the various interests represented in this effort. While the negotiating process has not yet been finalized, the essential elements of the regime and the position of the Consultative Parties on them have been made abundantly clear. This in turn has meant that to a large extent the range of options for a satisfactory settlement is already visible.

The specific rules and procedures which have been suggested for governing the activities of prospecting, exploring and developing mineral resources in the Antarctic are analysed in terms of their legal meaning and significance, together with such difficult questions as the criteria for access to the resources, the environmental standards, the granting of authorizations to initiate mining activities, the financial provisions, the area of application of the regime, the stability of contracts and the applicable law. In all of these matters the traditional approaches of international law are confronted with new challenges and the need in many cases to seek unprecedented solutions.

Given the different views on sovereignty and jurisdiction that have

been mentioned above, the fundamental problem confronting the regime for mineral resources is who shall have the final authority for the granting of licences or approval of contracts and under what terms and conditions these could be issued. Various models and suggestions have been brought to the fore on this aspect, providing a wide range of options ranging from a territorial approach to a fully internationalized regime. It is on this point that the negotiators have had to make a particular effort to use their ingenuity to devise formulae which will satisfy the various interests at work. The careful distribution of competences that has been proposed to achieve this, the role of the proposed institutional machinery, the procedures for decision-making, the settlement of disputes and other factors central to this accommodation are discussed in successive sections of the book.

In view of the growing attention that Antarctica is attracting on the part of the world community at large, the accommodation of interests among the Consultative Parties is no longer the sole factor that will condition the achievement of a satisfactory settlement on the question of exploitation of mineral resources. The needs and interests of other parties to the Antarctic Treaty, of third States generally and of international organizations have become a consideration in the negotiation relevant to finalization of resource regimes in the area.

The important set of questions concerning these other interests is the subject of inquiry and research in the third part of the book, which discusses in particular the issue of expanded participation in the Antarctic Treaty system, the problems of international law posed by the eventual activity of third parties in the area and, most significantly, the meaning and prospects of the various initiatives that have taken place recently concerning the declaration of Antarctica as the common heritage of mankind and the more international organizational approaches that would ensue from adoption of a fully internationalized Antarctic regime.

The system of co-operation that applies today in Antarctica under the 1959 Treaty and related instruments has evolved a long way from the period of negative confrontation of competing claims and non-recognition of claims. The more positive approach of harmonizing interests within the framework of limited forms of internationalization has today become paramount in the Antarctic, the regime for mineral resources being the most recent and advanced example of this process. While sovereignty claims still have an important role to play in the context of this co-operation, it will be by means of their integration into the resources regimes in a way that will ensure their compatibility with other interests



that have recently proved to be equally relevant. This important phenomenon is explored throughout the book.

The book covers the state of the law, State practice and developments in the negotiations, as well as in the relevant literature and documentation on the subject, up to September 1986, except where otherwise indicated.

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This book has developed from the PhD thesis researched by the author at the London School of Economics and Political Science, University of London; the author acknowledges with gratitude the useful suggestions received from Dr Patricia Birnie and Professor Rosalyn Higgins in the preparation of this work.

# Abbreviations

- A.F.A.R. Australian Foreign Affairs Record  
A.J.I.L. American Journal of International Law  
An. Fr. D.I. Annuaire Francais de Droit International  
Ann. Suisse D.I. Annuaire Suisse de Droit International  
Annals Air and S.L. Annals of Air and Space Law  
Ant. J.U.S. Antarctic Journal of the United States  
A.N.U. Australian National University  
A.S.I.L. American Society of International Law  
Aust. Quar. The Australian Quarterly  
Aust. L.J. The Australian Law Journal  
B.A.S. British Antarctic Survey  
B.I.I.C.L. British Institute of International and Comparative Law  
Bos. Coll. I.C.L.R. Boston College International and Comparative Law Review  
Bos. U.L.R. Boston University Law Review  
Brook. J.I.L. Brooklyn Journal of International Law  
B.Y.B.I.L. British Yearbook of International Law  
C.C.A.M.L.R. Convention for the Conservation of Antarctic Marine Living Resources  
C.I.A. Central Intelligence Agency, U.S. Government  
C.J.T.L. Columbia Journal of Transnational Law  
C.J.W.B. The Columbia Journal of World Business  
C.M.L.R. Common Market Law Review  
Cal. West. I.L.J. California Western International Law Journal  
Can. Y.B.I.L. The Canadian Yearbook of International Law  
Case W.R.J.I.L. Case Western Reserve Journal of International Law  
Comp. I.L.J. South Afr. Comparative and International Law Journal of Southern Africa  
Conn. L. Rev. Connecticut Law Review  
Coop. and Confl. Cooperation and Conflict

