

## **After the Party: The Hollowing of the Antarctic Treaty System and the Governance of Antarctica**

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With the 50<sup>th</sup> anniversary of the adoption of the Antarctic Treaty,<sup>1</sup> a degree of triumphalism has recently been evident around the Antarctic Treaty System (ATS).<sup>2</sup> A high level celebratory event was held in Washington DC (where the original treaty was signed) associated with the calculated hosting of the 2009 Antarctic Treaty Consultative Meeting in the United States. The significance of the anniversary has been further bolstered, particularly in the eyes of parts of the Antarctic science community, by the ending of the fourth International Polar Year (IPY) in 2008. The latter has itself engendered not only a massive new scientific literature, but a social sciences focus on “legacy” which looks both forward from the recent scientific project, and back to the third IPY, better known as the International Geophysical Year (IGY) of 1957-58.<sup>3</sup> The social sciences used the legacy framing to finally inveigle a place at the Antarctic “science” table, previously denied it by the dominance of physical sciences and the absence of the indigenous peoples’ or conventionally resident populations’ issues which had long sanctioned Arctic participation. Antarctic science’s international coordinating body, the Scientific Committee on Antarctic Research (SCAR), even established a new Social Science Action Group.<sup>4</sup> The historic influence of IGY on the subsequent centrality of science in the ATS has encouraged some officials and (particularly) scientists to see the fourth IPY as necessarily reinvigorating this regional regime. Science, on this view, is re-affirmed as the driving interest in Antarctica. Whether or not this proves to be the case, as Jabour and Haward conclude, it “will reinforce and perhaps reinvigorate the *nexus between science and politics*” (emphasis added).<sup>5</sup>

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1 The Antarctic Treaty. Adopted Washington DC 1 December 1959, entered into force 23 June 1961. 402 UNTS 71.

2 “‘Antarctic Treaty System’ means the Antarctic Treaty, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments” – Article 1, 1991 Protocol on Environmental Protection to the Antarctic Treaty. 32 ILM 568.

3 See, for example: Dian Olson Belanger, *Deep Freeze: The United States, the International Geophysical Year, and the Origins of Antarctica’s Age of Science* (Boulder: University Press of Colorado, 2006); and Jessica M Shadian and Monica Tennberg, eds., *Legacies and Change in Polar Sciences: Historical, Legal and Political Reflections on the International Polar Year* (Farnham: Ashgate, 2009).

4 Details at <http://www.scar.org/researchgroups/via/>

5 Julia Jabour and Marcus Haward. *Antarctic Science, Politics and IPY Legacies*, in Jessica M Shadian and Monica Tennberg, eds., *Legacies and Change in Polar Sciences: Historical, Legal and Political Reflections on the International Polar Year* (Farnham: Ashgate, 2009), 101.

This paper seeks to examine one rather significant aspect of the present Antarctic dispensation that the celebratory hoopla seems to have entirely overlooked. Namely that, whatever just claims may be made for the successes of the Antarctic Treaty and the ensuing ATS in the past, this system entered a phase of institutional stasis following the adoption of its last major component, the Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol),<sup>6</sup> back in 1991. A charitable defence would be that the intervening two decades have been necessary to bed-in a number of developments set in train then. The Madrid Protocol, the consequences of the final agreement in 2001 to establish an Antarctic Treaty Secretariat,<sup>7</sup> and the adoption in 2005 of a long-negotiated sixth annex to the Madrid Protocol,<sup>8</sup> were not inconsiderable projects. But, allowing this, the main ‘operating manual’ for the ATS (comprising its main legal instruments) is now rather long in the tooth by international standards. Even the newest major instrument of the ATS, the Madrid Protocol, was very largely created by sowing together, with limited updating, a series of pre-existing standards and practices, some of which essentially dated to the mid 1960s. The formalizing of legal obligation provided by the Madrid Protocol is valuable, but substantively it reflects best Antarctic practice somewhat earlier than its adoption date.

