

# William & Mary Environmental Law and Policy Review

---

Volume 43 (2018-2019)  
Issue 1

Article 3

---

October 2018

## The Waters of Antarctica: Do They Belong to Some States, No States, Or All States?

Linda A. Malone

*William & Mary Law School, lamalo@wm.edu*

Follow this and additional works at: <https://scholarship.law.wm.edu/wmelpr>



Part of the [Environmental Law Commons](#), [International Law Commons](#), [Natural Resources Law Commons](#), [Natural Resources Management and Policy Commons](#), and the [Water Resource Management Commons](#)

---

### Repository Citation

Linda A. Malone, *The Waters of Antarctica: Do They Belong to Some States, No States, Or All States?*, 43 Wm. & Mary Env'tl. L. & Pol'y Rev. 53 (2018), <https://scholarship.law.wm.edu/wmelpr/vol43/iss1/3>

Copyright c 2018 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmelpr>

# THE WATERS OF ANTARCTICA: DO THEY BELONG TO SOME STATES, NO STATES, OR ALL STATES?

LINDA A. MALONE\*

## ABSTRACT

Major issues and complexities arise when one is looking at the international puzzle that is Antarctica. Despite being uninhabited year-round and lacking substantial long-term international law rules for sovereignty, states still try to claim their sovereignty over various parts of Antarctica.<sup>1</sup> The consortium of states under the Antarctica Treaty System (“ATS”) then further aggravates these complexities, especially when other states outside of the ATS have been arguing for different regimes and approaches to dealing with Antarctica and resource exploitation.<sup>2</sup> Due to these major issues and a desperate need for a resolution in times of global climate change, this Article delves into certain crucial topics including the status of the waters off Antarctica, the overall pertinence of the Law of the Sea Treaty, and the best approach to the upcoming negotiations for a treaty on sustainable use of marine biological diversity in areas outside national jurisdiction. This Article is not meant to provide the absolute answer to this puzzle, but will, however, analyze the various treaties, conventions, and ideas, and try to posit some ways of looking at the puzzle.

The Article starts by discussing the ATS and its goal of trying to preserve Antarctica. When it comes to the Antarctic waters, history shows that when unregulated, the waters have faced extensive exploitation of their resources, and some early attempts had been made to check this.<sup>3</sup> The Antarctic Treaty was adopted in 1959 and entered into force in

---

\* BA Vassar College; JD Duke University School of Law; LL.M. University of Illinois College of Law; Marshall-Wythe Foundation Professor of Law, William and Mary Law School. I would also like to thank Kelsey Thwaites, Sashenka Brauer, Leslie Crudele, and Jacquelyn Miner for their research assistance.

<sup>1</sup> Antarctic Treaty, Proclamation, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

<sup>2</sup> Stephen Nicol, *Resource Exploitation in the Antarctic Region*, AUSTRALIAN ANTARCTIC MAG. (May. 15, 2002), <http://www.antarctica.gov.au/magazine/2001-2005/issue-3-autumn-2002/feature/resource-exploitation-in-the-antarctic-region> [https://perma.cc/ZP8V-M9BN].

<sup>3</sup> *Id.*

1961, and it consists of fifty-three parties with different statuses and voting power—twenty-nine states have full power to participate in decision-making.<sup>4</sup> As the Article clearly points out and explains, the Treaty does not alter or affect any of the previous claims of territorial sovereignty and does not allow for new claims, or the expansion of those claims, while in force. Additionally, when the Treaty was adopted in 1959, the law of the sea was not yet being governed by the present United Nations Convention on the Law of the Sea (“UNCLOS”) of 1982, but by various separate treaties which were somewhat vague.<sup>5</sup> The Article goes into detail and discusses how the Antarctic Treaty of 1959 provided the framework for subsequent treaties and protocols, which significantly added more substance to, and made up, the ATS.

A key question analyzed in this Article is whether states’ territorial claims give rise to claims to Antarctica’s waters. If so, to what extent, and how exactly are some of these claims based? Some disputes and tension have arisen between ATS and other states in regards to this. Is there some form of joint sovereignty or condominium? To be further outlined, the landmark UNCLOS brought to the global community a concrete and comprehensive outline for the law of the sea, and a delineation of coastal zones/boundaries has largely evolved into customary international law. Yet, the Article looks at and poses one important question: do these boundaries under UNCLOS apply to Antarctica? If so, sovereignty claims must be addressed and many different potential outcomes arise. However, to whom is Antarctica open, and is it even available for territorial claims? Who governs Antarctica? The Article explores these questions by looking at claims from ATS and non-ATS parties. There has yet to be a comprehensive solution to the question of Antarctica but this Article raises significant, valid points in attempting to address this key global situation that is becoming increasingly important with today’s changing environment.

\* \* \*

At the southernmost perimeter of the planet lies the international law puzzle of Antarctica. Uninhabitable year-round and long-term, international law rules for claims of sovereignty premised on habitation have little or no relevance. Nevertheless, a number of states do claim

---

<sup>4</sup> Antarctic Treaty, *supra* note 1 (states include: Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom).

<sup>5</sup> *Id.*

sovereignty over parts, but not all, of Antarctica.<sup>6</sup> Further complicating the analysis, a consortium of states (some making territorial claims and some not) under the umbrella of the ATS have overseen Antarctica for seventy years.<sup>7</sup> This consortium has not gone unchallenged by other states outside the ATS, with some arguing for a global regime for resource exploitation under the auspices of the United Nations (“UN”), and others arguing for more of a “World Park” approach precluding any resource exploitation.<sup>8</sup> The legal issues are numerous and critically in need of resolution as global changes in climate and scarcity of a wide range of world resources increase the pressure to resolve what rights, if any, states have to the continent and its resources on and off land. The very term “land” is a misnomer for Antarctica, as most of what passes as *terra firma* in Antarctica is a massive ice sheet.<sup>9</sup>

Do any states have a legal basis to claim parts of Antarctica? If so, by what theories? Are the states making territorial claims justified in doing so even if the legal theories for their claims are not recognized ones? If Antarctica is not subject to claims of individual state sovereignty, what legal regime applies? Is the ATS system controlling? Is it controlling only for the state-parties to it, or are other states outside the system bound as well? Are such states bound even if they object to the ATS system? If there is no legal regime of global impact for Antarctica is there a legal vacuum? What legal regime should govern the continent and its resources? With respect to the valuable waters off Antarctica, does UNCLOS<sup>10</sup> apply at all, and if so, to what extent? The most recent complication is the drafting of a global treaty under the UN’s auspices to govern marine biological diversity in areas beyond national jurisdiction.<sup>11</sup> Will these negotiations encompass Antarctica, exclude Antarctica, or largely ignore the elephant in the room as did the negotiations for UNCLOS?<sup>12</sup> There are no definitive answers to these questions in what seems to have been, to date, an almost implicit assumption that there could be no majority agreement in any respect so the

---

<sup>6</sup> Jill Grob, Note, *Antarctica’s Frozen Territorial Claims: A Meltdown Proposal*, 30 B.C. INT’L & COMP. L. REV. 461, 465, 478–79, 481, 484 (2007).

<sup>7</sup> *Id.* at 462.

<sup>8</sup> *Id.* at 465.

<sup>9</sup> See CHRISTOPHER C. JOYNER & SUDHIR K. CHOPRA, THE ANTARCTIC LEGAL REGIME 165 (1988).

<sup>10</sup> Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

<sup>11</sup> G.A. Res. 69/292, ¶ 1 (June 19, 2015).

<sup>12</sup> See generally UNCLOS, *supra* note 10.

relative status quo of the ATS has continued in place, albeit with major revisions since 1948.<sup>13</sup> This issue avoidance is unlikely to continue, however, for the reasons noted above.

Specifically, this Article will focus on the status of the waters off of Antarctica, the relevance of UNCLOS, and what approach to Antarctica might be best in the upcoming negotiations for a treaty on sustainable use of marine biological diversity in areas beyond national jurisdiction. Although a proposal will be made to reconcile competing legal systems as best to preserve the continent while allowing for equitable global utilization, in the final analysis there is no dispositive legal answer to the international puzzle that is Antarctica.