Corn. I.L.J.    Cornell International Law Journal  
 F.A.O.    Food and Agriculture Organization of the United Nations  
 For. Af.    Foreign Affairs  
 For. Pol.    Foreign Policy  
 G.A.T.T.    General Agreement on Tariffs and Trade  
 G.Y.I.L.    German Yearbook of International Law  
 Har. I.L.J.    Harvard International Law Journal  
 I.C.E.S.    International Council for the Exploration of the Sea  
 I.C.L.Q.    International and Comparative Law Quarterly  
 I.J.I.L.    The Indian Journal of International Law  
 I.L.M.    International Legal Materials  
 I.M.O.    International Maritime Organization  
 I.O.    International Organization  
 I.Y.B.I.A.    The Indian Yearbook of International Affairs  
 Int. Af.    International Affairs  
 Int. Conc.    International Conciliation  
 I.U.C.N.    International Union for the Conservation of Nature  
 J.A.G.Jour.    Judge Advocate General Journal  
 J.D.I.    Journal du Droit International  
 J.I.S.W.A.    Journal of Interamerican Studies and World Affairs  
 J. Int. Af.    Journal of International Affairs  
 J.I.L.    Journal of International Law  
 J.M.L.C.    Journal of Maritime Law and Commerce  
 J.W.T.L.    Journal of World Trade Law  
 J. Comp. Leg. I.L.    Journal of Comparative Legislation and International Law  
 Jap. An. I.L.    Japanese Annual of International Law  
 Law Pol. Int. Bus.    Law and Policy in International Business  
 M.T.S.J.    Marine Technology Society Journal  
 Mc. Gill L.J.    Mc Gill Law Journal  
 Mel. U.L.R.    Melbourne University Law Review  
 N.Z.I.R.    New Zealand International Review  
 N.Z.L.J.    New Zealand Law Journal  
 Nat. Res. J.    Natural Resources Journal  
 Ocean Dev. I.L.    Ocean Development and International Law  
 O.Z.F.O.R.    Österreichische Zeitschrift für Öffentliches Recht  
 Phil. Trans. R. Soc. Lond.    Philosophical Transactions of the Royal Society,  
    London  
 Pol. Rec.    Polar Record  
 Pol. Sci. Q.    Political Science Quarterly  
 Proc. A.S.I.L.    Proceedings of the American Society of International Law  
 R.B.D.I.    Revue Belge de Droit International  
 R.G.D.I.P.    Revue Générale de Droit International Public  
 R.I.A.A.    Reports of International Arbitral Awards  
 Rec. Cours Ac. D.I.    Recueil des Cours de l'Académie de Droit International

Rev. Hel. D.I. *Revue Hellenique de Droit International*  
Rev. Iran. Rel. Int. *Revue Iranienne de Relations Internationales*  
Riv. Studi Pol. Int. *Rivista di Studi Politici Internazionali*  
S.C.A.R. *Scientific Committee on Antarctic Research*  
S.C.L.Rev. *Southern California Law Review*  
S.I. *Statutory Instruments of the United Kingdom*  
San.D.L.R. *San Diego Law Review*  
Sci. Publ. Af. *Science and Public Affairs*  
S.I.P.R.I. *Stockholm International Peace Research Institute*  
Sov. Y.B.L. *Soviet Yearbook of International Law*  
Stan. J.I.L. *Stanford Journal of International Law*  
Sy. J.I.L.C. *Syracuse Journal of International Law and Commerce*  
U.B.C.L.R. *University of British Columbia Law Review*  
U.C.L.A.-Alas. L.R. *University of California Los Angeles, Alaska Law Review*  
U.C.L.A. L. Rev. *University of California Los Angeles Law Review*  
U.N.E.P. *United Nations Environment Programme*  
U.N.T.S. *United Nations Treaty Series*  
Univ. Mia. L. Rev. *University of Miami Law Review*  
U.N.I.T.A.R. *United Nations Institute for Training and Research*  
U.S. Nav. Int. Proc. *United States Naval Institute Proceedings*  
U.W.I.S.T. *University of Wales Institute of Science and Technology*  
Virg. J.I.L. *Virginia Journal of International Law*  
Virg. L.R. *Virginia Law Review*  
West. Ont. L.R. *Western Ontario Law Review*  
Wil. Quar. *The Wilson Quarterly*  
Wisc. L. Rev. *Wisconsin Law Review*  
Y.B.I.L.C. *Yearbook of the International Law Commission*  
Y.B.W.A. *Year Book of World Affairs*  
Y.L.J. *The Yale Law Journal*  
Z.A.O.R.V. *Zeitschrift für ausländisches öffentliches recht und volkerrecht*

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## **Part I**

# **The international legal framework of Antarctic co-operation and the development of resources**