

Eyeing 2048: Antarctic Treaty System's Mining Ban

Sean Coburn*

I. Introduction

Antarctica is one of the last true wildernesses, an area yet unblemished by significant human intervention. It is considered “the epitome of remoteness and inaccessibility.”¹ However, Russia, China, India, Iran, and Turkey are all currently building or expanding bases in Antarctica. This is in addition to a host of operational bases already established by many countries including Finland, Argentina, the United States, Chile, Germany, Australia, and New Zealand. While various reasons, mainly scientific, are put forth for this flurry of activity, Antarctica presents a unique bounty for states—a potential vast reserve of untapped resources. “The newer players are stepping into what they view as a treasure house of resources,” Anne-Marie Brady, a scholar at New Zealand’s University of Canterbury who specializes in Antarctic politics, told the *New York Times*.² In the past, Antarctica’s mineral wealth was seen as too distant and expensive to extract, but the warming climate and advent of new technologies will increasingly make extraction feasible by the time the agreement banning mining can come up for review in 2048.³ In June 2016, twenty-nine nations reaffirmed their commitment to prevent mining on the continent; however, the diplomatic feasibility of this goal remains uncertain.

* J.D. Candidate, Columbia Law School, Class of 2018.

1. Harm de Blij, *A Regional Geography of Antarctica and the Southern Ocean*, 33 U. MIAMI L. REV. 299, 299 (1978).

2. Simon Romero, *Countries Rush for Upper Hand in Antarctica*, N.Y. TIMES, Dec. 29, 2015, <http://nyti.ms/1mfXZ2u> [<https://perma.cc/SC2C-WHZF>].

3. Protocol on Environmental Protection to the Antarctic Treaty art. 8, *opened for signature* Oct. 4, 1991, S. TREATY DOC. NO. 102-22 [hereinafter the Protocol].

II. THE TREATY BACKGROUND

On December 1, 1959, the Antarctic Treaty System (“ATS”) was signed by twelve countries who sought to manage Antarctica. The “continent was to be dedicated to scientific research, a unique ‘world background’ against which to gauge humanity’s impact on the planet.”⁴ The ATS governs “economic, political, social, scientific, and environmental issues on the continent.”⁵ The original treaty did not contemplate resource extraction in the region, but the issue was first raised by New Zealand and the United Kingdom in 1970 and dominated Antarctic politics for the next twenty years.⁶ A resource extraction agreement was not reached until 1991 when the member nations agreed to the Protocol on Environmental Protection to the Antarctic Treaty (the “Protocol”), also known as the Madrid Protocol. Article 7 simply states that “any activity relating to mineral resources, other than scientific research, shall be prohibited.”⁷

The mining ban is of indefinite duration, and strict rules for modifying the ban are provided by the Protocol. If all members agree, the prohibition can be modified at any time.⁸ “If, after the expiration of 50 years from the date of entry into force of this Protocol, any [member nation] so requests . . . a conference shall be held as soon as practicable to review the operation of this Protocol.” An amendment adopted at a review conference shall then enter into force provided it is passed by “a majority of the Parties, including 3/4 [of the original Consultative Parties].”⁹ A party may choose to withdraw from the Protocol if

4. Christopher Anderson, *Antarctic Treaty Talks Break Down As Scientists Debate Impact of Mining*, THE SCIENTIST, Nov. 13, 1989, <http://www.the-scientist.com/?articles.view/articleNo/10742/title/Antarctic-Treaty-Talks-Break-Down-As-Scientists-Debate-Impact-Of-Mining> [<https://perma.cc/PUH8-JU34>].

5. William M. Welch, *The Antarctic Treaty System: Is It Adequate to Regulate or Eliminate the Environmental Exploitation of the Globe’s Last Wilderness?*, 14 HOUS. J. INT’L L. 597, 600 (1992).