## I. THE ANTARCTIC TREATY SYSTEM

One outcome of the 1957–1958 International Geophysical Year was a push to formulate a legal regime for Antarctica.<sup>14</sup> The result was the 1959 multilateral treaty, the rather brief Antarctic Treaty.<sup>15</sup> The two essential purposes of the treaty were to preserve Antarctica for international scientific research and for peaceful purposes.<sup>16</sup>

The Southern Ocean, which circles the southernmost part of earth uninterrupted by any land mass, has as its northern boundary the Antarctic convergence, which is where the cold Antarctic waters meet the warmer sub-Antarctic waters further to the north.<sup>17</sup> This boundary is very roughly 20–30 miles wide between 50–60° South Latitude.<sup>18</sup> This is one of several boundaries applicable to Antarctica. The devastating impact historically of unregulated exploitation of the continent's waters

---

<sup>13</sup> See Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 I.L.M. 1455; Convention for the Conservation of Antarctic Seals, June 1, 1972, 29 U.S.T. 441, 1080 U.N.T.S. 175, 11 I.L.M. 251.

<sup>14</sup> See generally Christy Collis, *Critical legal geographies of possession: Antarctica and the International Geophysical Year 1957–1958*, 75 GEOJOURNAL 387, 387–95 (2010) (discussing the territorial politics of Antarctica).

<sup>15</sup> See generally Antarctic Treaty, *supra* note 1.

<sup>16</sup> *Id.* at Preamble (noting “it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes . . . [a]cknowledging the substantial contributions resulting from international cooperation in scientific investigation in Antarctica.”).

<sup>17</sup> Jonah Young, *Southern Ocean: Oceanographer's Perspective*, 33–34, ICE PRESS (Jan. 2, 2015).

<sup>18</sup> *Id.* at 1; see also *Southern Ocean*, THE COLUMBIA ENCYCLOPEDIA (6th ed. 2000), <https://www.encyclopedia.com/places/oceans-continents-and-polar-regions/oceans-and-continents/southern-ocean> [<https://perma.cc/9EQG-6BDG>].

and marine life, including whales and fur seals, has been extensively documented.<sup>19</sup> The situation was even worse than that of the Arctic, as Antarctica lacked not only a regional fisheries convention but states with unquestioned sovereignty to control exploitation.<sup>20</sup> The earliest check on marine biological diversity was the International Convention for the Regulation of Whaling,<sup>21</sup> and the International Whaling Commission which from 1946–1980 allowed whaling, but subject to quotas.<sup>22</sup>

The Antarctic Treaty was adopted in 1959 and entered into force in 1961.<sup>23</sup> There are fifty-three parties to the Treaty, although their status and voting power varies dramatically.<sup>24</sup> The original signatories to the Treaty are the twelve countries that, during the International Geophysical Year, were invited by the United States to participate in the negotiations due to their involvement with, or activity in, the continent.<sup>25</sup> These twelve countries are full Consultative Parties under Article IX with decision-making powers.<sup>26</sup> Since 1959 forty-one other countries have acceded to the Treaty.<sup>27</sup> Under Article IX(2) they may become full Consultative Parties “by conducting substantial scientific research”<sup>28</sup> in

---

<sup>19</sup> Denzil G.M. Miller, Natasha M. Slicer, & Eugene Sabourenkov, *An Action Framework to Address Illegal, Unreported, and Unregulated (IUU) Fishing*, 6 AUSTL. J. OF MAR. & OCEAN AFF. 2, 70, at 70–80 (2014); see also AUSTRALIAN GOV'T, *Illegal fishing in the Southern Ocean: the Problem, Practices and Perpetrators*, AUSTRALIAN ANTARCTIC MAG., Winter 2003, at 16, <http://www.antarctica.gov.au/magazine/2001-2005/issue-5-winter-2003/feature/illegal-fishing-in-the-southern-ocean-the-problem-practices-and-perpetrators> [<https://perma.cc/S2YY-AVAG>].

<sup>20</sup> AUSTRALIAN GOV'T, *Who Owns Antarctica*, DEP'T. OF THE ENV'T AND ENERGY AUSTRALIAN ANTARCTIC DIV. (June 19, 2018), <http://www.antarctica.gov.au/about-antarctica/people-in-antarctica/who-owns-antarctica> [<https://perma.cc/GC6J-N6BW>].

<sup>21</sup> See generally International Convention for the Regulation of Whaling, Preamble, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (enacted to “provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry”).

<sup>22</sup> Gabe Smith, *The International Whaling Commission: An Analysis of the Past and Reflections on the Future*, 16 NAT. RES. LAW. 4, 543, 550–53 (1984).

<sup>23</sup> See Antarctic Treaty, *supra* note 1.

<sup>24</sup> SECRETARIAT OF THE ANTARCTIC TREATY, *Antarctic Treaty: Parties*, ANTARCTIC TREATY SYS., [https://www.ats.aq/devAS/ats\\_parties.aspx?lang=e&lang=e](https://www.ats.aq/devAS/ats_parties.aspx?lang=e&lang=e) [<https://perma.cc/74VR-TQXS>] (last visited Oct. 29, 2018).

<sup>25</sup> See Antarctic Treaty, *supra* note 1, at Preamble (listing the “Governments of Argentina, Australia, Belgium, Chile, the French Republic, Japan, New Zealand, Norway, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America” as parties).

<sup>26</sup> *Id.* at art. 9; see also SECRETARIAT OF THE ANTARCTIC TREATY, *supra* note 24.

<sup>27</sup> See SECRETARIAT OF THE ANTARCTIC TREATY, *supra* note 24.

<sup>28</sup> See Antarctic Treaty, *supra* note 1, at art. 9(2).

Antarctica, and seventeen of the forty-one have so qualified.<sup>29</sup> As a result, there are twenty-nine state-parties fully entitled to participate in Treaty meetings and to participate in decision-making.<sup>30</sup> Amendments to the core treaty may only be by unanimous agreement under Article XII.<sup>31</sup>

There are only a few provisions in the Treaty which shed any light on jurisdictional conflicts and the binding nature of the Treaty outside of its parties. The foundation for the agreement is Article IV, which states nothing shall be interpreted in the Treaty as:

- (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
- (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of activities or those of its nationals in Antarctica, or otherwise;
- (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.<sup>32</sup>

In other words, the Treaty did not affect any pre-existing claims of territorial sovereignty, either positively or negatively. Such claims remain, but in a legal limbo so long as the Treaty governs. Article IV goes on to say that nothing taking place while the Treaty is in force may support or negate these claims, and no "new" claims or "enlargement[s] of an existing claim" may be asserted.<sup>33</sup>

The area to which the Treaty applies is prescribed as "[T]he area south of 60° South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area."<sup>34</sup> In 1959, the law of the sea was not governed by the present UNCLOS of 1982, but by various separate

---

<sup>29</sup> See SECRETARIAT OF THE ANTARCTIC TREATY, *supra* note 24.

<sup>30</sup> *Id.*

<sup>31</sup> See Antarctic Treaty, *supra* note 1, at art. 12.

<sup>32</sup> *Id.* at art. 4.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at art. 6.

treaties of 1958 on the high seas, the contiguous zone and territorial sea, and the continental shelf.<sup>35</sup> Whatever of these provisions at the time were considered customary law, only the 1958 Convention on the High Seas delineated a water boundary.<sup>36</sup> Moreover, Article I of that Convention only defined the “high seas” as the seas “not included in the territorial sea or in the internal waters of a State,”<sup>37</sup> a particularly unhelpful definition, seeing as the Convention on the Territorial Sea and Contiguous Zone specified no boundary for either.<sup>38</sup> The original treaty did not dictate environmental protections directly other than prohibiting military activities, nuclear explosions, and radioactive waste disposal.<sup>39</sup> Article IX(1)(f) does provide for future consultations and measure regarding “preservation and conservation of living resources in Antarctica.”<sup>40</sup>

Under Article IX of the Antarctic Treaty and meetings, the 1959 Treaty in practice has functioned as a framework for subsequent treaties providing more detail to the ATS.<sup>41</sup> As a result, the ATS now encompasses the 1959 Treaty, the 1972 Convention on the Conservation of Antarctic Seals (“CCAS”), the 1980 Convention on the Conservation of Antarctic Marine Living Resources (“CCAMLR”), the 1964 Agreed Measures for the Conservation of Antarctic Flora and Fauna (“Agreed Measures”) and the 1991 Madrid Protocol to the Antarctic Treaty (“Madrid Protocol”).<sup>42</sup> For jurisdictional purposes, the most important provision is Article I of CCAMLR. CCAMLR takes an ecosystem approach to conservation of marine living resources, and applies “to the Antarctic marine living resources of the area south of 60° South Latitude *and* to the Antarctic marine living resources of the area *between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem*” (emphasis

---

<sup>35</sup> See UNCLOS, *supra* note 10, at Preamble; Tullio Treves, *Audiovisual Library of International Law—1958 Geneva Conventions on the Law of the Sea*, U.N. OFF. OF LEGAL AFF. (OLA) (2008), <http://legal.un.org/avl/ha/gclos/gclos.html> [<https://perma.cc/C5QZ-ZYEW>].

