

# A Maritime Analysis of Conflicting International Law Regimes in Antarctica and the Southern Ocean

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## I. Introduction

Since 1961, Antarctica and the Southern Ocean have been the subject of a specific legal regime under the terms of the 1959 Antarctic Treaty.<sup>1</sup> That Treaty has been able to evolve over its more than 30 years of operation into one of the most successful international law regimes in recent history. Part of its success has been that the Treaty provided the basis for more specific legal instruments to be adopted, such as the 1964 Agreed Measures,<sup>2</sup> 1972 Convention for the Conservation of Antarctic Seals (CCAS),<sup>3</sup> and 1980 Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR).<sup>4</sup> With these additional instruments the Antarctic Treaty System (ATS) increasingly has begun to focus on resource management and environmental protection. This increasing emphasis on environmental protection was highlighted in the debates which occurred between 1988 and 1991 over whether the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA)<sup>5</sup> should be adopted or whether instead Antarctica and the Southern Ocean required a more comprehensive environmental protection regime. This debate was finally resolved in 1991 with the adoption of the Protocol on Environmental Protection to the Antarctic Treaty (Protocol).<sup>6</sup> The Protocol, which has yet to enter into force, represents the most comprehensive attempt by the Antarctic Treaty parties to implement an all encompassing regime dealing with the protection and preservation of the Antarctic environment.

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1 Done in Washington, 1 December 1959, in force 23 June 1961, 402 UNTS 71.

2 Adopted at Antarctic Treaty Consultative Meeting III (1964) as recommendation III-VIII, reprinted in Heap J (ed), *Handbook of the Antarctic Treaty System*, 7th ed (1990), pp 2403-06; Bush WM, *Antarctica and International Law* (1982), vol 1, pp 146-60.

3 Done in London, 1 June 1972, in force 11 March 1978, (1972) 11 ILM 251.

4 Done in Canberra, 20 May 1980, in force 7 April 1982, (1980) 19 ILM 827 (hereinafter CCAMLR).

5 Done in Wellington, 2 June 1988, (1988) 27 ILM 868 (hereinafter CRAMRA).

6 Done in Madrid, 4 October 1991, not yet in force, (1991) 30 ILM 1455 (hereinafter Protocol).

While the ATS has been developing more detailed provisions dealing with environmental protection, international law in general has not stood still. Two developments in particular have been significant for the Antarctic and Southern Ocean region. The first has been the development of a more sophisticated regime for the law of the sea. In 1958, four Conventions dealing with the law of the sea were negotiated at Geneva.<sup>7</sup> These Conventions have since been replaced by the 1982 United Nations Convention on the Law of the Sea (UNCLOS).<sup>8</sup> Many of the provisions of UNCLOS are important for Antarctica and the Southern Ocean, particularly those dealing with expanded maritime zones and the deep seabed. The second significant development has been in the area of international environmental law. Since the 1972 United Nations Conference on the Human Environment (Stockholm Conference) there has been an increasing world-wide interest in protecting the global environment. To that end a multitude of international environmental law instruments have been adopted which have both global, regional and bilateral application.<sup>9</sup> Many of these instruments have potential application in Antarctica and the Southern Ocean.

Through the parallel development of the ATS and general and conventional international law provisions dealing with the law of the sea and protection of the international environment, there is now some overlap between the regimes. In addition, there exists in some provisions a conflict between the rights, duties and obligations of the State parties. This is partly a result of the impact of the Antarctic Treaty upon sovereignty and jurisdiction, the reliance of global instruments seeking to protect the environment upon State parties exercising domestic and extraterritorial jurisdiction, and the unique environmental conditions which exist in the region. While these issues have gradually emerged since the ATS began to take a greater interest in environmental management and protection, they have become more prominent since the conclusion of the Protocol and are now being considered by the Antarctic Treaty parties.<sup>10</sup> This article will explore these issues by particularly focussing on Antarctic maritime claims, the deep seabed, resource management, and protection of the marine environment. In the process, an analysis will be undertaken of relevant provisions adopted by Antarctic Treaty parties and of other international instruments having global application within the region.

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7 These Conventions were:

- (1) Convention on Fishing and Conservation of the Living Resources of the High Seas, 599 UNTS 285;
- (2) Convention on the Continental Shelf, 499 UNTS 311;
- (3) Convention on the High Seas, 450 UNTS 82;
- (4) Convention on the Territorial Sea and Contiguous Zone, 516 UNTS 205.

8 Done in Montego Bay, Jamaica, 10 December 1982, scheduled to enter into force on 16 November 1994, (1982) 21 ILM 1261.

9 A review of international instruments dealing with the protection of the environment is found in Sand PH (ed), *The Effectiveness of International Environmental Agreements: A Survey of Existing Legal Instruments* (1992).

10 *Draft Final Report of the XVIIIth Antarctic Treaty Meeting* (XVIII ATCM/WP 37; 22 April 1994), pp 11–12 at paras 51–55.

Before commencing a substantive review of these issues, it is necessary to consider the area of application of the Antarctic Treaty as designated by article IV. This legal boundary also applies throughout much of the ATS. Article IV provides:

The provisions of the present Treaty shall apply to the 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.

This provision has been subject to much debate.<sup>11</sup> One interpretation is that all high seas rights recognised in international law at the time of the Treaty's entry into force remain in place for the Treaty's duration. However, this would have the effect of "freezing" the international law of the sea applicable in the Southern Ocean and excluding developments in the law since the Treaty's entry into force. A more appropriate interpretation is that article VI provides that the Treaty parties must not derogate from high seas rights under international law as they exist from time to time. This approach would allow for any attempt by the Antarctic Treaty parties to regulate marine pollution on the high seas to be acceptable providing it conformed with existing international law standards at that time. It is also interesting to consider the terms of the Protocol, which adopts essentially the same area of application as the Antarctic Treaty.<sup>12</sup> An exception may exist, however, with respect to the protection of "dependent and associated ecosystems" of the Antarctic environment. While this term is not precisely defined, one interpretation could be that the Protocol's provisions extend as far north as the "Antarctic Convergence", which many commentators recognise as being the biological boundary in the Southern Ocean between Antarctica and warmer ecosystems to the north.<sup>13</sup> It may be possible, however, to argue that the Protocol is intended to apply as far north as those ecosystems which support fauna such as seals, penguins and whales which migrate north in the winter to warmer regions beyond Antarctica and the Southern Ocean.<sup>14</sup> The ambiguity on this matter remains to be resolved as with the Protocol not yet in force there is no practice concerning its implementation.

## II. Antarctic Maritime Claims

One of the most significant developments in the law of the sea since 1958 has been the expansion of maritime zones which coastal States may claim. UNCLOS confirms the right of coastal States to claim a territorial sea of 12 miles (article 3), a contiguous zone of 24 miles (article 33), a new resource zone

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11 For a discussion of the interpretation of article VI of the Treaty see Auburn FM, *Antarctic Law and Politics* (1982), pp 130–36; Triggs G, *International Law and Australian Sovereignty in Antarctica* (1986), pp 158–61; Bush, n 2 above, vol I, pp 66–70.

12 Protocol, articles 1, 2, 4.

13 Young, "Ecology and Conservation of the Polar Regions" (1989) 18 *AMBIO* 23 at 23.

14 Cf CCAMLR, article I which has a northern boundary that approximates the Antarctic Convergence.

called the “Exclusive Economic Zone” (EEZ) (Part V), and also an expanded continental shelf of no less than 200 miles (Part VI). As a result of these developments coastal State sovereignty and jurisdiction has been considerably expanded and this has numerous implications for resource management in offshore areas.

### (a) Treaty provisions

With respect to maritime claims in Antarctica, two issues arise: whether there exist “coastal States” in Antarctica, and whether under the terms of the Antarctic Treaty it is possible for claimant States to legitimately assert maritime claims. As to the first question, while all seven Antarctic territorial claimants make a claim to some part of the Antarctic continent’s coastline, because of the uncertain international law status of these claims the issue remains whether there truly exist “coastal States” in Antarctica.<sup>15</sup> This raises for consideration whether the Antarctic claimants are recognised in international law as the legitimate territorial sovereign over coastal regions, a matter which can only be resolved by a long historical review of each claim which is beyond the scope of this work.<sup>16</sup> Express recognition of Antarctic territorial claims only exists amongst some of the territorial claimants. Argentina, Chile and the United Kingdom contest the validity of their various claims over the Antarctic peninsula.<sup>17</sup> The United States, which has the largest physical presence on the continent, has also expressly refused to acknowledge the validity of the territorial claims and by having established a large scientific base at the South Pole on a site which covers all of the territorial claims implicitly questions their validity. In addition, some States have expressly, or by implication, questioned the validity of the Antarctic territorial claims. The debate in the United Nations during much of the 1980s over whether Antarctica should be declared part of the “common heritage of mankind”,<sup>18</sup> clearly indicated that many States did not accept the validity of the current territorial claims. Nevertheless, while there may be some questions over the legal validity of the territorial claims, this should not act as an impediment to the assertion of maritime claims. No doctrine exists in international law requiring coastal State sovereignty to have been formally recognised before a maritime claim can be asserted.<sup>19</sup> It therefore remains open to the territorial claimants to assert maritime claims offshore Antarctica.