6. British Antarctic Survey, *Mineral Resources*, DISCOVERING ANTARCTICA, <http://discoveringantarctica.org.uk/challenges/sustainability/mineral-resources> [<https://perma.cc/WL4G-PE3B>] (last visited Dec. 20, 2016).

7. The Protocol, *supra* note 3, art. 7.

8. *Id.* art. 25.

9. *Id.*

a modification so agreed does not subsequently enter into force—this is the walkout clause.¹⁰

If a country did choose to violate the ban today, there are no formal means to punish it. The ATS lacks a binding liability mechanism. The treaty system, besides the walkout clause, acknowledges the “common heritage of mankind.”¹¹ The expansion of the ATS to fifty-three parties is a result of the right of other nations to join the ATS and derive benefit from this common heritage, although the restrictions on becoming a consultative voting member somewhat belie this purpose. Regardless, there is no binding enforcement mechanism for those who may violate the Protocol, meaning nations have no assurance that “more powerful, self-regulating, member-nations will not someday escape unpunished for the exploitation or destruction of the benefits that belong to all of mankind.”¹² The Protocol contemplates a liability regime, stating, “the Parties undertake to elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by this Protocol,” and allowing for the adoption of a liability regime through an annex; yet nothing has been adopted as of this time.¹³ Without a formal liability system in place, “self-policing of the member-nations’ adherence to the [P]rotocol will remain suspect.”¹⁴

However, if outright mining activities were undertaken, one would imagine a strong response even in the absence of a liability mechanism. The potential for a severe response is sufficient to constrain actors at this time as there are few gains to be had from breaching the treaty now. The larger issue from an environmental perspective relates to countries seeking to set a geopolitical precedent and undertake commercial mining after 2048 regardless of the commercial viability of a project at that time. A first mover could claim ownership of the resources—pointing to the rule of capture that has long held sway over uninhabited regions—and then simply ramp up commercial activity as dictated by the market.

10. *Id.*

11. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

12. Welch, *supra* note 5, at 650.

13. The Protocol, *supra* note 3, art. 16.

14. Welch, *supra* note 5, at 650.

III. THE FUTURE OF THE MINING BAN

Exactly how strong this ban will be past 2048 remains unclear. On June 1, 2016, the twenty-nine consultative members to the Antarctic Treaty unanimously agreed to a resolution at the Thirty-Ninth Antarctic Treaty Consultative Meeting stating their “firm commitment to retain and continue to implement . . . as a matter of highest priority” the ban on mining activities in the Antarctic. The resolution was initiated by the United States to commemorate the twenty-fifth anniversary of the 1991 signing of the Protocol.¹⁵ The U.S. State Department noted, “The resolution also addressed a common misconception that the Protocol has an established expiration date, which it does not.”¹⁶ However, William Welch notes that the walkout clause in article 25 “changes the protocol’s indefinite ban into merely a fifty-year moratorium,”¹⁷ and the increased state presence on the continent is in response to the possibility of resource extraction; indeed, some nations have directly acknowledged this.¹⁸

If a country were to decide to walk away from the treaty, the United-States-proposed walkout clause made it “significantly easier for a nation to unilaterally withdraw from the protocol and conduct virtually unregulated mining operations in Antarctica.”¹⁹ The United States believed such a clause necessary due to the need for consensus: “Article 25 sections 3 and 4 stipulate that any amendment to allow mining after 50 years must first be adopted by a majority of all member nations, and then ratified by three-fourths of the voting nations, including all twenty-six consultative parties at the time the protocol is adopted.”²⁰ The United States’ chief negotiator, Curtis Bohlen, feared this would result in a veto

15. Antarctic Treaty, Res. 6, ATCM XXXIX - CEP XIX (Jan. 6, 2016) (“[c]onfirming ongoing commitment to the prohibition on Antarctic mineral resource activities, other than for scientific research; support for the Antarctic Mining Ban”).