<sup>36</sup> Convention on the High Seas art. 3, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82; Treves, *supra* note 35 (signed in 1958 and entered into force in 1962).

<sup>37</sup> Convention on the High Seas at art. 1.

<sup>38</sup> See Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205; Treves, *supra* note 35 (signed in 1958 and entered into force in 1964).

<sup>39</sup> See Antarctic Treaty, *supra* note 1, at art. 1, 5.

<sup>40</sup> *Id.* at art. 9(1)(f).

<sup>41</sup> *Id.* at art. 9.

<sup>42</sup> *Antarctic Treaty: Related Agreements*, ANTARCTIC TREATY SYS., [https://www.ats.aq/e/ats\\_related.htm](https://www.ats.aq/e/ats_related.htm) [<https://perma.cc/3NE8-GRYW>] (last visited Oct. 29, 2018).

added).<sup>43</sup> CCAMLR, at least for marine living resources, extends the ATS's reach beyond the 60° South Latitude to the boundary of the Antarctic Convergence.<sup>44</sup> Article I(4) goes on to define the Convergence as a line "joining the following points along parallels of latitude and meridians of longitude: 50°S, 0°; 50°S, 30°E; 45°S, 30°E; 45°S, 80°E; 55°S, 80°E; 55°S, 150°E; 60°S, 150°E; 60°S, 50°W; 50°S, 50°W; 50°S, 0°."<sup>45</sup>

In 1991, largely in response to the looming threat of mineral exploitation in the Antarctic, the ATS parties promulgated the 1991 Madrid Protocol on Environmental Protection to the Antarctic Treaty.<sup>46</sup> Article I(b) defined the "Antarctic Treaty area" again as being limited to the boundary in Article VI of the original treaty.<sup>47</sup> As the title indicated, the principal purpose of the Protocol was to provide a more comprehensive and coordinated environmental regime than that established by the prior agreements and recommendations of the Consultative Parties.<sup>48</sup> Towards that end, Article 7 prohibits "[a]ny activity relating to mineral resources, other than scientific research."<sup>49</sup> Article 13 of the Protocol repeats Article X of the Antarctic Treaty, that every Party shall exert "appropriate efforts, consistent with the Charter of the United Nations, to the end that *no one* engages in any activity contrary to" these agreements.<sup>50</sup>

Article 25 of the Protocol contains the extremely complicated provisions for modification or amendment of the Protocol, clearly designed to make lifting the mining ban difficult at best.<sup>51</sup> Fifty years after the Protocol enters into force, any proposed modification or amendment to the Protocol must be adopted by a majority of the Parties, including three-fourths of the Consultative Parties at the time of adoption of the Protocol.<sup>52</sup> It only enters into force, however, after three-fourths of Consultative Parties have fully accepted the amendment, *including all of the Antarctic Treaty Consultative Parties* at the time of the Protocol's adoption.<sup>53</sup> In addition, the ban on mineral activities continues unless there

---

<sup>43</sup> Convention on the Conservation of Antarctic Marine Living Resources art. 1, *opened for signature* May 20, 1980, 33 U.S.T. 3476, 1329 U.N.T.S. 47.

<sup>44</sup> *Id.* at art. 1(1).

<sup>45</sup> *Id.* at art. 1(4).

<sup>46</sup> Protocol on Environmental Protection to the Antarctic Treaty, *supra* note 13.

<sup>47</sup> *Id.* at art. 1(b).

<sup>48</sup> *Id.* at art. 2 ("The Parties commit themselves to the comprehensive protection of the Antarctic environment . . .").

<sup>49</sup> *Id.* at art. 7.

<sup>50</sup> *Id.* at art. 13 (emphasis added).

<sup>51</sup> Protocol on Environmental Protection to the Antarctic Treaty, *supra* note 13, at art. 25.

<sup>52</sup> *Id.* at art. 25(2)–(3).

<sup>53</sup> *Id.* at art. 25(4).

is in force an alternative, binding legal regime on mineral resource activities “that includes an agreed means for determining whether, and, if so, under which conditions, any such activities would be acceptable.”<sup>54</sup>

## II. THE TERRITORIAL CLAIMS AND CLAIMANTS

The seven so-called “claimant” states are the United Kingdom, New Zealand, Australia, France, Norway, Chile, and Argentina.<sup>55</sup> The “non-claimant” states, those which had engaged in research and exploration in Antarctica by 1959 but would not assert or recognize territorial claims, are Belgium, Japan, South Africa, the Soviet Union, and the United States.<sup>56</sup> An in-depth analysis of the territorial claims, and the legitimacy of the legal theories and factual basis with respect to each state’s claims, is beyond the scope of this Article (even assuming Antarctica is a legitimate object for any territorial claim). Rather, the focus is whether, or to what extent, territorial claims would even give rise to claims to the waters off Antarctica. Even a cursory glance at the list of claimant states is perplexing as to how some of these claims are based. The prevalent principles asserted are discovery, occupation, propinquity, the sector theory, and *uti posseditis*.<sup>57</sup> The sturdiest legal theory of effective occupation is inherently ill-suited to Antarctica as possession must be actual, continuous, and useful.<sup>58</sup> Even if the decision of the Permanent Court of International Justice in the *Eastern Greenland*<sup>59</sup> case may be interpreted as loosening these requirements for difficult environments, a questionable interpretation at best, the size of the continent, as well as the limited nature and geographic extent of activities, makes for a difficult claim. Discovery is not generally accepted as a basis since at least the *Island of Palmas*<sup>60</sup> case, nor does the theory assist in determining competing claims or the geographical extent of a claim of discovery. Propinquity, the theory that a state which acquires sovereignty over part of a territory does so over the entire territory,<sup>61</sup> fails on both the initial

---

<sup>54</sup> *Id.* at art. 25(5)(a).

<sup>55</sup> See Antarctic Treaty, *supra* note 1, at Preamble.

<sup>56</sup> *Id.*

<sup>57</sup> See generally Douglas M. Zang, *Frozen in Time: The Antarctic Minerals Convention*, 76 CORNELL L. REV. 722, 735–51 (1991) (analyzing territorial claims and Antarctic jurisdiction).

<sup>58</sup> *Island of Palmas (U.S. v. Neth.)* 2 UNRIAA 829, 839 (1928).

<sup>59</sup> *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 PCIJ (ser. A/B) No. 53, at 22 (Apr. 5).

<sup>60</sup> *Island of Palmas (U.S. v. Neth.)* 2 UNRIAA 829 (1928).

<sup>61</sup> Elmer Plischke, *Territorial Sovereignty in the Arctic* (1950), <https://collections.dartmouth.edu/arctica-beta/html/EA11-03.html> [<https://perma.cc/7N9Z-WP9V>].

question of how to gain sovereignty and how to reconcile competing claims of partial claimant states. *Uti possidetis* is premised on the theory that Chile and Argentina may claim under the 1493 Papal Bull dividing the world between Spain and Portugal, a theory which never had nor gained wide acceptance.<sup>62</sup> The sector theory, first developed with respect to the Arctic region, posited that states whose territory extended beyond the Arctic Circle have sovereignty over a triangular sector formed by the eastern and western limits of the state culminating at a point at the North Pole.<sup>63</sup> Although the territorial claims in Antarctica have been modeled on triangular sectors, there are a number of problems in applicability to Antarctica: no state extends below the Antarctic Circle; the theory conflicts with the concept of effective occupation; and the theory conflicts with freedom of the high seas in the waters in a sector drawn from Antarctica, which would unquestionably qualify as the high seas.<sup>64</sup> For the purposes of this analysis, none of these theories illuminates how to reconcile the competing and overlapping territorial claims, or the large sections of Antarctica which no state claims or possibly could as a practical matter of uninhabitability.