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15 This is a question considered in some detail by Joyner CC, *Antarctica and the Law of the Sea* (1992), pp 41–67; see also Nussbaum, “Legal Status of Antarctic Off-Shore Areas” (1993) 6 *Antarctic and Southern Ocean Law and Policy Occasional Papers* 1 at 2–12.

16 For an analysis of some of these questions see Auburn, n 11 above, pp 5–47; Triggs, n 11 above, pp 1–96.

17 Auburn, n 11 above, pp 48–61.

18 See Beck, “The United Nations and Antarctica” (1984) 22 *Polar Record* 137; Beck, “The United Nations and Antarctica 1986” (1987) 23 *Polar Record* 683.

19 See O’Connell DP, *International Law*, 2nd ed (1970), vol 1, pp 140–41.

The second issue which arises is whether it is possible to assert maritime claims in Antarctica given the terms of article IV of the Antarctic Treaty.<sup>20</sup> In the lead-up to the negotiation of the Treaty in 1959 the resolution of disputes over the status of Antarctic territorial claims was considered one of the pivotal issues. Article IV(1) of the Treaty was considered the answer to this problem.<sup>21</sup> It has the effect of entrenching the status quo with respect to existing and potential sovereignty claims for the duration of the Treaty. In addition, article IV(2) also prohibits the making of any additional or new sovereignty claim while the Treaty is in force.<sup>22</sup> This also has important consequences for the assertion of maritime claims. However, as will be seen, the Antarctic claimants have adopted varying approaches to the question of whether basic maritime claims or even extended maritime claims can be asserted offshore Antarctica.<sup>23</sup>

### (b) State practice

As regards the territorial sea, there has been variable practice amongst the territorial claimants. In some instances claims have been made in conjunction with territorial claims.<sup>24</sup> In other instances, separate proclamations have been

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20 There has been considerable debate over the effect and impact of article IV, see Triggs, n 11 above, p 137; Auburn, n 11 above, p 104; Watts A, *International Law and the Antarctic Treaty System* (1992), p 124.

21 Article IV (1) provides:

(1) Nothing contained in the present Treaty shall be interpreted 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 its 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.

22 Article IV (2) provides:

No acts of activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

As to whether new maritime claims can be made while the Treaty is in force see Bush, n 2 above, vol I, pp 60–63; Vicuna FO, *Antarctic Mineral Exploitation* (1988), pp 130–33.

23 It should be noted that to date there is no evidence of contiguous zone claims having been made in Antarctica. This no doubt partly relates to the very special nature of the contiguous zone as a maritime area within which jurisdiction exists for certain immigration and customs purposes only.

24 See for Argentina—"Argentine Note to the International Bureau of the Universal Postal Union Asserting Argentine Jurisdiction over Antarctica and Other Territories" (14 September 1927), reprinted in Bush, n 2 above, vol I, pp 584–85; Chile—"Decree No 1, 747 Declaring the Limits of Chilean Antarctic Territory" (6 November 1940), reprinted in *ibid*, vol II, pp 310–11; Norway—"Royal Proclamation Defining the Area of Norwegian Sovereignty in Antarctica" (14 December 1939), reprinted in *ibid*, vol III, p 149; United Kingdom—"British Note

made over territorial sea zones.<sup>25</sup> In the case of New Zealand's territorial sea off the Ross Dependency it seems that there was no formal proclamation as such but rather a gradual recognition that through the application of previous United Kingdom legislation a territorial sea did indeed exist.<sup>26</sup> While State practice shows that the Antarctic territorial claimants have not been reluctant to assert territorial sea claims, are such claims permitted under the Antarctic Treaty? One view is that article IV(2) should not be interpreted as inhibiting territorial claimants from asserting territorial sea claims.<sup>27</sup> This follows because the territorial sea is considered an inherent right of coastal States,<sup>28</sup> recognised in customary international law and conventions prior to the entry into force of the Antarctic Treaty.<sup>29</sup> A more difficult question arises over whether territorial sea claims can be enlarged without breaching article IV(2). If customary international law now recognises that coastal States are entitled to a 12 mile territorial sea it could be argued that the enlargement of an Antarctic territorial sea claim from 3 to 12 miles is not an enlargement for the purposes of article IV(2), but merely an act adopting a current coastal State entitlement recognised by international law. Nevertheless, it must be conceded that the enlargement of a pre-existing claim to a territorial sea offshore Antarctica will result in the assertion of sovereignty over a greater maritime area.<sup>30</sup> This may explain why

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to Chile Providing Information Sought Concerning British Claims to Certain Territory" (23 May 1914), reprinted in *ibid*, vol II, pp 304–05.

- 25 See for Australia—Commonwealth of Australia Gazette, No S 297 (13 November 1990), reprinted in (1992) 13 *Aust YBIL* 278; and France—"Law No 66–400 Concerning Marine Fishing and the Exploitation of the Produce of the Sea in French Southern and Antarctic Lands" (18 June 1966), reprinted in Bush, n 2 above, vol II, pp 551–55, and "Order No 5 Promulgating Legislation Concerning the Delimitation of the French Territorial Sea" (13 January 1972), reprinted in *ibid*, vol II, pp 579–80.
- 26 See "Foreign Office Opinion on the Territorial Scope of the Ross Dependency Whaling Regulations" (15 March 1927), reprinted in Bush, n 2 above, vol III, p 56, and also "Parliamentary Statement Concerning Jurisdiction over the Territorial Sea of the Ross Dependency" (23 September 1977), reprinted in *ibid*, vol III, p 97.
- 27 As Antarctic Treaty, article IV(2) refers to claims to "territorial sovereignty" and not "maritime sovereignty", another question is whether it has any application in the case of claims over offshore maritime zones. It could be inferred that as the intent of article IV was to preclude the assertion of new sovereignty claims, or the enlargement of existing ones for the duration of the Treaty, and that the Treaty applies to the area south of 60° South, that it was intended that the Treaty not only apply to the Antarctic continent and ice shelves, but also maritime areas. As such the article IV(2) limitation extends to maritime claims as well as to claims made to the Antarctic continent and offshore islands.
- 28 UNCLOS, article 2(1) UNCLOS provides as follows:  
The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
- 29 See O'Connell DP, *The International Law of the Sea* (1982), vol I, pp 60–169; Churchill RR and Lowe AV, *The Law of the Sea*, rev ed (1988), pp 59–63.
- 30 Opeskin and Rothwell, "Australia's Territorial Sea: International and Federal Implications of its Extension to 12 Miles" (1991) 22 *Ocean Development and International Law* 395 at 402.

some Antarctic claimants seek to assert more extensive maritime claims but do not enforce them against foreign nationals.<sup>31</sup>

Beyond the territorial sea, there exists a division amongst the Antarctic claimants over whether other maritime claims can be asserted.<sup>32</sup> Both Australia and Chile made claims to the continental shelf offshore their Antarctic territories prior to the entry into force of the Antarctic Treaty.<sup>33</sup> In 1966 Argentina claimed sovereignty over its adjacent Antarctic continental shelf out to the edge of the 200 mile limit or the limit of exploitation.<sup>34</sup> No other claimant has asserted a continental shelf claim, though France has made claims over the adjacent continental shelves of its sub-Antarctic islands.<sup>35</sup> The validity of Antarctic continental shelf claims, whether asserted prior to or after the entry into force of the Antarctic Treaty, raises similar issues to the validity of territorial sea claims. Coastal State rights to a continental shelf had been recognised under both customary international law and convention prior to 1961.<sup>36</sup> While the outer limits of the continental shelf were extended by UNCLOS, the extent of coastal State rights to a continental shelf did not change. The law of the sea recognises that coastal States have inherent sovereign rights over a continental shelf which need not be actively proclaimed. As such, it can be argued that an Antarctic continental shelf claim is an inherent right of every

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31 For a review of the position in the Australian Antarctic Territory, see Crawford and Rothwell, "Legal Issues Confronting Australia's Antarctica" (1992) 13 *Aust YBIL* 53 at 79–85.

32 The view that Antarctic territory cannot generate maritime zones in addition to those existing at the time of the commencement of the Antarctic Treaty appears to have been taken by the USSR, see Bush, n 2 above, vol I, p 260; and by New Zealand in respect of a potential EEZ claim for the Ross Dependency, see *ibid*, vol III, p 96. The United States also has adopted this view and takes the stance that the high seas extend right to the edge of the coastline, see Oxman, "Antarctica and the New Law of the Sea" (1982) 19 *Cornell International Journal Law* 211 at 228. See also Peterson, "Antarctic Implications of the New Law of the Sea" (1986) 16 *Ocean Development International Law* 137 at 153; Vicuna and Infante, "Le Droit de la Mer dans L'Antarctique" (1980) 84 *Revue Generale du Droit International Public* 340.

33 Australia—Commonwealth of Australia Gazette, No 56 of 1953 (11 September 1953), p 1 at col 1, reprinted in Bush, n 2 above, vol II, pp 172–74; Chile—"Presidential Declaration Over Continental Shelf and Seas Adjacent to the Coasts" (23 June 1947), reprinted in Bush, n 2 above, vol II, pp 448–49.

