Editorial: Antarctic Treaty System – Achievements and Prospects

I. Introduction

The 2019 issue of *Taumauri*, the Waikato Law Review, emphasises the foundation objectives of *Te Piringa* Faculty of Law at the University of Waikato: biculturalism, law in context, and professionalism. This issue also celebrates the establishment of the Waikato Public Law and Policy Research Unit hosted by the Faculty of Law, and the symposium held by the Unit in Wellington on 28 November 2018 critically analysing "The Antarctic Treaty System: Past achievements and future prospects".

The Waikato Public Law and Policy Research Unit promotes the widest conception of public law and policy, encompassing administrative law, charity law and the regulation of civil society, constitutional law, criminal law and justice, and international law. It was established in 2018 to fill a clear gap in the interrogation of these issues in an integrated and holistic way. This issue of the Waikato Law Review furthers these aims and objectives.

II. The Antarctic Treaty System: Past Achievements and Future Prospects

As part of its focus on public international law, the Unit hosted the symposium on the Antarctic Treaty System. The New Zealand Law Foundation, who provided the grant funding to cover the accommodation and travel costs for bringing the international speakers to New Zealand, generously supported the symposium.

The Antarctic Treaty 1959 has now been in place for over 60 years and is regarded by informed commentators as one of the most successful multi-party international treaty systems. The symposium was held on the cusp of the 60th anniversary of the Treaty, and provided an opportunity to look back and take stock of previous success – and more importantly, an opportunity to assess the future prospects for the Treaty system.

New Zealand has played a key role in the Antarctic Treaty system and has had a long involvement with Antarctica since accepting the transfer sovereignty over the Ross Dependency from the United Kingdom in 1923. The symposium was therefore highly relevant for lawyers, policy-makers, regulators, scientists, and academics working on both applied and theoretical research in relation to the continent and New Zealand's interests in Antarctica. It attracted a diverse range of attendees from across the Department of Conservation, a former Judge of the International Court of Justice, the Ministry for Foreign Affairs and Trade, the New Zealand Defence Force, the Office of the Auditor General, and academics from the University of Auckland, the University of Southern Denmark, the University of Waikato, and Victoria University of Wellington.

A. The Antarctic Treaty System: Challenges and Opportunities

Marcus Haward from the Institute for Marine and Antarctic Studies at the University of Tasmania addressed "The Antarctic Treaty System: Challenges and Opportunities". He emphasized the key

importance of the Antarctic Treaty system in maintaining the peaceful use of the continent and underlined that its success could be measured by the way in which the Treaty system has managed external and internal pressures by avoiding disputes, addressing challenges (e.g. whaling), and by providing a guideline for addressing future issues (e.g. protecting biodiversity in areas beyond national jurisdiction (BBNJ) based on techniques derived from the Convention for the Conservation of Antarctic Marine Living Resources). Haward also noted the Cold War background to the Treaty negotiations and, what he termed, the "elegant simplicity" of Article IV in freezing sovereignty disputes and enabling the parties to focus on peace and security. He also drew attention to the capability for expansion of the Treaty system into areas such as the protection Albatrosses and other migratory sea birds. In terms of emerging issues, Haward identified the protection of the Southern Ocean under the United Nations Convention on the Law of the Sea (UNCLOS) and the negotiation of a new implementing agreement regarding BBNJ, the human impact of tourism, biological prospecting, climate change, and fishing as the key emerging issues that will test the strength of the Treaty system. He concluded by stressing that maintaining key norms from the Treaty system would require careful work.