There is also the question of whether some combination of the Parties or the Consultative Parties exert some form of joint sovereignty over Antarctica, or at least the parts covered by their activities or territorial claims. Aside from the individual state claims, has a *de facto* "condominium" been established over all or part of Antarctica? A condominium is defined as territory "under the joint tenancy of two or more States, these several States exercising sovereignty conjointly over it, and over the individuals living thereon."<sup>65</sup> Several problems are evident from that black-letter law definition. Obviously, Antarctica does not present the usual situation of land with "individuals living thereon."<sup>66</sup> In addition, the ATS parties themselves have suspended claims of sovereignty and their legitimacy,<sup>67</sup> which hardly qualifies as exercising sovereignty conjointly over Antarctica, but perhaps that only signifies that any condominium would not be a *de jure* condominium but a *de facto* one. It would

---

<sup>62</sup> See Zang, *supra* note 57, at 744–45 ("the Antarctic claims of Chile and Argentina are legitimate as a matter of historic right . . . . This arcane theory has never gained wide acceptance.").

<sup>63</sup> *Id.* at 743–44.

<sup>64</sup> *Id.*

<sup>65</sup> 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 453 (H. Lauterpacht 8th ed. 1962) (original emphasis omitted).

<sup>66</sup> *Id.*

<sup>67</sup> Anna Homan, *Maritime Zones in Antarctica*, 20 AUSTL. & N.Z. MAR. L.J. 70 (2006).

also seem that in order for any condominium to be recognized under international law, there must be a determination that the condominium states have a legitimate legal claim to sovereignty, returning to the problematic legal bases for the claimant states to portions of Antarctica. There also remains the question of whether such a condominium would be entitled to assert sovereignty over all of Antarctica, including its waters and the expanse of Antarctica that no state claims. These questions are inextricably tangled up in the question of what legal regime is established by the ATS and whether it is binding on non-ATS states as discussed below.<sup>68</sup>

### III. ANTARCTICA AND THE 1982 LAW OF THE SEA TREATY

In 1982, the landmark UNCLOS for the first time provided a single, comprehensive framework for the law of the sea for the global community. Some of the provisions were similar or identical to those in the 1958 Conventions, merely reflecting customary international law, but many more were entirely new and innovative.<sup>69</sup> The Convention was also remarkable for finally delineating the reach of the territorial sea, the contiguous zone, the continental shelf and the high seas, and doing so in reference to nautical mile limitations.<sup>70</sup> The Convention had entirely new legal frameworks for marine pollution, species preservation, dispute resolution, and the deep seabed.<sup>71</sup> It was quite simply a remarkable achievement in clarifying and advancing the law of the sea regime.

As of 2017, virtually every state (that is, 168 states) is party to the Convention.<sup>72</sup> Having gone into effect in 1994,<sup>73</sup> it is accepted as the governing law of the sea and largely evolved into customary international

---

<sup>68</sup> See *infra* notes 128–44 and accompanying text.

<sup>69</sup> See UNCLOS, *supra* note 10; see also Division for Ocean Affairs and the Law of the Sea: Office of Legal Affairs—United Nations, *The United Nations Convention on the Law of the Sea: A Historical Perspective*, UNITED NATIONS (2012), [http://www.un.org/depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm#Third%20Conference](http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Third%20Conference) [<https://perma.cc/WH68-2TDH>].

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> UNCLOS, *supra* note 10, at 397–98. See also *Chapter XXI—Law of the Sea: United Nations Convention on the Law of the Sea*, U.N.T.C. (updated as of August 25, 2018), [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en) [<https://perma.cc/L7XN-PTY>].

<sup>73</sup> UNCLOS *supra* note 10, at 397.

law.<sup>74</sup> Even the United States, which is not a party to the Convention, refers formally to the requirements of the Convention and has based its own delineation of its territorial sea, contiguous zone, and continental shelf on the convention's definitions and delineations.<sup>75</sup>

The essential delineations of a state's coastal zones are as follows. The territorial sea extends twelve nautical miles from the baseline of the coastal state as the baseline is itself to be determined under the Convention.<sup>76</sup> The territorial sea is virtually an extension of the land territory of the state with full sovereign rights, subject primarily to the right of innocent passage for other states through those waters.<sup>77</sup> The contiguous zone extends an additional twelve nautical miles out from the baseline or twenty-four nautical miles, for the state to enforce its customs, fiscal, immigration, or sanitary laws within its territorial sea.<sup>78</sup> Despite its over 300 articles, nine annexes, and multiple implementation agreements, the contiguous zone is addressed only in Article 33, and briefly at that.<sup>79</sup> It essentially repeats the 1958 provision on the contiguous zone adding the twenty-four-nautical-mile limit.<sup>80</sup> Far more important is the Convention's establishment of an exclusive economic zone extending 200 nautical miles out from the coastal state's baseline.<sup>81</sup> Within this zone, other states have essentially the freedom of the high seas with respect to passage in those waters, but the coastal state has exclusive sovereign rights with respect to living and non-living resources.<sup>82</sup> The high seas are those waters beyond any coastal state's jurisdiction of 200 nautical miles through which all states have the freedom of navigation, overflight, fishing, and scientific research, among other freedoms (or as Article 87 states, "*inter alia*").<sup>83</sup>

---

<sup>74</sup> See John A. Duff, *The United States and the Law of the Sea Convention: Sliding Back From Accession and Ratification*, 11 OCEAN & COASTAL L.J. 1, 12 (2006) (discussing UNCLOS as "customary international law").

<sup>75</sup> See *id.* at 13–16 (providing examples of the United States courts applying Convention principles).

<sup>76</sup> See UNCLOS, *supra* note 10, at art. 3 ("Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.").

<sup>77</sup> See *id.* at art. 2, art. 17.

<sup>78</sup> *Id.* at art. 33.

<sup>79</sup> *Id.*

<sup>80</sup> Compare *id.* with Antarctic Treaty, *supra* note 1, at art. 24.

<sup>81</sup> UNCLOS, *supra* note 10, at art. 57.

<sup>82</sup> *Id.* at art. 56–57.

<sup>83</sup> *Id.* at art. 87.

Underneath ocean waters, UNCLOS also governs the continental shelf and the contiguous zone.<sup>84</sup> The continental shelf extends to the outer edge of the coastal state's continental margin or at the least 350 nautical miles from the coastal state's baseline.<sup>85</sup> An outer limit is established for states with expansive shelves to the continental margin of 350 nautical miles from the baseline or 100 nautical miles from the 2,500 metre isobath, which is a line drawn at the depth of 2,500 metres.<sup>86</sup> The deep seabed is the ocean floor beyond national jurisdiction, the underlying equivalent of the high seas.<sup>87</sup> The regime governing the deep seabed, however, was an entirely new legal framework and a controversial one, which, at least initially, was responsible for the United States' refusal to ratify the treaty.<sup>88</sup>

The deep seabed provisions of UNCLOS are relevant to Antarctica theoretically, insofar as they are predicated on the legal concept of "the common heritage of mankind."<sup>89</sup> As early as 1968, the United Nations General Assembly had approved of the concept that the General Assembly declare the seabed, the ocean floor, and its resources as the "common heritage of mankind."<sup>90</sup> It would subsequently develop that the agreement on this designation for the seabed did not include agreement on what the designation might signify under international law.<sup>91</sup> Essentially, the agreement on the designation was driven by many of the developing countries and lesser-developed countries opposing the possibility of unrestrained exploitation of seabed resources by the handful of developed countries who could do so, without participation and resource-sharing for the global community.<sup>92</sup> Unresolved, and hotly contested in the following decades,

---

<sup>84</sup> See *id.* at art. 2.

<sup>85</sup> *Id.* at art. 76.

<sup>86</sup> *Id.*

<sup>87</sup> See UNCLOS, *supra* note 10, at art. 136–37.

<sup>88</sup> See Kathryn Surace-Smith, *United States Activity Outside of the Law of the Sea Convention: Deep Seabed Mining and Transit Passage*, 84 COLUM. L. REV. 1032, 1033, 1040 (1984).

<sup>89</sup> See UNCLOS, *supra* note 10, at art. 136.

<sup>90</sup> G.A. Res. 2467 (XXIII) at 15 (1968). See also Martin A. Harry, *The Deep Seabed: The Common Heritage of Mankind or Arena for Unilateral Exploitation?*, 40 NAVAL L. REV. 207, 209–11 (1992) (providing a short historical background for the "common heritage of mankind" concept).