34 "Law No 17.094" (29 December 1966), reprinted in Bush, n 2 above, vol II, p 72.

35 See *ibid*, p 554.

36 Continental Shelf Convention, 499 UNTS 311; Churchill and Lowe, n 29 above, pp 121–27; O'Connell, n 29 above, pp 475–76. In the *North Sea Continental Shelf* cases (*Federal Republic of Germany v. Denmark, Federal Republic of Germany v The Netherlands*) [1969] ICJ Reports 3 at 31 the court noted:

What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion—in the sense that, although covered by water, they are a prolongation or continuation of that territory, an extension of it under the sea.

Also see Vicuna, n 22 above, p 156.

claimant and does not represent the assertion of a new claim.<sup>37</sup> Consequently under the terms of the Antarctic Treaty it would seem that coastal States are entitled to assert continental shelf claims in Antarctica. However, as in the case of the territorial sea, an issue can arise over whether the enlargement of a previously asserted continental shelf claim in order to meet the new standards set by UNCLOS breaches the terms of article IV(2).<sup>38</sup>

Moreso than in the case of either the territorial sea or continental shelf, EEZ claims raise difficulties for the Antarctic territorial claimants under article IV(2). This follows because the EEZ concept was not recognised in international law prior to 1961,<sup>39</sup> and unlike the territorial sea or continental shelf it is not recognised as an inherent sovereign right of a coastal State.<sup>40</sup> It follows that EEZ claims must be proclaimed if they are to be asserted.<sup>41</sup> Under these circumstances, the conclusion seems inescapable that the declaration of an EEZ in Antarctica seeking to assert sovereignty and jurisdiction is either an enlargement of an existing claim or assertion of a new claim and thereby

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37 UNCLOS, article 77(1) provides:

The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

A number of commentators are of the view that the assertion of a continental shelf claim is not in conflict with article IV(2), see Birnie, "The Effect of Article VI of the Antarctic Treaty on Scientific Research" in Wolfrum R (ed), *Antarctic Challenge III* (1988), p 105 at 116; Triggs, "The Antarctic Treaty System: Some Jurisdictional Problems" in Triggs GD (ed), *The Antarctic Treaty Regime: Law, Environment and Resources* (1987), p 88 at 90; Auburn, n 11 above, p 136; Nussbaum, n 15 above, at 13–15.

38 See Crawford and Rothwell, n 31 above, at 81. For a consideration of how the new limits of the continental shelf would be applied in Antarctica see Joyner, n 15 above, pp 126–27. However, there is no evidence that any of the three continental shelf claimants have yet adjusted their claim in conformity with UNCLOS. Another maritime claim which should be noted is Chile's claim to an "El Mar Presencial" or a Presencial Sea offshore the Chilean mainland and its Antarctic territory. The basis for such a claim is unknown in international law: Dalton, "The Chilean Mar Presencial: A Harmless Concept or a Dangerous Precedent?" (1993) 8 *International Journal of Marine and Coastal Law* 397.

39 The earliest point in time at which the concept could be said to have been recognised in customary international law was in the 1970s during the early stages of negotiations at the Third United Nations Conference on the Law of the Sea; see Attard DJ, *The Exclusive Economic Zone in International Law* (1987), pp 30–31; O'Connell, n 29 above, pp 553–58 (reviewing State practice up till the commencement of the Third UN Conference on the Law of the Sea).

40 See UNCLOS, article 56. See the discussion in Attard, n 39 above, pp 54–61; O'Connell, n 29 above, pp 571–72; Kwiatkowska B, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (1989), pp 7–9.

41 Attard, n 39 above, p 56 notes:

A review of the relevant State practice demonstrates that the large majority of EEZ claimants consider an express proclamation necessary for the existence of EEZ rights.

See also Harry, "The Antarctic Regime and the Law of the Sea Convention: An Australian View" (1981) 21 *Virginia Journal International Law* 727 at 733; Cf Triggs, n 11 above, p 160.



infringes article IV(2).<sup>42</sup> However, it is important to note that an EEZ does not confer sovereign rights over the whole offshore claimed, rather, it confers sovereign rights over resources within the area. It can not therefore be equated with a claim to territorial sovereignty. This is an important distinction because article IV(2) directly limits the assertion of claims to “territorial sovereignty” while the Treaty is in force.

### **(c) Australian practice**

The Australian position in regard to the Australian Antarctic Territory (AAT) and its adjacent offshore area demonstrates the problems which territorial claimants face. Despite having the most extensive claim to the continent, only a few other States have expressly recognised the Australian claim to the AAT.<sup>43</sup> Nevertheless, Australia has asserted both a territorial sea and continental shelf offshore Antarctica. Australia’s sole AAT maritime claim which impacts upon the activities of foreign vessels is its 12 nautical mile territorial sea.<sup>44</sup> This claim is asserted despite the absence of baselines. The claim was also extended from 3 to 12 nautical miles in 1990 despite potential objections on the grounds that it infringed article IV of the Treaty. There can be no denying that the assertion of an enlarged territorial sea represents a new territorial claim, however, it can also be argued that a 12 mile territorial sea is now an inherent right of coastal States recognised in international law and as such does not infringe article IV.<sup>45</sup> Australia’s continental shelf claim was asserted prior to the conclusion of the Treaty and while its outer limits have not been proclaimed, the fact remains that a formal claim to a continental shelf has been made.<sup>46</sup> Recent amendments to the Seas and Submerged Lands Act 1973 (Cth) will soon allow Australia to assert a more extensive continental shelf claim in line with the new definition for that zone contained in UNCLOS. If Australia does take that opportunity to

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42 Crawford and Rothwell, n 31 above, at 81; Churchill and Lowe, n 29 above, p 136. For further discussion on EEZ claims in Antarctica see Joyner, “The Exclusive Economic Zone and Antarctica” (1981) 21 *Virginia Journal International Law* 691; Joyner, “The Exclusive Economic Zone and Antarctica: The Dilemmas of Non-Sovereign Jurisdiction” (1988) 19 *Ocean Development International Law* 469–91; Vicuna, “The Application of the Law of the Sea and the Exclusive Economic Zone to the Antarctic Continent” in Vicuna FO (ed), *Antarctic Resources Policy: Scientific, Legal and Political Issues* (1983), pp 243.

43 France, New Zealand, Norway and the United Kingdom have all expressly recognised the Australian claim, see Bush, n 2 above, vol II, p 189. Both the United States and Russia (previously the USSR) have stated that they do not recognise the validity of any State’s claim in Antarctica, see *ibid*, vol I, p 58.

44 Commonwealth of Australia Gazette, No S 297 (13 November 1990), reprinted in (1992) 13 *Aust YBIL* 278, extending the territorial sea from 3 to 12 nautical miles under the terms of the Seas and Submerged Lands Act 1973 (Cth); also see Opeskin and Rothwell, n 30 above, at 401.

45 *Ibid*, at 402.

46 Commonwealth of Australia Gazette, No 56 of 1953 (11 September 1953), p 1 at col 1, reprinted in Bush, n 2 above, vol II, pp 172–74. Australia has also sought to legislate with respect to activities that may be conducted on the continental shelf, see ss 3 and 6, Antarctic Mining Prohibition Act 1991 (Cth).

formally proclaim a new continental shelf zone off the AAT, similar issues to those discussed above concerning the enlarged territorial sea arise.

Australia has taken a more conservative approach to an EEZ claim offshore the AAT. When Australia proclaimed a 200 nautical mile "Australian Fisheries Zone" in 1979, it specifically extended to the waters of Australia's external territories including the AAT.<sup>47</sup> However, a little over one month later, a new proclamation was made which excepted the waters around the AAT.<sup>48</sup> The effect of this action was to exempt foreign vessels from the reach of Australian law so that the waters of the AAT beyond the territorial sea remained open to foreign fishing. Australian nationals and vessels were, however, still caught by the reach of Australian law because even though the waters were not part of the Australian fishing zone they were still "proclaimed waters" for the purposes of the Fisheries Management Act 1991 (Cth).<sup>49</sup> As a result of reforms implemented by the Maritime Legislation Amendment Act 1994 (Cth), Australia formally proclaimed an EEZ offshore the AAT on 1 August 1994. This declaration expressly raises the issue of whether Australia has sought to enlarge an Antarctic claim contrary to the terms of article IV of the Treaty. Nevertheless, it should also be noted that the Australian Fisheries Zone remains in place within the limits of the new EEZ. As a result, the fisheries management regime which applies within the new EEZ offshore the AAT is exactly the same as that which existed previously with the result that only Australian vessels and nationals are currently subject to Australian law.<sup>50</sup>

Australia's attitude towards enforcement of a fisheries regime and declaration of an EEZ offshore the AAT has attracted some criticism.<sup>51</sup> This concern has been expressed as a result of the increased interest by various States in the Southern Ocean as a potential area for fishing activities and because of the uncertainty that arises over the application of the Antarctic Treaty and its associated conventions to non-parties.<sup>52</sup> However, given the uncertain state of

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47 Commonwealth of Australia Gazette, No S189 (26 September 1979), reprinted in Bush, n 2 above, vol II, p 202.

48 Commonwealth of Australia Gazette, No S225 (31 October 1979), reprinted in *ibid*, vol II, p 208, for further background see, pp 202–08.