16. Press Release, U.S. Dept. of State, United States Leads Antarctic Treaty Parties To Reaffirm Support for Ban on Mining Activities (June 9, 2016).

17. Welch, *supra* note 5, at 648.

18. Jane Perlez, *China, Pursuing Strategic Interests, Builds Presence in Antarctica*, N.Y. TIMES, May 3, 2015, <http://www.nytimes.com/2015/05/04/world/asia/china-pursuing-strategic-interests-builds-presence-in-antarctica.html> [<https://perma.cc/25VL-PWST>].

19. Welch, *supra* note 5, at 643.

20. *Id.* at 644.

power whereby “you could have one nation block the will of the rest,”²¹ and to counter this power introduced the walkout clause—which ironically would allow one nation seeking to mine to effectively block the rest.

The walkout clause allows a voting nation to withdraw from the Protocol if an amendment to approve mining has not been ratified within three years of being submitted.²² To those opposing all mineral extraction in the region, the three-year timeframe is especially troubling. ATS member-nations historically have moved slowly in domestically ratifying amendments, meaning that a future amendment to article 7's mineral prohibition would not be ratified in three years.²³ This would then allow a member-nation to “walk out” and begin unilateral mining operations two years later.²⁴ Moreover, the two-step nature of ratification could coerce states to adopt an amendment they did not vote for. Article 25 only requires a majority of all parties and three-fourths of the voting parties who initially adopted the Protocol for adoption of an amendment, but requires unanimous consent of these voting nations and three fourths of all parties for ratification—meaning a country may feel compelled to ratify an amendment it did not adopt merely to avoid the prospect of a walkout.²⁵ The walkout clause's legal loophole “may become the noose around the neck of the globe's last wilderness.”²⁶

Due to the walkout clause, environmentalists and others opposing commercial mining in Antarctica should remain wary of any attempt to renegotiate the moratorium. Even a strong regulatory regime, such as the mining by consensus regime originally contemplated, could prove a tragic mistake if a nation were able to walk out due to slow ratification. Watchdogs must vigilantly place pressure on states to act quickly to ratify any new agreement even if cost factors still prohibit traditional commercial enterprise. A state actor might choose to suffer the heavy losses associated with being the first

21. *Id.*

22. *Id.*

23. *Id.* at 647.

24. See the Protocol, *supra* note 3, art. 25.

25. *Id.*

26. Welch, *supra* note 5, at 649.

mover as it seeks to establish ownership over the most valuable resources.

The most effective means to prevent commercial development within the context of the ATS is simply to maintain the mining ban and disallow the prospect of a walkout. The majority/three-fourths requirement should still be sufficient to prevent a walkout if environmental groups oppose any modification of the moratorium—even those that would seek to permanently ban drilling. I.e., if no proposed amendment is able to reach the majority (and three fourths of original voting parties) required for adoption, the issue of a walkout during ratification is moot. Those who would seek to institute a fair and effective mining regime may be hamstrung by the three-year ratification window. Any mining regime would create winners and losers in the context of their preexisting Antarctic claims, and a country that is given fewer ownership rights than it feels it is due could simply walk out once the three-year ratification window closes.

IV. CONCLUSION

As the climate warms, commodity prices rise, and new technologies make polar extraction cheaper, state actors have begun eyeing the vast mineral wealth of Antarctica. The continent is governed by consensus under the Antarctic Treaty System, yet questions of ownership of the mineral wealth remain unanswered. States seeking to set a geopolitical precedent may undertake to begin exploitation even if cost factors are not met by 2048 when the Protocol comes up for review. Because of the walkout clause contained in the mining ban, environmental advocates should be wary of any attempt to modify the Protocol. While a permanent ban with a legally binding enforcement mechanism would be ideal, any attempt to institute such a ban could give rise to a walkout as the three-year ratification window is so short. Without a permanent ban, environmental groups should continue to monitor Antarctic action taken by states to ensure scientific enterprise does not cross into commercial activity.