B. Why does the Antarctic Matter? Re-imagining the Treaty Regime from a European Perspective

Catherine Mackenzie from the University of Cambridge addressed the question "Why does the Antarctic matter? Re-imagining the treaty regime from a European perspective". She approached this "big" question by asking what makes a treaty work – does this arise because it is specific or common, or does uniqueness matter. Mackenzie found that treaty making is something that runs deep in the European conscience (citing the Treaty of Medina 622) and that it is a dynamic and ongoing process. She also found that, typically, treaties are focused on the community interest in maintaining borders. For example, as a result of the Treaty of Westphalia 1648 Mackenzie observed that we know what sovereign states look like, based on territorial claims and cultural influence. In contrast, the Antarctic Treaty system challenges these notions by freezing territorial claims (Article IV). As a result, she noted that, regime building has not therefore followed, and while states retain legislative competence - the traditional state trappings have not emerged. These observations led Mackenzie to focus on the mechanics of collective regimes (e.g. the Antarctic Treaty system, the Convention on Biological Diversity (CBD), the Ramsar Convention, and the World Heritage Convention) based on the concept of the common heritage of mankind. She found that the common heritage of mankind is a conceptual notion that is not defined or limited by borders. Mackenzie therefore questioned whether collective regimes generally are incapable of enforcement based on public choice economics that typically (in her view) produce third-best options and the impulse of collective decision-making where compromise is prevalent (e.g. the European Union). As a result, she found that there is a fundamental clash between the collective nature of the Antarctic Treaty system and the traditional (ideological) approach of state parties.

Mackenzie then examined the attributes of successful treaty regimes. Generally, she found that treaties with a smaller number of parties tend be more effective, but that success can sometime be diluted (e.g. CBD) because expectations are lowered to the lowest possible level. She also found that the objectives of treaty making are important (noting Haward's emphasis on peace and security in relation to the Antarctic Treaty system), and that sometimes regime effectiveness can simply be based on the fact that "something positive" can be identified in relation to the particular regime by most observers.

In conclusion, Mackenzie noted a number of critical points when reimagining the Antarctic Treaty system, namely, that problem definition (looking at where regime fractures could occur – e.g. climate change or mineral exploitation), the time required to conclude treaty negotiations (e.g. UNCLOS), the political will to implement multi-lateral environmental agreements, the need for capacity building to support developing nations, that there is no single formula that works in treaty negotiations, that good results are rarely the product of a single factor, and that where problems occur the treaty document itself will generally be the ultimate tool that determines how issues are resolved. Finally, in relation to the question of whether uniqueness matters, Mackenzie observed that Antarctica (notwithstanding its importance) is merely one of a number of wilderness areas that deserve protection, that there is real tension between the precautionary approach and evidence based standard setting, that the elephants in the room are minerals (including oil) exploration and climate change, that territorial claims would be problematic absent Article IV, and that the biggest issue facing Antarctica could arise from establishing a permanent population and any resulting pressure for self-determination.

C. So What? Using Scientific Knowledge to Inform Antarctic Decision-making

Julia Jabour also from the Institute for Marine and Antarctic Studies at the University of Tasmania posed the provocative question "So what? Using scientific knowledge to inform Antarctic decision-making". She noted that scientific research enables states to become parties to the Antarctic Treaty system and is a hedge against exclusion. In particular, Jabour observed that climate change makes science important due to the impact of climate change on ice, light, temperature, salinity, and ecology. This led her to argue strongly for cap and trade schemes to limit greenhouse gas emissions, but she noted that such action would require political decisions by states. Jabour also noted the trend towards the politicization of scientific research in Antarctica, and questioned whether in practice it supports or informs policy. For example, she noted the review by the Commission for the Conservation of Antarctic Marine Living Resources that found that scientific research was not always funneled toward or connected with decision-making, and more recent national trends that require academic research to demonstrate that it will be in the national interest of the funding state or provide national benefits to the funding state. Generally, Jabour observed the conflict between conservation and use of Antarctic resources and argued that these considerations should in practice be balanced. She concluded by emphasizing the increasing use of technology in Antarctic scientific research such as biotelemetry tagging, the use of drones and satellites for surveillance, and the use of 3D printing and imaging of krill to assist with monitoring. Overall, Jabour found that scientific research is a legitimate peaceful activity that provides state credibility for participation in the Antarctic Treaty system, and that scientific research is valuable where it can be translated into decision-making.