49 For discussion concerning the position under the previous Fisheries Act 1952 (Cth) see Bush, n 2 above, vol II, p 205, 209; Opeskin and Rothwell, n 30 above, at 402.

50 It should be noted that not all Australian law in the AAT makes exceptions for foreign nationals, see Antarctic Mining Prohibition Act 1991 (Cth), s 6 which prohibits all persons from engaging in mining in the AAT. However, under s 9, proceedings can not be brought against such a person if they are not an Australian national or ordinarily resident in Australia and mining in Antarctica is also an offence against the law of the person's country or nationality for which the person would be liable to be prosecuted.

51 See Triggs, n 11 above, pp 248–49; House of Representatives Standing Committee on Legal and Constitutional Affairs, *Australian Law in Antarctica* (1992), p 17. For the official Australian Government view on the extent of the offshore claim see Bush, n 2 above, vol I, p 62 and vol II, p 203–05.

52 This directly raises the issue of whether the Antarctic Treaty System could be considered to be an objective regime, see Triggs, n 11 above, p 140; Auburn, n 11 above, p 118; Watts, n 20 above, p 184.

Australia's Antarctic sovereignty and the effect that article IV of the Treaty may have upon the ability of claimant States to enlarge their Antarctic maritime claims, Australia's practice may be consistent with the "frozen sovereignty" approach. Indeed, given the difficulty in enforcing Australian jurisdiction in the Southern Ocean, the more active assertion of an offshore claim which could not in reality be enforced may add to the impression that Australia's AAT claim was a "paper one" only.<sup>53</sup> Nevertheless, in 1992 a Parliamentary Committee did recommend that the Fisheries Management Act 1991 (Cth) be amended so as to include within the Australian Fishing Zone the 200 miles adjacent to the AAT so as to extend Australian jurisdiction to the activities of non-contracting parties to the Antarctic Treaty.<sup>54</sup>

### III. Deep Seabed

One of the major developments in the law of the sea during the past 20 years has been the development of a regime for the deep seabed and this is found in Part XI of UNCLOS.<sup>55</sup> The deep seabed regime was the cause of great controversy towards the end of the Third United Nations Conference on the Law of the Sea and even with UNCLOS scheduled to enter into force in late 1994 there is still some doubt over what form Part XI of the Convention will eventually take.<sup>56</sup> Nevertheless, there can be no denying that there is a gradual movement towards the recognition of a regime for the deep seabed based upon resource sharing and common heritage concepts. Following the negotiation in 1991 of the Protocol and its prohibition on Antarctic mining activities, the potential arises for a clash between a regional regime which prohibits mining and a global regime which is designed to facilitate mining. Notwithstanding the question of whether deep seabed mining is commercially or technologically possible in the Southern Ocean, a number of legal issues exist. The first is determining what parts of the Southern Ocean seabed are subject to or may be subject to national jurisdiction. Once these limits have been settled it may then be possible to ascertain what are the areas beyond the limits of national jurisdiction which may be classified as part of the "area".<sup>57</sup> This is a difficult task due to article IV of the Antarctic Treaty and the impact it has upon Antarctic maritime claims.

53 Auburn, n 11 above, p 219.

54 House of Representatives Standing Committee on Legal and Constitutional Affairs, n 51 above, p 18—recommendation 2:

The Committee recommends that the Fisheries Management Act 1991 be amended to include in the Australian Fishing Zone the 200 nautical miles adjacent to the Australian Antarctic Territory, so as to extend Australian jurisdiction to the activities of non-Contracting parties to the Antarctic Treaty.

55 For a review see Churchill and Lowe, n 29 above, pp 177–201.

56 See Anderson, "Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea" (1993) 42 *International and Comparative Law Quarterly* 654; Panel on the Law of Ocean Uses (Oxman, Rapporteur), "United States Interests in the Law of the Sea Convention" (1994) 88 *American Journal of International Law* 167.

57 UNCLOS, article 1(1), defines the "area" as "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".

### (a) UNCLOS and the deep seabed

Any consideration as to whether parts of the Southern Ocean could be classified as part of the “area” under UNCLOS raises several difficult issues.<sup>58</sup> First, because only three Antarctic claimants have actually asserted continental shelf claims, the question arises whether for the purposes of determining the area beyond the limits of national jurisdiction in the Southern Ocean account is to be taken of potential maritime zones or only those which have actually been asserted. An issue here is whether territorial claimants who failed to assert offshore claims prior to the entry into force of the Antarctic Treaty are now precluded from doing so under article IV(2) or whether rights to a continental shelf are inherent in every coastal State. This again raises for consideration the status of maritime claims under the Antarctic Treaty. Given the uncertainty surrounding this issue, it is difficult to determine conclusively what the outer limits of national maritime jurisdiction are in Antarctica. A second issue is whether the International Seabed Authority would have authority over the seabed offshore the unclaimed sector. As there is no territorial claimant, no maritime zones have been proclaimed offshore this sector. As a result, it could be argued that the Authority would be entitled to exploit the seabed up to the edge of the low-water mark of the Antarctic unclaimed sector.<sup>59</sup> The third, and perhaps most substantial question is whether Part XI of UNCLOS can even be said to apply in Antarctica.<sup>60</sup> The question of Antarctica was expressly excluded during the negotiation of UNCLOS, which given the tentative discussions then taking place between the Antarctic Treaty parties over the implementation of a mining regime in Antarctica, can be seen as significant. Nevertheless, there is nothing in the Convention which limits its operation and the “area” is considered to be those portions of the deep seabed beyond the limits of national jurisdiction. It could, however, be argued that only those portions of the Southern Ocean which can truly be classified as not part of a continental shelf (as defined in UNCLOS) fall within the “area” and that it is not necessary for a continental shelf to have been formally proclaimed in all instances.

### (b) CRAMRA

While the Antarctic Treaty contains no provisions which on their face apply to mining of the Southern Ocean seabed, the Antarctic Treaty parties have given some consideration to the issue. Though it is now abandoned, the provisions of CRAMRA remain significant on this question. Article 5 adopted the same area of application as the Antarctic Treaty. It specified that “Antarctic mineral resource activities which take place on the continent of Antarctica and all Antarctic islands, including all ice shelves, south of 60° south latitude and in the

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58 See generally on this question Joyner, n 15 above, pp 127–31.

59 For discussion on this question see *ibid*, pp 89–91.

60 See the discussion in Infante, “The Continental Shelf of Antarctica: Legal Implications for a Regime on Minerals Resources” in Vicuna FO (ed), *Antarctic Resources Policy: Scientific, Legal and Political Issues* (1983), p 253 at 259–60; Muller, “The Impact of UNCLOS III on the Antarctic Regime” in Wolfrum R (ed), *Antarctic Challenge* (1984), p 169 at 175–76.

seabed and subsoil of adjacent offshore areas up to the deep seabed” were regulated by the Convention.<sup>61</sup> However, for the purposes of CRAMRA, the “deep seabed” was defined as the seabed and subsoil beyond the geographic extent of the continental shelf.<sup>62</sup> This suggested that even though some territorial claimants had not asserted continental shelf claims offshore Antarctica, it was intended that CRAMRA would apply within those areas as if such claims had been asserted.<sup>63</sup> Not only did CRAMRA seek to exercise a form of collective jurisdiction over all potential continental shelf areas within the Antarctic Treaty area, but there was also an inference that its provisions concerning limitations on environmental impact as a result of mining activities also applied beyond the continental shelf to the deep seabed.<sup>64</sup> The CRAMRA regime therefore implied that despite a lack of uniformity in claims to the continental shelf and the potential for some parts of the Southern Ocean to be a part of the “area”, the Antarctic Treaty parties sought to exercise some jurisdiction over mining activities in the Southern Ocean.

### (c) Protocol

The abandonment of CRAMRA and adoption instead of the Protocol has seen another attempt by the Antarctic Treaty parties to put in place a regime regulating Antarctic mining activities. The Protocol has two principal goals: to prohibit mining activities in Antarctica and also to establish a comprehensive environmental protection regime for the region. Article 7 clearly prohibits activities relating to mineral resources. Remembering that the Protocol’s basic area of application is the same as the Treaty, it can be implied that this prohibition on mineral resource activities extends to both the continental shelf and seabed up to 60°S. While this provision seems fairly clear, it could have been more explicit. At one stage during the negotiation of the Protocol it was proposed that article 7 provide:

Mineral resource activities shall be prohibited on the continent of Antarctica and on all Antarctic ice shelves, south of 60° South Latitude, and in the seabed and subsoil of adjacent offshore areas up to the deep seabed.<sup>65</sup>

The adoption of this language in article 7 would have resolved any potential for ambiguity over the status of continental shelf and deep seabed mining.

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61 CRAMRA, article 5(2).

62 CRAMRA, article 5(3), defining the continental shelf in accordance with international law.

63 This presumably applied also to the unclaimed sector.

64 See CRAMRA, article 5(4) providing:

Nothing in this Article shall be construed as limiting the application of other Articles of this Convention in so far as they relate to possible impacts outside the area...including impacts on dependent or on associated ecosystems.