<sup>91</sup> See generally Harry, *supra* note 90 (discussing the conflicting legal interpretations of the common-heritage concept, and the implications of these interpretations on the international legal status of seabeds).

<sup>92</sup> See Jennifer Frakes, *The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise?*, 21 WIS. INT'L L.J. 409, 415–18 (2003).

would be how the global community would benefit from the resources of the seabed and the obligations of the developed countries in implementing the common heritage.<sup>93</sup> The concept that areas of the global commons—whether the seabed, the high seas, outer space, or celestial bodies—are a common heritage of mankind would resurface in the context of Antarctica as a common heritage of mankind.<sup>94</sup>

These boundaries under UNCLOS, as important as they otherwise are, are significant for Antarctica only if they apply to Antarctica. Whether they do or do not is not evident on the face of the expansive treaty, as it never mentions Antarctica.<sup>95</sup> Whether this glaring omission was intended to indicate exclusion, was inadvertent, or was a reflection of an inability to reach a consensus, necessitates a messy inquiry into the *travaux préparatoires* of the Convention and conflicting statements by state representatives as to coverage of Antarctica.<sup>96</sup> Politically, injecting any determinative inquiry into the legal status of Antarctica as to governance by the ATS or the global community would have been a thorny issue with the potential to derail the already complex negotiations and compromises necessary for UNCLOS.<sup>97</sup>

If UNCLOS applies, or at some point is applied, to Antarctica, the sovereignty claims and legitimacy, or lack thereof, can no longer be ignored. Attribution of coastal waters to any state is dependent upon the legitimate status of that state as a coastal state.<sup>98</sup> Several dramatically different outcomes may result:

1. If no territorial claims are recognized, either due to their illegitimacy or acceptance of Antarctica as the “common heritage of mankind” in a “World Park” sense, then the waters off Antarctica can be characterized as the high seas under UNCLOS. Ironically, the most protective designation for the continent is the least protective of the waters off Antarctica, opening all those waters to the freedoms of the high seas.

---

<sup>93</sup> See *id.* at 419–20.

<sup>94</sup> See *id.*

<sup>95</sup> See generally UNCLOS, *supra* note 10.

<sup>96</sup> See generally *id.*

<sup>97</sup> See Treves, *supra* note 35, at 1–3.

<sup>98</sup> See *id.* at art. 2.

2. If no territorial claims are recognized and Antarctica is viewed as the “belonging to everyone” common heritage of mankind, the possibility arises for the negotiation of an agreement to administer the waters off Antarctica with an international mechanism as with the deep seabed under UNCLOS.
3. If any territorial claims are recognized (or asserted forcefully), a claimant state may assert its authority to claim the full reach of a territorial sea, contiguous zone, exclusive economic zone, a continental shelf, and an expanded continental shelf under UNCLOS. Given the unclaimed expanses of Antarctica, the high seas boundary would fluctuate from 200 miles from the coastal baseline to equivalency with the baseline. The reach of a state claim to an expanded continental shelf could reach as far as 350 nautical miles from the baseline or 100 nautical miles from the 2,500 metre isobaths, whichever is farther.
4. If any territorial claims are recognized but UNCLOS is *not applicable*, the state claims to the offshore waters would be those within the triangular vector to the 60E latitude, with any additional reach provided by CCAMLR’s ecosystem approach.

With respect to the fourth possibility above, the unique position of Norway with respect to its Antarctic claims deserves mention. Although it was the Norwegian Amundsen who first reached the South Pole, Norway has not claimed either the full extent of the land mass or waters to which it would be entitled under the vector approach.<sup>99</sup> It has taken this position so as not to lend any recognition to the vector claims made by Russia in the Arctic which work to the detriment of Norway.<sup>100</sup> Once again, the question becomes one of what is or is not accepted customary international law. If some territorial claims are recognized as valid, how are the extent of those claims to be determined? Aside from the overlapping nature of those claims, is the vector approach a generally accepted method of boundary delineation for the polar areas?

---

<sup>99</sup> See Norwegian Ministry of Foreign Affairs, Norwegian Interests and Policy in the Antarctic, 32 MELD. ST. 1, 12, 17 (2016).

<sup>100</sup> See Øystein Jensen & Svein Vigeland Rottem, *The Politics of Security and International Law in Norway’s Arctic Waters*, 46 POLAR RECORD 75, 77–78 (2010).

#### IV. IS ANTARCTICA EVEN SUBJECT TO TERRITORIAL CLAIMS UNDER INTERNATIONAL LAW?

In December of 1989 the United Nations General Assembly passed a Resolution on the Question of Antarctica.<sup>101</sup> The resolution was the culmination of an earlier study by the Secretary-General and a resultant 1984 General Assembly Resolution to include the question of Antarctica on its agenda.<sup>102</sup> Both resolutions reflected the dismay of a number of states at their exclusion from the Antarctica "club." The precise legal parameters of the "common heritage of mankind" in 1984 were no more clear with respect to Antarctica than they were with respect to the seabed prior to UNCLOS in 1982.

Conceptually, the common heritage of mankind has been described as including six basic elements.<sup>103</sup> First, areas designated as the common heritage are not subject to appropriation, either as to the area itself or its resources, by any person or state.<sup>104</sup> Appropriation is prohibited because the area and its resources belong to the global community and that community is entitled to share its management.<sup>105</sup> Third, economic benefits from the area's resources, *if exploited*, must be shared internationally and equitably.<sup>106</sup> Fourth, the area may only be used for peaceful purposes.<sup>107</sup> Similarly, scientific research in the area is open to the entire community.<sup>108</sup> Finally, and less clearly, the concept may necessitate technology transfer and other support from the developed countries to lesser developed countries in order to implement meaningfully the sharing of the common heritage.<sup>109</sup>

The barest outline of the common heritage of mankind concept reveals that "the devil is in the details" in applying the concept to any global commons. The core question is whether the common heritage of mankind necessarily entails resource exploitation, or whether equitable sharing of a global commons should be free of any resource exploitation. The

---

<sup>101</sup> G.A. Res. 48/80 A, *Question of Antarctica* (Dec. 16, 1993); G.A. Res. 44/124 A, *Question of Antarctica* (Dec. 15, 1989).

<sup>102</sup> G.A. Res. 44/124 A, *Question of Antarctica* (Dec. 15, 1989).

<sup>103</sup> See J.M. Spectar, *Saving the Ice Princess: NGOs, Antarctica & International Law in the New Millennium*, 23 SUFFOLK TRANSNAT'L L. REV. 57, 59-60 (1999).

<sup>104</sup> *Id.* at 59.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 59-60.

<sup>107</sup> *Id.* at 60.

<sup>108</sup> *Id.*

<sup>109</sup> Spectar, *supra* note 103, at 60.

latter view has been characterized as equating the common heritage of mankind with the concept of a “World Park,” in which the area is preserved in its natural state for global enjoyment free of economic/commercial utilization.<sup>110</sup> Under the resource-exploitation view, a further split developed among the states advocating for some form of resource exploitation. Developed countries, even though open to the possibility of some form of shared management, tended to view the best legal regime as one which coordinated exploitation globally, but with minimal interference other than to prescribe processes and environmental safeguards (what will hereinafter be referred to as the “belonging to no one” common heritage).<sup>111</sup> Lesser developed countries, seeking their own share in the new international economic order, sought a legal regime in which they had not only full participation in decision-making, but full, equitable sharing of the economic benefits and technological advances from the area with all the responsibilities that would entail for developed countries to developing countries (as in “belonging to everyone” common heritage).<sup>112</sup> The tension between these three views for the deep seabed would lead eventually in UNCLOS to acceptance of the “belonging to everyone” common heritage approach, but not until after intense negotiations, multiple additional implementation agreements, and defection (most notably the United States) from UNCLOS altogether.<sup>113</sup> Ironically, the most hotly contested part of UNCLOS in the following years would become less contentious, as the anticipated profitability of deep seabed mining did not meet expectations.<sup>114</sup> The most basic tenet of the common heritage of mankind concept, however, is rejection of any state’s claims of sovereignty over the area, much less over its resources.

In the 1989 General Assembly resolution, the General Assembly departed from the “belonging to everyone” approach in UNCLOS for the deep seabed to the “World Park” approach for Antarctica.<sup>115</sup> The resolution was adopted in response to negotiations in the ATS for an ATS treaty managing resource exploitation in Antarctica, known as the 1988 Convention for the Regulation of Antarctic Mineral Resource Activities or

---

<sup>110</sup> *See id.* at 89–94.