D. Biodiversity in the Antarctic: A Race against Time, but Who Owns What?

Christopher Battershill from the University of Waikato addressed the challenging topic of "Biodiversity in the Antarctic: a race against time, but who owns what?" He focused on bio prospecting and questions around the ownership of Antarctic bio-resources, and the intellectual property rights of indigenous people. In particular, Battershill reported on case studies regarding metabolites found in sponges (that can be used to block certain cancers) that revealed questions about the sample sizes required for pharmaceutical testing and the need for environmental impact

assessment. For example, he noted that small sample sizes can sometimes have a disproportionate adverse impact and he argued for a case-by-case approach. This led Battershill to look at legal responses outside the Antarctic Treaty system (e.g. Rio Declaration, Nagoya Protocol, and the findings from the Waitangi Tribunal Report (WAI 262) regarding Maori interests in plant species and the need to regulate scientific research and commercialization) and to suggest that UNCLOS could be used as a model for providing more detailed regulation of bio-prospecting.

E. Drawing the Themes Together, A New Zealand Perspective on Antarctic Law

Finally, Alberto Costi from Victoria University Wellington provided a thought provoking overview "Drawing the themes together, a New Zealand perspective on Antarctic law", while Amy Laurenson from the Ministry of Foreign Affairs and Trade spoke briefly about her role as the New Zealand Commissioner under the Convention for the Conservation of Antarctic Marine Living Resources. Costi noted (like Haward and Mackenzie) that the Antarctic Treaty system is based on good will and cooperation. He then considered what the next challenges for the Treaty system are likely to be. Overall, Costi identified ten wide-ranging issues. First, emerging political trends over the next 20 years in terms of the role of China within the Antarctic and the action of Russia in testing the law. Second, that there will likely be increased competition for resources as a result of bio prospecting. Third, (more positively) that the Sustainable Development Goals may become more important for resolving issues. Fourth, that there could be a potential shift in the Antarctic Treaty system away from the current focus on peace and security, research, and high standards of environmental management. Fifth, future challenges could include growing membership that may affect the balance of power between the original Antarctic Treaty signatories, and the potential for new members to take a more cynical approach to resource exploitation. Sixth, whether the Antarctic Treaty system could cope with future challenges giving its low cost institutional structure and whether consensus decision-making would find it difficult to address hard questions (described by Costi as "thickening governing issues") – as a consequence, there is a risk that the Antarctic Treaty system may become ineffective absent more investment. Seventh, that when viewed from an external perspective, New Zealand "punches above its weight" and exhibits a sense of duty to the wider international community. Eighth, that regime development is important, and that remaining outside the United Nations framework is likely to be beneficial, and that the long-term interests of the parties would likely best be served by a pragmatic approach to addressing issues. Ninth, that climate change and biodiversity remain key issues. Tenth, that Antarctic research must be used to inform decision-making both by regulators and commercial and industrial interests.

The keynote papers by Marcus Haward and Julia Jabour are now disseminated by publication in this issue of the Waikato Law Review.

III. International Law Scholarship

This issue of the Waikato Law Review also reflects the Faculty's research in the field of international law that focuses on armed conflict, conflict of laws, foreign investment law, humanitarian law, human rights, international criminal law, international environmental law, international trade, and law of the sea. For example, the article by Sheikh Mohammad Towhidul Karim and George F Tomossy from Macquarrie University on the progressive realisation of the right to health draws the important connection between human rights and the environment emphasised by the Sustainable Development Goals. While the article by Ashley Murphy from the University of

Chester argues persuasively that the climate change emergency should be viewed through a security initiative lens to underscore the urgent need for climate change mitigation. The article by Sharifah Saeedah Syed Mohamed from the University of Technology MARA emphasises the importance of international trade and the need for effective commercial terms of trade to underpin a sustainable global economy, and also provides a neat segue to the article by John Farrar noted below. These themes also link into the book review of Human Rights and the Environment: Legality, Dignity and Geography (Edward Elgar Publishing, Cheltenham, 2019) by James R May and Erin Daly from Widener University.

IV. Law in Context and Professionalism

Finally, the article by Emeritus Professor John Farrar (formerly Dean of Law at the University of Waikato) focuses on the career of William Larnach and his role in the commercial and corporate world of 19th century New Zealand. This article reflects the Faculty's commitments to the study of law in context and professionalism, and its innovation in being the first New Zealand law school to teach the Law of Corporate Entities as a compulsory subject in the LLB degree programme.

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