See also discussion in Wolfrum R, *The Convention on the Regulation of Antarctic Mineral Resource Activities* (1991), pp 31–34; Gautier, “The Maritime Area of the Antarctic and the New Law of the Sea” in Verhoeven J, Sands P, and Bruce M (eds), *The Antarctic Environment and International Law* (1992), p 121 at 132.

65 Bush, n 2 above, Binder I, Pt AT90A, p 54.

Notwithstanding this problem, the Protocol is an indicator that the Antarctic Treaty parties do not believe there is any scope for the application of the UNCLOS deep seabed minerals regime in Antarctic waters.<sup>66</sup>

#### **(d) Which legal regime prevails?**

While the prospect of commercial deep seabed mining in the Southern Ocean seems remote at present, the above analysis does demonstrate the potential for a conflict between the specific regional regime created for the Southern Ocean by the ATS and the global deep seabed regime created by UNCLOS. The conflicts between these regimes also raise the issue of the legitimacy of the ATS and could bring to a head once again the issue of whether the common heritage rights of all States to access deep seabed minerals prevail over the interests of a small group of States who seek to create a legal regime for a region. These are difficult issues and indicate that despite the optimism amongst Treaty parties that the negotiation of the Protocol has resolved the mining issue, there is the potential for the problem to arise once again. One solution to the problem would be to have inserted in UNCLOS an exception for the deep seabed of the Southern Ocean so that in effect the "area" does not include the Southern Ocean. With a growing realisation that deep seabed mining can have substantial environmental impact and an acceptance that Antarctica and the Southern Ocean are important wilderness areas which contain fragile ecosystems that are vulnerable to substantial environmental impact, it could be conceded that such an amendment to UNCLOS is justified. To assert however, that the provisions of the Protocol and ATS prevail over UNCLOS will raise for debate the legitimacy of the ATS and also whether it constitutes an objective regime. These are difficult issues, and as the UN debates during the 1980s indicate, they remain unresolved.

### **IV. Marine Living Resource Management**

Another area of conflict is with respect to marine living resource management. Both CCAS and CCAMLR have been the two major instruments adopted by the Antarctic Treaty parties to deal with marine living resource management and it is generally considered that they have been a success. At the international level, the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas<sup>67</sup> while applicable in the Southern Ocean had little effect. However, UNCLOS does create some important resource management obligations, as does more specific management regimes such as the 1946 International Convention for the Regulation of Whaling.<sup>68</sup>

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66 Watts, n 20 above, pp 159–62; Triggs, n 11 above, pp 225–26.

67 599 UNTS 285.

68 Done in Washington, 2 December 1946, in force 10 November 1948, 161 UNTS 74 (hereinafter Whaling Convention).

**(a) UNCLOS**

Both Parts V and VII of UNCLOS contain important provisions dealing with marine living resource management. The most extensive provisions are found in Part V dealing with the EEZ. While the EEZ is an area of resource sovereignty for the coastal State, it also has a sovereign right to “conserve” the resources of the EEZ (article 56). Given that this right is to be exercised in a manner consistent with the terms of the Convention, there is an implication that coastal States are also under an obligation to conserve EEZ resources. An interpretation reinforced by article 62, which provides that coastal States are to “ensure through proper conservation and management measures that the management of the living resources in the exclusive economic zone is not endangered by over-exploitation”. Coastal States are placed under an obligation to both conserve and manage living resources within their EEZ, and in some instances this may extend to prohibiting exploitation altogether. This is certainly contemplated in regard to marine mammals where a special obligation to conserve exists (article 65). On the high seas, UNCLOS recognises the long-standing freedom of fishing by all States (article 116). However, some of the Convention’s obligations concerning conservation and management are also extended by Part VII of UNCLOS to that area (articles 116–20). In addition, when determining resource management mechanisms for high seas living resources, States shall also take into account the impact upon an ecosystem of the harvesting of a particular species. This is particularly important in the waters of the Southern Ocean given the limited extent of the food chain and the effect the overharvesting of one species can have on others higher up the food chain.

**(b) Antarctic regime**

The Antarctic Treaty has no detailed provisions dealing with living resources.<sup>69</sup> This reflects the lack of priority given to resource management and environmental conservation at the time the Treaty was concluded. However, two specific Conventions have subsequently been adopted by the Antarctic Treaty parties dealing with marine living resource management: CCAS and CCAMLR. CCAS prohibits certain types of sealing activities, and imposes limitations such as closed seasons on others. In the case of those seal species potentially subject to sealing activities, once a commercial sealing operation commences a mechanism exists under the Convention for the viability of commercial activity to be considered in relation to its impact upon the resource and appropriate recommendations can be made to control the activity. Because sealing in Antarctic waters had substantially decreased by the time the Convention was implemented, it has never truly been tested. Nevertheless, sealing activities no longer pose a threat to seals in Antarctica. CCAMLR is a more substantial marine living resource management regime. It has an area of application which extends beyond the Antarctic Treaty limits and this is representative of its

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<sup>69</sup> Antarctic Treaty, article IX(1)(f) does confer upon the Antarctic Treaty parties the ability to make recommendations dealing with the “preservation and conservation of living resources in Antarctica”.

ecosystem approach.<sup>70</sup> The Convention takes a precautionary approach to resource management without going so far as to impose an all encompassing licensing regime for all marine living resource activities. Measures which manage resource exploitation within an ecosystem approach are adopted by the CCAMLR Commission. These measures are formulated from advice provided by a Scientific Committee of the Commission which has the role of reviewing catch and other research data provided by the parties or collected by the Commission. CCAMLR has been judged a success to date, though some concerns have been raised over the delay in adopting measures to deal with the krill fishery.<sup>71</sup> One of the important issues which CCAMLR raises is whether a regional fishing regime, which substantially limits the traditional high seas freedom of fishing, can be applied and enforced against non-parties in an area that is high seas.<sup>72</sup> CCAMLR does not seek to impose legal obligations upon non-parties, and the only reference to the potential for the activities of such parties to conflict with the CCAMLR regime is found in article X, which provides that States which infringe CCAMLR provisions may have such action drawn to their attention by the CCAMLR Commission.<sup>73</sup>

### (c) Whaling

The application of the 1946 International Convention for the Regulation of Whaling within the Southern Ocean is particularly important because of the large numbers of whales which frequent polar waters and the historical interest of many polar States in whaling. The Convention, which has been signed by most whaling nations and the principal parties to the Antarctic Treaty, creates a regulatory regime for the catching of whales in all the world's oceans. Administered by the International Whaling Commission (IWC), State parties through the IWC forum can set catch quotas, designate protected species, and regulate whaling methods. While the Convention seeks to prevent the over-exploitation of whales it could not be claimed that it is protectionist. Rather, it seeks to ensure sustainable whaling.<sup>74</sup>

The Convention has an extremely wide application. Article 2(1) provides:

This Convention applies to factory ships, land stations, and whale catchers under the jurisdiction of the Contracting Governments and to all waters in which whaling is prosecuted by such factory ships, land stations, and whale catchers.

This has allowed the IWC to regulate all whaling activity on the high seas. Given the serious depletion of whale stocks that had occurred before the

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70 CCAMLR, article II.

71 Nicol, "Management of the Krill Fishery: Was CCAMLR Slow to Act?" (1992) 28 *Polar Record* 155; Nicol and De la Mare, "Ecosystem Management and the Antarctic Krill" (1993) 81 (1) *American Scientist* 36.

72 Sahurie EJ, *The International Law of Antarctica* (1992), pp 546–49.

73 CCAMLR, article XXII also imposes obligations upon the State parties to the Convention to ensure, consistently with the provisions of the United Nations Charter, that no other State engages in activities contrary to the terms of the Convention.

74 See Lyster S, *International Wildlife Law* (1985), pp 19–20.



Convention's entry into force, the IWC has always sought to closely monitor and regulate any whaling activities taking place in the Southern Ocean. To that end the provisions of the Schedule to the Convention, have played a significant role.<sup>75</sup> The Schedule has been subject to a number of major amendments and revisions at the Annual Meetings of the IWC. The most important was a 1982 amendment which prohibited all commercial whaling from the 1985/1986 season in Antarctica and elsewhere from 1986.<sup>76</sup>

In regard to the waters of the Southern Ocean, while whaling has been substantially regulated and even prohibited in recent years, a small quota remains in place for "scientific whaling" so as to enable whale research to continue.<sup>77</sup> This has been the subject of controversy as claims have been made that Japanese whalers have used this as a loophole to engage in commercial whaling in disguise.<sup>78</sup> A specific response to the concerns over the future management of whales in the Southern Ocean was a 1992 proposal by France that a "whale sanctuary" be established in the Southern Ocean.<sup>79</sup> After considerable debate amongst IWC members, a revised version of this proposal was accepted by the IWC at its 46th Annual Meeting in 1994 in Mexico.<sup>80</sup> The "Southern Ocean Sanctuary" applies south of 40°S, with the exception of the Indian Ocean where an Indian Ocean Sanctuary already exists as far south as 55°S, and, an area in the Western Pacific and immediately to the north of the Antarctic Peninsula where the boundary is set at 60°S.<sup>81</sup> At present, it is uncertain what the ramifications of the Southern Ocean Whale Sanctuary will be. The Sanctuary only applies to commercial whaling, and this leaves open the prospect that scientific whaling will continue in the region. Two IWC members have particularly expressed concerns over this development. Japan, which was

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75 Whaling Convention, article V deals with the Schedule to the Convention, which can be amended from time to time by the contracting parties at meetings of the IWC.