<sup>111</sup> *See* Frakes, *supra* note 92, at 411 (“Common heritage spaces are legally owned by no one.”).

<sup>112</sup> *Id.* at 414–15.

<sup>113</sup> *Id.* at 416–19.

<sup>114</sup> *Id.* at 418–20.

<sup>115</sup> *World Park Antarctica*, GREENPEACE (2015), <http://www.greenpeace.org/international/Templates/Planet3/Pages/DetailPage.aspx?id=18409&epslanguage=en> [https://perma.cc/2RSW-Z9N7].

“CRAMRA.”<sup>116</sup> CRAMRA would never enter into force, as Australia and France announced they would only support the “World Park” approach, and CRAMRA’s ratification required their support.<sup>117</sup> The final nail in CRAMRA’s coffin was when the U.S. House of Representatives approved a ban on mining in Antarctica, indicating a shift in the U.S.’s prior pro-exploitation position.<sup>118</sup> CRAMRA would, in the interim, prompt the “World Park” response in the 1989 General Assembly resolution in protest to what many states saw as an exclusionary attempt by the ATS states to claim the resources of Antarctica for themselves.

The resolution unequivocally referred to Antarctica as a World Park, and urged all states to “support all efforts to ban prospecting and mining in and around Antarctica.”<sup>119</sup> Negotiations to establish Antarctica “as a nature reserve or world park” in order to “ensure the protection and conservation of its environment and its dependent ecosystems for the benefit of all mankind” must be conducted “with the full participation of all members of the international community.”<sup>120</sup> In doing so, Antarctica was to be placed under the management of the *entire* global community and used for “the benefit of mankind as a whole.”<sup>121</sup> The 1989 Resolution was as outright a condemnation of the ATS as diplomacy would allow. It criticized the ATS states for failing to include the Secretary-General of the UN in its ATS meetings despite numerous UN resolutions calling for them to do so.<sup>122</sup> Declaring that Antarctica was subject only to a global management regime was a rejection of the legal legitimacy of the entire ATS. If the ATS parties were to allow mining in Antarctica, the General Assembly had made it clear that its members would not accept the legality of the regime.

---

<sup>116</sup> Convention on the Regulation of Antarctic Mineral Resource Activities, Introductory Note, June 2, 1988, 27 I.L.M. 868, <https://www.state.gov/documents/organization/15282.pdf> [<https://perma.cc/M4W7-MUXJ>].

<sup>117</sup> Sam Blay & Ben Tsamenyi, *Australia and the Convention for the Regulation of Antarctic Mineral Resource Activities (CRAMRA)*, POLAR RECORD, 195, 195, 201 (1990), <https://ro.uow.edu.au/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1238&context=lhapapers> [<https://perma.cc/6MAX-UXBC>].

<sup>118</sup> Alan Riding, *Pact Bans Oil Exploration in Antarctic*, N.Y. TIMES (Oct. 5, 1991), <http://www.nytimes.com/1991/10/05/world/pact-bans-oil-exploration-in-antarctic.html> [<https://perma.cc/9QTW-6AP2>].

<sup>119</sup> Press Release, U.S. Dep’t of St., United States Leads Antarctic Treaty Support for Ban on Mining Activities (June 9, 2016).

<sup>120</sup> G.A. Res. 48/80 A, *Question of Antarctica* (Dec. 16, 1993); G.A. Res. 44/124 A, *Question of Antarctica* (Dec. 15, 1989).

<sup>121</sup> G.A. Res. 44/124 A, *Question of Antarctica* (Dec. 15, 1989).

<sup>122</sup> *Id.*

Following the failure of CRAMRA, the ATS parties would adopt the 1991 Madrid Protocol discussed above.<sup>123</sup> The Protocol, with its fifty-year ban on mining, avoided a direct showdown between the ATS parties and the General Assembly.<sup>124</sup> The Protocol, however, affirmed the position of the ATS parties that resource exploitation in Antarctica was a question for their determination, without the full involvement of the international community.<sup>125</sup> This point was emphasized by Article 4(2), which said nothing in the Protocol “shall derogate from the rights and obligations of the Parties to this Protocol under the other international instruments in force within the Antarctic Treaty System.”<sup>126</sup> There is no mention of the “common heritage of mankind” in the Protocol.<sup>127</sup> The mining ban thus postponed a fundamental difference of opinion between the ATS parties and the global community over who had the legal authority to manage Antarctica.

A. *At Present Is There a Generally Accepted Legal Regime Which Governs Antarctica with Globally Applicable Legal Responsibilities?*

As with so many international law questions, the initial answer to the above question varies depending upon whom is asked. Certainly, the ATS parties would assert that the ATS governs Antarctica for the global community. In political support of that proposition the parties could point to the significant achievement of the ATS for over sixty years in quelling territorial claims by the claimant states and doing much to preserve the fragile Antarctic environment. Most, if not all, states not included in the ATS (and some non-consultative parties who are in the ATS) would assert that the only legitimate legal regime for Antarctica is the global regime (presumably, but not necessarily as a World Park) yet to be formulated. An objective analysis necessitates an in-depth analysis of the law of treaties and the formulation of customary international law, with major implications for any claim of the ATS parties as a group to sovereignty over Antarctica.

---

<sup>123</sup> Protocol on Environmental Protection to the Antarctic Treaty, *supra* note 13.

<sup>124</sup> *Id.* at art. 7.

<sup>125</sup> *Id.* at art. 8.

<sup>126</sup> *Id.* at art. 4.

<sup>127</sup> See Protocol on Environmental Protection to the Antarctic Treaty, *supra* note 13.

Under the Vienna Convention on the Law of Treaties, only parties to a treaty are bound by a treaty.<sup>128</sup> All parties to a treaty must observe it in good faith.<sup>129</sup> The provisions of this “treaty on treaties” are generally viewed as customary international law, binding even upon those few states which are not a party to it (such as the United States, which refers to it for legal requirements as it does with UNCLOS).<sup>130</sup> Article 4 of the Vienna Convention addresses treaties and third states.<sup>131</sup> Article 34 expresses the general rule that a treaty “does not create either obligations or rights for a third state without its consent.”<sup>132</sup> This Part goes on to emphasize that no treaty creates an obligation for a non-party state without that state’s consent.<sup>133</sup> Moreover, only if the parties to a treaty *intend* to create a *right* in non-party states does a treaty do so, and then with the non-state parties’ consent.<sup>134</sup> There is no question that the ATS parties have not intended to create any rights in non-party states as a matter of treaty law.

Customary international law, however, may evolve from treaty provisions generally accepted as international law within the meaning of Article 36 of the Statute of the International Court of Justice.<sup>135</sup> Custom emanating from treaty provisions binds parties and non-parties to the treaty,<sup>136</sup> subject perhaps to the “persistent objector” exception, an exception not widely accepted as such. Despite having excluded most of the international community from the ATS decision-making, the Consultative Parties would argue that the nearly sixty-year functioning of the ATS has established a *globally enforceable* body of customary international law.<sup>137</sup> A less assertive argument from the Consultative Parties’ perspective would be that the ATS has established regional customary law that governs Antarctica, but that begs the question of how that

---

<sup>128</sup> United Nations, *Vienna Convention on the Law of Treaties*, art. 2, May 23, 1969, 18232 UNTS 332 (1980).

<sup>129</sup> *Id.* at art. 26.

<sup>130</sup> *Id.* See also *Vienna Convention on the Law of Treaties*, U.S. DEP’T OF ST., <https://www.state.gov/s/treaty/faqs/70139.htm> [<https://perma.cc/4AUN-QJZ9>].

<sup>131</sup> United Nations, *supra* note 128, at art. 4.

<sup>132</sup> *Id.* at art. 34.

<sup>133</sup> *Id.* at art. 35.

<sup>134</sup> *Id.*

<sup>135</sup> Statute of the International Court of Justice, ch 2. art. 36 ¶ 2.

<sup>136</sup> *Id.* art. 63.

<sup>137</sup> Davor Vidas, IMPLEMENTING THE ENVIRONMENTAL PROTECTION REGIME FOR THE ANTARCTIC, 11 (2000).

regional custom might bind the rest of the global community.<sup>138</sup> Article 38 of the Vienna Treaty provides that the principle of *pacta tertiis* (treaties do not create obligations for non-parties) does not “preclude a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.”<sup>139</sup>

Recognition of the ATS as customary international law encounters a fundamental difficulty. Custom must be generally accepted as a source of international law.<sup>140</sup> For at least thirty years, the international community through the General Assembly has made clear its disapproval of the ATS and its exclusionary nature.<sup>141</sup> Although the ATS has fifty-three Consultative and Non-Consultative Parties,<sup>142</sup> there is not unanimous agreement even among the Parties that the ATS is customary international law and not only a treaty regime.<sup>143</sup> The somewhat alarming conclusion which follows is that the ATS does not in any way bind the states outside of the ATS with respect to Antarctica.<sup>144</sup> In other words, whatever obligations the ATS parties have, other states are free to utilize Antarctica in any way they choose assuming no other independent treaty obligations limit their activities such as the International Whaling Convention, UNCLOS, MARPOL 73/78, or the London Dumping Convention.

*B. Will the Treaty on Conservation and Sustainable Use of Marine Biological Diversity in Areas Beyond National Jurisdiction Have Any Legal Effect in Antarctica’s Waters?*

In January 2015, a United Nations Working Group had its final meeting to consider marine biodiversity beyond national jurisdiction.<sup>145</sup>

---

<sup>138</sup> *Id.*

<sup>139</sup> United Nations, *supra* note 128, at art. 38.

<sup>140</sup> Statute of the International Court of Justice, ch. 2 art. 38(1)(b) (discussing customary international law).

<sup>141</sup> Moritaka Hayashi, *The Antarctic Question in the United Nations*, 19 CORNELL INT’L L.J. 275, 282–85 (1986) (discussing how the Treaty was “frequently criticized” for its exclusive and secretive nature, largely when it comes to decision-making power).

<sup>142</sup> SECRETARIAT OF THE ANTARCTIC TREATY, Antarctic Treaty: The Antarctic Treaty, ANTARCTIC TREATY SYS., <https://www.ats.aq/e/ats.htm> [<https://perma.cc/FRD6-9W7N>].

<sup>143</sup> Gillian Triggs, *The Antarctic Treaty Regime: A Workable Compromise or Purgatory of Ambiguity*, 17 CASE W. RES. J. INT’L L. 195, 195 (1985) (discussing how the Treaty is not “a clear enforcement mechanism” or formal international organization “with legal personality”).

<sup>144</sup> See Donald R. Rothwell, *The Antarctic Treaty: 1961–1991 and Beyond*, 14 SYDNEY L. REV. 62, 69 (1992).

<sup>145</sup> Letter dated 13 February, 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal

It recommended formulation of a new treaty under UNCLOS.<sup>146</sup> Accordingly, in June of 2015, the General Assembly adopted a resolution<sup>147</sup> calling for a preparatory committee to draft a global treaty on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (the BBNJ Treaty)<sup>148</sup> in 2016, which was declared to be the Year of the Whale by the Pacific Regional Environment Programme.<sup>149</sup> Approximately half of the Earth's surface are areas beyond national jurisdiction.<sup>150</sup> One meeting in 2017 of the preparatory committee, when concluded, will trigger a decision of the General Assembly on whether to launch formal treaty negotiations.<sup>151</sup> Thus far, informal discussion of coverage has centered on whether the Arctic Ocean areas will be a specific subject of the BBNJ negotiations.<sup>152</sup> The ATS designation of the Antarctic Ross Sea as a specially protected area under the ATS may have intensified the call for specific Arctic consideration.<sup>153</sup> It remains to be seen if the international community will confront the ATS directly in the context of negotiations.

---

Working Group to the President of the General Assembly, U.N. Doc. A/69/780 (Feb. 13, 2015), [http://repository.un.org/bitstream/handle/11176/158296/A\\_69\\_780-EN.pdf?sequence=3&isAllowed=y](http://repository.un.org/bitstream/handle/11176/158296/A_69_780-EN.pdf?sequence=3&isAllowed=y) [<https://perma.cc/9WVB-EZ4V>].

<sup>146</sup> *Id.*

<sup>147</sup> G.A. Res. 69/292 ¶ 1, *supra* note 11.

<sup>148</sup> *Id.* at G.A. Res. 69/292(a).

<sup>149</sup> *Year of the Whale in the Pacific Islands 2016/2017 Background Information and Proposal for Workshop*, Circular 15/55 (*Secretariat of the Pac. Reg'l Env't Programme*) Aug. 25, 2015, at 1.

<sup>150</sup> Glen Wright & Julien Rochette, *Sea Change: Negotiating a New Agreement on the Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction*, IDDRI, 1 (March 2016).

<sup>151</sup> *Id.* at 2–3.

<sup>152</sup> See generally Kamrul Hossain, *Arctic Marine Biodiversity in Areas Beyond National Jurisdiction: Framing A Legally Binding MPA Protection?*, AM. SOC'Y OF INT'L L. (Aug. 31, 2016), <https://www.asil.org/insights/volume/20/issue/14/arctic-marine-biodiversity-areas-beyond-national-jurisdiction-framing> [<https://perma.cc/4NUA-787Y>].

<sup>153</sup> Brian Clark Howard, *World's Largest Marine Reserve Created Off Antarctica*, NAT'L GEOGRAPHIC (Oct. 27, 2016), <https://news.nationalgeographic.com/2016/10/ross-sea-marine-protected-area-antarctica/> [<https://perma.cc/XP7M-HYUW>]. Even within the protected area, an excluded area remains open for lucrative Antarctic toothfish fishing, euphemistically renamed as "Chilean Sea Bass." *Id.* Continued fishing of the species in this limited area was allowed despite the fact that the environmental damage from such fishing was in part the incentive for designating the Ross Sea from additional exploitation.

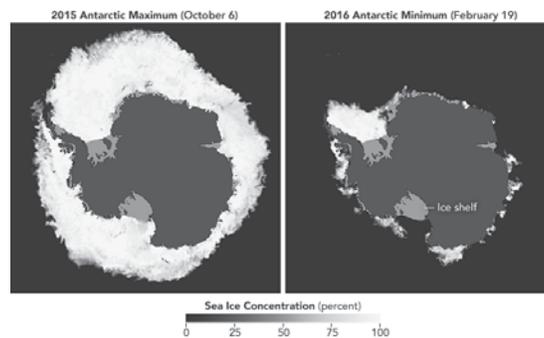
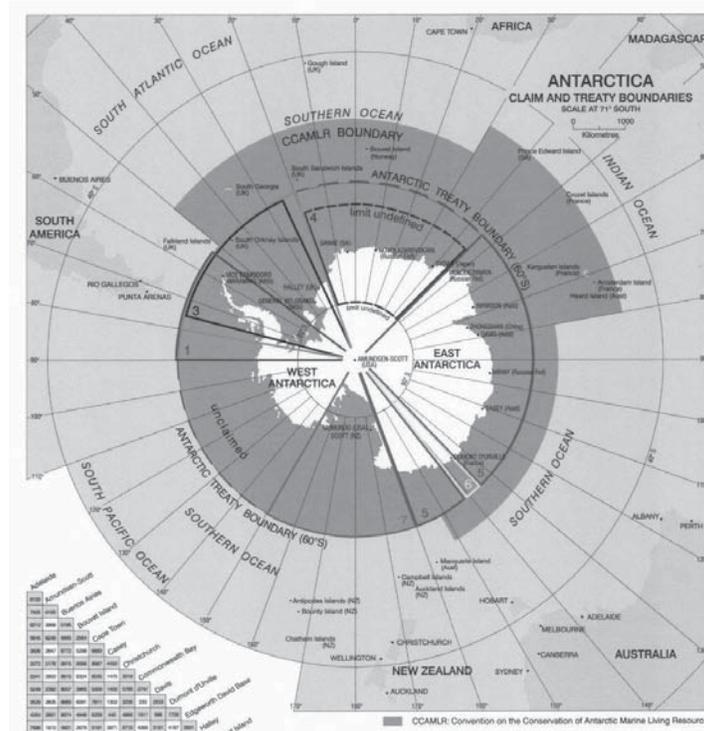