76 Whaling Convention, Schedule, para 10(e); for comment see Lyster, n 74 above, pp 19, 25–27.

77 Whaling Convention, article VIII exempts whaling for "scientific research" from the operative provisions of the Convention. Such whaling operations are controlled by the contracting States, subject to reports being provided to the IWC on the extent of such whaling operations and the results of the scientific research.

78 See Ellis, "Japanese Whaling in the Antarctic: Science or Subterfuge?" (1988) 31(2) *Oceanus* 68. The current quota for minke whales in the Southern Ocean is set at 300. Japan has, in recent times, been the only State to engage in such Southern Ocean whaling activities.

79 "A Southern Ocean Whale Sanctuary Proposed by the Government of France to the 44th Annual Meeting of the IWC" (IWC/44/19).

80 Press Release—Minister for the Environment, Sports and Territories, Minister for Foreign Affairs and Trade, "Sanctuary for Whales in the Southern Ocean" (27 May 1994).

81 Proposal for a Widely-Accepted Southern Ocean Sanctuary, Agenda Item 12, 25 May 1994 (IWC/46/53). The boundary of the Southern Ocean Sanctuary was designed to approximate that of CCAMLR, excepting the Indian Ocean area already covered by the Southern Ocean Sanctuary and also in the Atlantic and Western Pacific in order to provide protection to the sei and fin whale feeding grounds.

the only IWC member to vote against the Southern Ocean Sanctuary proposal, has indicated that it intends to continue taking 300 minke whales annually for scientific purposes.<sup>82</sup> Norway has also indicated that it intends to take whales for scientific purposes. Australia directly expressed to the Norwegian Ambassador in Canberra in June 1994 its concern over this development.

#### (d) Conflicts and overlaps

A number of issues arise in regard to these various marine living resource management regimes in the Southern Ocean. While all are based on a principle of conservation, difficulties can arise with overlap and differences in implementation. For example, UNCLOS is based on the assumption that within the EEZ coastal States will actively seek to manage and conserve resources. However, there are few EEZ claims made adjacent to the Antarctic continent and those States which do assert such claims do not actively manage marine living resources within the area. As an alternative to coastal State management of EEZ resources, the Antarctic Treaty parties have adopted their own specific regimes to deal with some of these issues.<sup>83</sup> However, CCAMLR is based on an ecosystem approach to marine living resource management and adopts a more sophisticated approach to managing Antarctic marine living resources compared to the UNCLOS provisions which would apply within the same area. CCAMLR also extends over an area which encompasses all the potential EEZ areas around the continent (including the offshore area of the unclaimed sector), and over waters which are high sea. Finally, the Whaling Convention seeks to prohibit commercial whaling in the waters of the Southern Ocean. While this is consistent with both UNCLOS and CCAMLR, the Antarctic claimants are restrained from actively implementing prohibitions on whaling within the waters adjacent to their Antarctic claims because of the restrictions imposed upon them by the Antarctic Treaty.<sup>84</sup>

It has been recognised that there is a potential for conflict and overlap between these various resource management regimes. Both CCAMLR and the Madrid Protocol seek to ensure that neither derogate from the terms of the Whaling Convention.<sup>85</sup> Likewise, UNCLOS recognises the importance of the work of other international organisations in management of marine mammals

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82 Darby, "Whale sanctuary nations sink Japan 23-1", *The Sydney Morning Herald* (28 May 1994), p 23; Bitá, "Japan may continue whale hunt", *The Weekend Australian* (28-29 May 1994), p 9.

83 While some Antarctic territorial claimants do not actively assert their EEZ claims, they have been prepared to implement their obligations under CCAMLR by way of domestic legislation, see Antarctic Marine Living Resources Conservation Act 1981 (Cth) adopting the terms of CCAMLR.

84 See Whale Protection Act 1980 (Cth), as amended by Maritime Legislation Amendment Act 1994 (Cth) which provides in Section 6 for the application of the Act within the EEZ, presumably including the EEZ offshore the AAT. However, as Section 6(3) provides that the Act is subject "to the obligations of Australia under international law", it could be implied that the terms of article 4, Antarctic Treaty, operate to restrict the operation of the Act in this instance.

85 CCAMLR, article VI; Protocol, Annex II, article 7.

(article 65). However, this recognition of the “jurisdiction” of the Whaling Convention is to no effect if the power of the regime is waning. While the adoption of a Southern Ocean whaling sanctuary is a major breakthrough in the protection of whales within the region, the Sanctuary is only worthwhile if it is enforced. This is where the authority of the IWC is becoming questionable, especially following the recent withdrawal of Iceland, and the disquiet being expressed by Japan and Norway. As a result then of the strengths and weaknesses of both legal regimes, the management approach is not as strong as it could be. This is even reflected in the approach taken by territorial claimants towards the protection of whales off their Antarctic territories. In one instance, it is known that whaling has occurred offshore the AAT and Australian law has been powerless.<sup>86</sup>

There is likewise a conflict between the provisions of UNCLOS and CCAMLR. For the purposes of UNCLOS much of the Southern Ocean would be considered high seas. As noted above few EEZ claims have been asserted and for the purposes of UNCLOS its high seas provisions extend beyond the territorial sea and EEZ (article 86). If an Antarctic territorial claimant has therefore not asserted either one of these maritime zones, then the high seas of the Southern Ocean extends up to the edge of the continent. This then becomes significant in determining what conservation and management regime exists for the waters of the Southern Ocean. UNCLOS has only one dedicated provision dealing with conservation of high seas living resources.<sup>87</sup> Contrast this with CCAMLR which creates a very complex regime for the management of Antarctic marine living resources, but which is difficult to enforce beyond the Treaty parties.<sup>88</sup> A conflict therefore exists with the general principles of UNCLOS which permits high seas fishing activities and the more explicit provisions of CCAMLR which adopts an ecosystem management approach to Southern Ocean fishing activities. The difficulty with the regime is that CCAMLR measures have not been uniformly implemented by the territorial claimants in the few offshore areas they claim. This is once again a direct result of the uncertain sovereignty status of Antarctic territorial claims and also limitations which exist on the exercise of jurisdiction.

## **V. Protection of Marine Environment**

The protection of the marine environment has been an issue of growing concern throughout the latter part of this century. Initially the focus was on ship-sourced pollution and efforts were made to ensure that vessels which had a high pollution risk such as tankers conformed to certain construction standards so as to diminish the risk of pollution following a maritime incident. Coastal States were also given greater powers to intervene to limit pollution risks following maritime incidents. New international laws were also implemented to limit operational discharges at sea and reduce the risks of potential oil spills during

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86 Shevlin, “Japanese Whaling Activity Observed Near Davis Station” (1992) 69 *ANARE News* 18.

87 UNCLOS, article 119.

88 Joyner, n 15 above, p 254.

loading and unloading.<sup>89</sup> These regimes have been relatively successful and now much greater global attention is being given to the problem of land-based marine pollution.

In Antarctica there has until very recently been no serious attempt by the ATS to control marine pollution. This has partly been because the problem was not seen to be serious enough to warrant a legal regime, and also because most Treaty parties were also parties to the international regime which imposed obligations upon their vessels wherever they may be. This complacency no longer exists following two events in 1989. The *Exxon Valdez* incident in Alaska indicated how susceptible a polar marine environment is to pollution damage and also exposed the difficulties encountered in attempting to clean-up a major oil spill in polar conditions. The *Bahia Paraiso* incident off the Antarctic Peninsula<sup>90</sup> not only reinforced these lessons, but also exposed the inability of the Antarctic legal regime to cope with liability issues, compensation and also the practicalities of clean-up and environmental restoration. A second factor which has also been influential has been the significant growth in ship-borne tourism in Antarctica and increased risk this brings of further marine pollution incidents.

### (a) UNCLOS

Not only is UNCLOS a most important instrument from the perspective of clarifying coastal State rights over adjacent maritime areas, it also contains some very important provisions dealing with the protection of the marine environment.<sup>91</sup> Article 192 sets the general theme for this part of the Convention by providing: "States have the obligation to protect and preserve the marine environment". In turn, article 194 outlines some of the measures which States can take to prevent, reduce and control pollution of the marine environment.<sup>92</sup> In seeking to achieve this goal, UNCLOS places emphasis on

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89 Of which the best example is the 1973 International Convention for the Prevention of Pollution from Ships and its 1978 Protocol (MARPOL 73/78), done in London, 2 November 1973, did not enter into force in its original form, (1973) 12 ILM 1319, as amended by the 1978 Protocol, done in London, 16 February 1978, (1978) 17 ILM 546, which together entered into force on 2 October 1983.

90 The *Bahia Paraiso* was an Argentine supply vessel which in January 1989 grounded and eventually sank in waters near the US Palmer Station on the Antarctic Peninsula. Eighty-one tourists were on board at the time. A rescue operation was mounted from the US base in conjunction with Argentine authorities and other vessels in the area. While no lives were lost, the environmental damage to the coastline and marine life in the area was extensive. See Barinaga and Lindley, "Wrecked Ship Causes Damage to Antarctic Ecosystem" (1989) 337 *Nature* 495; "Argentine Ship Sinks Near Palmer Station" (1989) 24 *Antarctic Journal of the United States* 3.

91 For a review of UNCLOS provisions dealing with environmental management see McConnell and Gold, "The Modern Law of the Sea: Framework for the Protection and Preservation of the Marine Environment" (1991) 23 *Case Western Reserve Journal of International Law* 83.

92 This article has been described as the "core operative stipulation" see Joyner, "The Southern Ocean and Marine Pollution: Problems and Prospects" (1985) 17 *Case Western Reserve Journal of International Law* 165.

greater global and regional cooperation (articles 197–201). It seeks to deal with pollution from a number of sources. These include land-based sources (article 207), sea-bed activities (articles 208, 209), dumping at sea (articles 210), vessel-source pollution (article 211), and atmospheric pollution (article 212). While the Convention's marine pollution provisions do not go any further than existing measures they are important because for the first time principles which had developed in various international marine pollution conventions since the 1950s are codified. Part XII therefore assists to recognise certain principles of State responsibility towards the marine environment and confirms more extensive coastal State jurisdiction so as to regulate polluting activities.<sup>93</sup> Its provisions can also be interpreted as providing a basis for greater regional cooperation by States to deal with problems of marine pollution and the protection of the marine environment.<sup>94</sup>

From the perspective of the Southern Ocean, the most important provision in UNCLOS is article 234. It provides coastal States with the ability to implement laws and regulations for the "prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone". This provision does not confer upon States the ability to implement extensive marine pollution provisions over all polar waters. Measures adopted under article 234 must be "non-discriminatory" and have due regard for navigation. It is not possible, therefore, to impose such high construction standards on vessels which seek to navigate through such waters that navigational freedoms are limited. It is considered by many commentators, and apparently assumed by its negotiators, that article 234 only applies to the Arctic and does not have an impact in the Southern Ocean.<sup>95</sup> This assessment is based on the view that the Third United Nations Conference on the Law of the Sea expressly excluded Antarctica from its consideration. While this may have been the view adopted during the Conference negotiations,<sup>96</sup> there is nothing in the terms of the Convention to suggest that it has a limited area of application. On its terms then, article 234 does give to the Antarctic territorial claimants some scope for more extensive offshore jurisdiction under the law of the sea.<sup>97</sup> Certainly the Southern Ocean meets the physical characteristics of an ice-covered area as referred to in article 234. Despite the commonly held view that article 234 only deals with Arctic waters, there is the potential for the Antarctic territorial claimants to rely upon it to assert more extensive offshore jurisdiction in the Southern Ocean. However, to date, none have taken this opportunity.

### **(b) Global provisions controlling marine pollution**

Of the specific global marine pollution regimes, the 1973 International Convention for the Prevention of Pollution from Ships and its 1978 Protocol

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93 See *ibid*; Joyner, n 15 above, pp 156–60.

94 See Brubaker D, *Marine Pollution and International Law* (1993), pp 295–99.

95 See Watts, n 20 above, p 163.

96 See Auburn, n 11 above, p 126; Peterson, n 32 above, p 153.

97 See the discussion on this question in Gautier, n 64 above, p 134; also Watts, n 20 above, 163.

(MARPOL),<sup>98</sup> and the 1972 London Dumping Convention<sup>99</sup> apply in the Southern Ocean.<sup>100</sup> However, while these Conventions are generally considered to have been successful in combating vessel-sourced oil pollution, dumping, and other forms of vessel-sourced discharges which occur at sea, neither deal with any of the specialised pollution problems which can arise in polar waters.<sup>101</sup> This was highlighted by the fact that it was only in 1991 that the Southern Ocean was declared a “special area” under MARPOL. This had the effect that all operational discharges were absolutely prohibited from vessels except under cases of extreme peril.<sup>102</sup> A further amendment was proposed in 1992 so that the Southern Ocean south of 60°S would also be included as a Special Area under Annex II.<sup>103</sup> With this exception, the major conventions dealing with vessel-source pollution do not take into account the navigational and operational difficulties which vessels can experience in polar waters, or recognise that the polar marine environment is particularly susceptible to damage from pollution. The 1989 Basel Convention on the Transboundary Movement of Hazardous Wastes is another convention of global application.<sup>104</sup> However, only one provision specifically applies to polar waters. Under article 4(6) the parties agree to not allow the export of hazardous wastes or other wastes for disposal within the area covered by the Antarctic Treaty.

### **(c) Protocol**

Apart from the global marine pollution regimes already noted, there has been no attempt to implement an individual marine pollution regime in the Southern Ocean. Nevertheless, the Antarctic Treaty parties have increasingly become concerned over marine pollution issues and have adopted a variety of Recommendations to deal with the problem.<sup>105</sup> The most significant initiative is contained in Annex IV of the Protocol which deals with the “Prevention of Marine Pollution”. In particular the following polluting activities are prohibited: the discharge of oil except in cases permitted under Annex I of MARPOL (article 3), the discharge into the sea of noxious liquid substances (article 4), the

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98 Note 89 above.

99 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, done in London, 29 December 1972, in force 30 August 1975, 1046 UNTS 120.

100 For a discussion concerning the application of these regimes in the Southern Ocean see Joyner, n 15 above, pp 149–56.

101 For a critique concerning their application in Arctic waters see Brubaker, n 94 above, pp 234–38, 244–54.

102 See IMO Doc 30/24; Antarctic Treaty Special Consultative Meeting document XI ATSCM/2/Info 2 of 22 April 1991. For further discussion of the application of MARPOL in the Southern Ocean, see Joyner, n 15 above, pp 151–56.

103 See IMO Doc MEPC 33/20.Add.1—Resolution MEPC.57 (33) adopted on 30 October 1992 (Designation of the Antarctic Area as a Special Area and Lists of Liquid Substances in Annex II).

104 Done in Basel, 22 March 1989, in force 24 May 1992, (1989) 28 ILM 649.

105 See for example the following recommendations adopted to deal with marine pollution issues: recommendations IX–6, X–7, XI–2. For a review see Joyner, n 15 above, pp 161–72.

disposal of garbage at sea (article 5), and the discharge into the sea of sewage (article 6). An unusual feature of Annex IV is that it attempts to apply certain MARPOL provisions.<sup>106</sup> To that end some MARPOL definitions and exceptions are adopted. However, the Annex expressly provides that in regard to States which are also parties to MARPOL, “nothing in this Annex shall derogate from the specific rights and obligations thereunder” (article 14). The provisions of Annex IV extend to each party to the Protocol, ships that fly its flag, and ships which are engaged “in or supporting its Antarctic operations” (article 2). However, article 11 allows for a significant exception: its provisions do not apply to warships and other ships “owned or operated by a State and used, for the time being, only on government non-commercial service”. As a result, a great many vessels which visit Antarctic waters on behalf of national expeditions in order to resupply scientific bases or to conduct scientific research in the Southern Ocean are exempt from these provisions.<sup>107</sup> The Annex also includes a provision dealing with the need to ensure that vessels are fitted with adequate waste retention capacity and that the parties develop comprehensive emergency preparedness and response procedures for marine pollution incidents. This is especially important after the grounding of the *Bahia Parasio*.

While the adoption on these measures under the Protocol is a positive step, they are not comprehensive. As Bush has noted: “While attempts were made to repeat here the phraseology of the MARPOL annexes, the language necessarily diverges. This is generally because the present annex encompasses in one relatively short annex what is dealt with in five lengthy annexes under MARPOL”.<sup>108</sup> Few attempts are made in Annex IV to go beyond the reach of the MARPOL provisions. Where there is an exception to the MARPOL regime, as in the case of article 9 (1) which imposes obligations upon parties to ensure that vessels supporting its Antarctic operations are equipped with adequate retention capacity, the overriding impact of article 14 providing that nothing in the Annex is to derogate from rights and obligations under MARPOL seems to defeat the effort.<sup>109</sup> Annex IV also suffers because of inherent problems in the Protocol itself and the Treaty regime. Some of these matters have been noted above, however, a specific issue in relation to marine pollution relates to the Protocol’s area of application. Irrespective of whether the Protocol applies north of 60°S in its protection of “dependent and associated ecosystems”, there are

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106 Joyner, n 15 above, pp 173–74 notes that an earlier version of this Annex provided that parties were to “take appropriate measures to ensure compliance” with a range of international conventions protecting the marine environment such as MARPOL and others.

107 Blay, “New Trends in the Protection of the Antarctic Environment: The 1991 Madrid Protocol” (1992) 86 *American Journal of International Law* 377 at 394 comments: “This exclusion significantly undermines the annex”. See also Joyner, “The 1991 Madrid Environmental Protocol: Rethinking the World Park Status for Antarctica” (1992) 1 *Review of European Community and International Environmental Law* 328 at 334.