### The Antarctic Convergence<sup>155</sup>



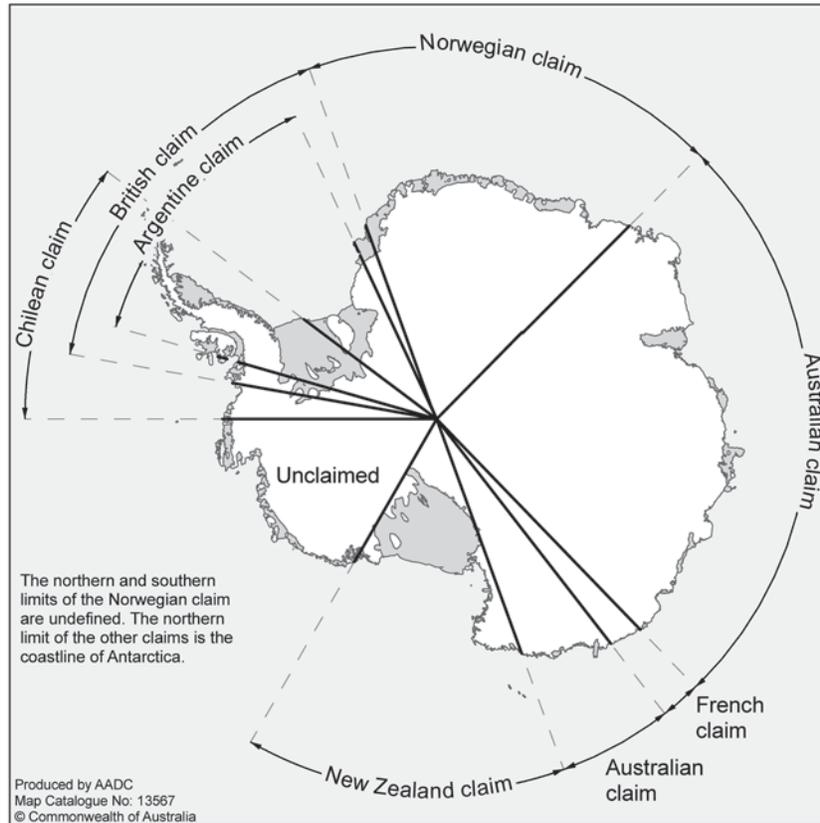
---

<sup>155</sup> Nigel Roberts, *The Antarctic in Antarctica and New Zealand—Voyages of Discovery*, TEARA—THE ENCYCLOPEDIA OF N.Z. (2012), <https://teara.govt.nz/en/map/37136/the-antarctic> [<https://perma.cc/83NS-MT4Z>] (showing the Antarctic convergence).

CCAMLR Boundaries<sup>156</sup>

<sup>156</sup> Australian Government: Department of the Environment and Energy, Figure “showing CCAMLR Convention area” in *Success Combating Illegal Fishing*, AUSTRALIAN ANTARCTIC DIV.: LEADING AUSTRALIA’S ANTARCTIC PROGRAM (Nov. 7, 2006), <http://www.antarctica.gov.au/news/2006/success-combating-illegal-fishing> [<https://perma.cc/4U9S-GUHZ>]; Joshua Stevens, Image Showing Antarctica and the Antarctic Sea Ice in *Antarctic Sea Ice*, NASA (2016), <https://earthobservatory.nasa.gov/Features/SeaIce/page4.php> [<https://perma.cc/G2DC-35GU>].

### The UNCLOS Boundaries with Territorial Claims<sup>157</sup>



<sup>157</sup> *Map 13567: Antarctica: Territorial Claims [Black and white]*, AUSTRALIAN ANTARCTIC DATA CENTRE (2018), [https://data.aad.gov.au/aadc/mapcat/display\\_map.cfm?map\\_id=13567](https://data.aad.gov.au/aadc/mapcat/display_map.cfm?map_id=13567) [<https://perma.cc/VCA6-XAUG>].



Arctic Ocean or the Antarctica Convergence where the Arctic Ocean meets the warmer waters of the adjacent southern oceans, and the third map illustrates how that corresponds to the ecosystem-based boundaries under CCAMLR.<sup>161</sup> The next map shows an approximation of the coastal water claims assuming the validity of the territorial claims, entitling each claimant to a territorial sea, contiguous zone, exclusive economic zone, and continental shelf.<sup>162</sup> Once again, conflicting territorial claims cloud the coastal boundaries even under the boundaries established by UNCLOS.<sup>163</sup> The final map reflects a legal assessment of the territorial claims most likely to merit legal recognition and the resultant coastal water boundaries.<sup>164</sup> This approach shows a very fluctuating set of coastal boundaries in which the high seas may in some instances start at the coastal baseline where no territorial claims are valid to the standard high seas delineation of beyond 200 nautical miles from the coastal baseline when such territorial claims are recognized.<sup>165</sup> Finally, if no territorial claims are recognized on whatever legal analysis, the waters off Antarctica are by default the high seas.<sup>166</sup> For example, if the General Assembly's categorization of Antarctica as a "World Park" and the "common heritage of mankind" prevails, the waters would presumably be entirely the high seas. Such a designation without further international agreement for regulation would expose the Antarctic waters to free exploitation of its resources by any state under the freedoms of the high seas.

## CONCLUSION

The fragile ecosystem of Antarctica is subject to an equally fragile legal regime. There are states that claim its territory but are going along, for now, with the ATS.<sup>167</sup> There are non-claimant states in the ATS which do not recognize territorial claims but insist that the ATS controls the global community as a whole.<sup>168</sup> There are non-claimant states in the

---

<sup>161</sup> Roberts, *supra* note 155; Australian Government: Department of the Environment and Energy, *supra* note 156.

<sup>162</sup> AUSTRALIAN ANTARCTIC DATA CENTRE, *supra* note 157.

<sup>163</sup> *See id.*

<sup>164</sup> GRID-ARENDAL, *supra* note 158.

<sup>165</sup> *See id.*

<sup>166</sup> *See* Arabella Thorp, *Antarctica: the treaty system and territorial claims*, Parliament UK 1, 12 (2012), <http://researchbriefings.files.parliament.uk/documents/SN05040/SN05040.pdf> [<https://perma.cc/W3WS-AJLN>].

<sup>167</sup> *See id.* at 7.

<sup>168</sup> *Id.* at 5.

ATS that question the ATS and its global legal impact even while being non-consultative parties in the ATS. There is presumably a majority of States in the General Assembly which do not recognize either the territorial claims or the legitimacy of the ATS as a globally binding legal regime. The General Assembly approach at present creates another type of legal vacuum for the Antarctic waters which opens them without further global agreement to free exploitation as the high seas under UNCLOS. None of these approaches is satisfactory or certain to continue indefinitely with the increasing pressures to exploit natural resources wherever located.

Generally, the world community has been willing to tolerate the ATS as long as resource exploitation was essentially banned, while asserting its own claim to those resources whenever opened to exploitation. If the Madrid Protocol had allowed for mining, as the failed CRAMRA did, the uneasy truce between the ATS and the General Assembly would have dissolved. With aggressive assertions of authority in the Arctic by Russia, internally the ATS is on fragile grounds of agreement.<sup>169</sup> As difficult procedurally as it is, the Madrid Protocol can be undone. If the international community seeks to assume authority over the future of Antarctica, it must first resolve the question of *whether or not* Antarctic resources may be exploited, on land or in the coastal waters. If the consensus allows for exploitation of coastal waters, the community would be wise to formulate a legal regime to do so similar to that formulated for the deep seabed. Exploitation of resources on *terra firma* would be even more challenging and with little or no guiding precedent. It should be assumed that the changing climate and evolving technology will make Antarctic mineral exploitation feasible and attractive at some point in the future, as fishing has already begun in its waters.<sup>170</sup> The only global consensus so far has been to ignore the problem to procrastinate formulation of a solution. It is unlikely as a political and legal matter that most states will accept as the legal regime the exclusive ATS “club.” The treaty negotiations for areas beyond national jurisdiction provide an opportunity for the global community to tackle the problems directly, as difficult as that will be. The uneasy truce over Antarctica will only become more uneasy as the future of the continent, and the planet, becomes more imperiled.

---

<sup>169</sup> See Ian Armstrong, *Russia's long-game in Antarctica runs political risk*, GLOBAL RISK INSIGHTS (Jan. 28, 2016), <https://globalriskinsights.com/2016/01/russias-long-game-in-antarctica-runs-political-risk/> [<https://perma.cc/Q3K7-UJMB>].

<sup>170</sup> See *id.*