108 Bush, n 2 above, Binder I, Pt AT91C, p 129.

109 Ibid; see also Francioni, “The Madrid Protocol on the Protection of the Antarctic Environment” (1993) 28 *Texas International Law Journal* 47 at 72. For another review of Annex IV see Joyner, n 15 above, pp 172–74.

strong grounds for arguing that the application of any marine pollution regime in the Southern Ocean should at the very least extend as far north as the limits of CCAMLR.<sup>110</sup> The ambiguity on this matter remains to be resolved as the Antarctic Treaty parties have yet to implement the Protocol. Another potential conflict exists between the CCAMLR Commission and the Protocol in their separate interest in and regulation of the disposal of plastics and other fishing related marine debris.<sup>111</sup>

## VI. Reassessing Regime Interaction and Conflict

This review of the various maritime regimes which exist in the Antarctic and Southern Ocean region illustrate a number of problems, some of which are unique to the region, and others which have more global application. Many of the unique regional problems exist because of the limitations which the Antarctic Treaty places upon both territorial claimants and other parties. The result is that traditional notions of territorial sovereignty and jurisdiction are not exercised throughout the region. Other problems arise because the Antarctic Treaty regime is not universally accepted by all States. While there are not at present any non-parties which openly disregard the ATS legal regime, there are examples of States having operated within the region and not respecting the regime. In addition, there are a number of States, who while not yet having engaged in significant activities within the region, have stated that they do not accept the ATS. The other problem, which is of more general application, is that the Antarctic maritime legal regime demonstrates some of the difficulties of applying global regimes in regions which not only have a distinctive legal regime of their own but also have peculiar environmental and geographical factors which combine to negate the effect of the global regime. While Antarctica is undoubtedly an extreme illustration of this problem, the same issues exist in other regions of the world.<sup>112</sup>

### (a) Unique features of the Antarctic legal regime

Article IV of the Antarctic Treaty has a number of consequences for the legal regime in the region. Its most important impact has been that the territorial claimants have adopted varying practices with respect to their own maritime claims. This is particularly acute with respect to EEZ and continental shelf claims. As a result it is not possible to assert that a traditional offshore regime

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110 The northern limit of CCAMLR is considered to be the "Antarctic convergence". For further discussion see Bush, n 2 above, Binder I, Pt AT91C, p 3.

111 See Protocol, Annex IV; Commission for the Conservation of Antarctic Marine Living Resources, *Report of the Eleventh Meeting of the Commission* (Hobart, 26 October–6 November 1992), p 15 at para 5.2–5.6; Joyner and Frew, "Plastic Pollution in the Marine Environment" (1991) 22 *Ocean Development and International Law* 33 at 52–53.

112 The most obvious other example is the Arctic region, however areas such as the Mediterranean, Southwest Pacific, and Caribbean are also illustrative of the problem.



exists around the Antarctic continent.<sup>113</sup> The problem which is created by the varying approach towards the offshore regime in the Southern Ocean is that other legal regimes, which assume coastal States will have asserted EEZ or equivalent claims over the adjacent offshore, are ill equipped to fill this legal vacuum. It also means that some legal regimes have the potential to apply in instances which were never anticipated. There is no simple solution to this problem as is illustrated by approach Australia has taken over its AAT maritime claims. A further difficulty is that as a result of the challenge issued to the legitimacy of the ATS during the 1980s, Antarctic Treaty parties may have become more tentative regarding the assertion of their sovereignty and territorial jurisdiction. Despite then the recommendation contained within the 1992 parliamentary report calling on Australia to take a more assertive approach towards the AAT offshore area, Australia has to date remained sensitive to not only the limitations placed upon the exercise of Australian sovereignty under the Treaty but also the political limitations which exist within the ATS.

To an extent, the Antarctic Treaty parties have sought to overcome these problems in their individual exercise of offshore sovereignty and jurisdiction by adopting a collective approach. In reality, this has been the basis for much of the Antarctic legal regime since the Treaty entered into force in that States, especially territorial claimants, agreed to limitations upon their exercise of sovereignty and jurisdiction in favour of a unified approach through instruments such as CCAS, CCAMLR and most recently the Protocol. CCAMLR is the best example in that it sought to establish a regional regime for marine living resources which while permitting traditional fishing activities also applied rigorous environmental standards. This in itself is not unusual, and indeed such regional regimes are contemplated and encouraged in UNCLOS. Where CCAMLR differs from these approaches is that its area of application extends beyond the actual or potential areas of national jurisdiction of the coastal States in the region to cover large expanses of traditional high seas areas. Its membership also reflects a bias towards the Antarctic Treaty parties, and there has been minimal success in attracting parties to CCAMLR who do not also accept the Antarctic Treaty. While CCAMLR has been judged a success by many commentators, there remains the scope for non-parties to challenge its legitimacy. If a non-party to the regime did, for example, commence extensive krill harvesting operations, the fine balance which exists in CCAMLR between resource management and conservation of the ecosystem would be threatened. The greatest weakness then of the CCAMLR regime is the threat which is posed by non-parties, who if challenged can argue that not even UNCLOS recognises that such limitations can be placed upon harvesting of marine living resources on the high seas.

This vulnerability of the CCAMLR regime is further illustrated by the lack of support which it is given by the territorial claimants who adopt varying attitudes towards making an EEZ claim. If such claims were uniformly made,

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113 Rothwell and Kaye, "Law of the Sea and the Polar Regions: Reconsidering the Traditional Norms" (1994) 18 *Marine Policy* 41 at 58.

then the potential would exist for each claimant to enact laws within its EEZ which complemented and supported CCAMLR. The lack of such laws illustrate the problems caused when the provisions of the Antarctic Treaty are compared against those of UNCLOS. CCAMLR, apparently, does not contemplate the exercise of extensive offshore jurisdiction, while UNCLOS does. The differences between the underlying assumptions made in each of these legal regimes creates the potential for conflict between a global and regional legal regime which can result in great uncertainty over the extent of coastal State rights and obligations and the rights of extra-regional States who seek to utilise the marine resources of the area.

Another example of the collective approach is found in the Protocol. Its provisions are of great significance not only because it seeks to prohibit mining activities but also because of its extensive provisions dealing with environmental protection. However, as has been shown above, some provisions of the Protocol dealing with the Southern Ocean are inadequate. No attempt is made to deal with the potential conflict between the Protocol's prohibition of seabed mining and the existence of a global regime permitting such mining. In another instance, the Protocol seeks to duplicate certain provisions of MARPOL. But the terms of Annex IV of the Protocol are so inadequate that MARPOL's extensive provisions dealing with a variety of marine pollution provisions are neither adequately implemented, nor adjusted to take account of the unique legal and environmental features of the region.<sup>114</sup> While the ATS has therefore been a success from a number of perspectives, it can not be claimed that the legal regime which it has created adequately deals with Antarctic and Southern Ocean maritime issues.

### **(b) The need for a comprehensive and integrated regime**

The fundamental problem which exists with the maritime legal regime in Antarctica and the Southern Ocean is determining whether the regional regime represented by the ATS, or the various global regimes such as that created by UNCLOS, MARPOL and the Whaling Convention apply. This is a matter which is not easily resolved. While the ATS has been mindful of the existence of other legal regimes which deal with matters such as whaling and marine pollution, as is demonstrated by the Protocol's provisions on marine pollution this has not stopped the ATS from also dealing with the same problem. This demonstrates a difficulty which international law faces when global and regional regimes exist. Global legal regimes, which during the United Nations era have become increasingly popular, are helpful in creating a legal system which has universal support but which is sometimes incapable of taking into account regional peculiarities or being able to respond to those problems as they develop.

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114 Bush, n 2 above, Binder I, Pt AT91C, p 130 notes:

One wonders what was the purpose of including the present annex in the environmental protocol...As it stands the observer might be forgiven for suspecting that the present annex was adopted for no better reason than to have a piece of paper on an important subject to hang from the new "comprehensive" environmental protocol.

Regional regimes have the advantage of being able to effectively deal with regional problems in which specific environmental, geographical, geopolitical and also cultural issues can be dealt with. However, regional regimes can face difficulties in their recognition and this is especially important where the regime seeks to manage resources that are traditionally considered as being available for global exploitation.

The Antarctic and Southern Ocean region is a good example of these problems created by different international law regimes. As a result, in the maritime field there is a patchwork appearance to the legal regime. This is resulting in a regime which is not comprehensive and which is open to potential exploitation by some States. A more integrated approach is required if the unique problems which exist in the region are to be effectively dealt with. While global legal regimes such as UNCLOS and MARPOL provide helpful bases through which the legal problems can be dealt with, they are poor in terms of dealing with specific regional problems. These conventions also anticipate coastal, port and flag States more actively asserting sovereignty and jurisdiction. To date, this has not occurred in Antarctica. The issues which have been discussed throughout this article raise for consideration whether the Antarctic Treaty parties, or the individual territorial claimants, should be taking a more assertive approach towards marine environmental protection and the management of marine living and non-living resources. Perhaps, the time has now arrived, as maritime activities increase in the region with the popularity of eco-tourism and the search for new marine living resource stocks, for the Antarctic territorial claimants to take a more assertive role in regard to maritime affairs. The adoption of such an approach would complement the provisions which already exist within the ATS. In addition, the Antarctic Treaty parties should carefully consider the state of the ATS and seek to resolve conflicts which exist within the system and with global legal instruments. Through such an approach, it will be possible to create a more comprehensive and integrated maritime legal regime for Antarctica and the Southern Ocean.