The world has changed mightily since the adoption of the Madrid Protocol in 1991, and Antarctica has in many respects seen the greatest expansion (qualitatively and quantitatively) of human activity over this period.<sup>9</sup> A variety of mandatory Measures (and Conservation Measures under CCAMLR) and hortatory Resolutions have indeed been adopted over the past two decades, but these have been, of course, properly subsidiary to the rights and duties accepted under the main ATS instruments. They are to these what domestic Regulations are to Acts, and thus ultimately not *substitutes* for them. The ATS has not really kept pace with the material development of human activity in Antarctica over this period.

In important ways this has led to the ATS being ‘hollowed out’ over the past 20 years, so that although the edifice still looks shiny in certain lights, the degree to which the Antarctic is actually *operationally* managed by the ATS has declined. Nothing is yet terminal, but the current complacency around our Antarctic arrangements — complacency certainly reinforced by 2009’s 50<sup>th</sup> anniversary — warrants some attention. Implicit in this concern is a genuinely positive analysis of what the ATS has actually achieved (even if this cannot be

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6 Protocol on Environmental Protection to the Antarctic Treaty. Adopted Madrid 4 October 1991, entered into force 14 January 1998. 30 ILM 1455.

7 Decision 1 (2001). Page 45 in Russia, Final Report of the Twenty-fourth Antarctic Treaty Consultative Meeting (Moscow: Ministry of Foreign Affairs, 2002). For an analysis see, Patrizia Vigni, “The Secretariat of the Antarctic Treaty: Achievements and Weaknesses Three Years after its Establishment” in Gillian Triggs and Anna Riddell, eds., *Antarctica: Legal and Environmental Challenges for the Future* (London: British Institute of International and Comparative Law, 2007), 17.

8 Measure 1 (2005): Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty: Liability Arising from Environmental Emergencies. Pages 61-72 in Antarctic Treaty Secretariat, Final Report of the Twenty-Eighth Antarctic Treaty Consultative Meeting (Buenos Aires: Antarctic Treaty Secretariat, 2005); and Alan D Hemmings, “Agreement to a Liability Annex to the Protocol,” *Antarctic* 23 (2005): 50.

9 See: Alan D Hemmings, “From the New Geopolitics of Resources to Nanotechnology: Emerging Challenges of Globalism in Antarctica,” *The Yearbook of Polar Law* 1 (2009): 53.

conceded to be everything that is sometimes claimed) and, critically, what it might *still* be able to achieve, if it can be reinvigorated and not left merely burnishing its long-service medals.

It is certainly not unreasonable to celebrate a cooperative half-century in the Antarctic, where the barbarities so regularly associated with just about everywhere else in the world have been avoided. However, the crude validation sometimes sought in these celebrations for some rather simplistic Antarctic lessons, behind which significant geopolitical and sectoral interests are allowed to remain unexamined, has not been entirely comforting. Amongst these are the reinforcement of an Antarctic creation myth wherein science plays Ulysses in the foundation of the ATS (and essentially and successfully outwits perfidious diplomats and politicians in securing a rational humanist Antarctic dispensation based on science), an ascription of all positive Antarctic outcomes to the existence of the Antarctic institutions, and an overstatement of the degree to which the underlying territorial sovereignty issues have actually been dealt with<sup>10</sup>. A recent editorial by Klaus Dodds offers a useful corrective to some of this, noting that: “my own view is that we need to be a little more jaundiced. Science was, at its best, a mechanism for promoting cooperation and exchange”.<sup>11</sup>

An obvious consequence of the recent focus on the past 50 years of the ATS has been to reinforce a tendency for much of Antarctic social science to be essentially historical in focus (Antarctica’s ‘Heroic Age’ continues to exert a disproportionate attraction), if not sometimes downright exculpatory in relation to national interests.<sup>12</sup> Substantially less scholarly attention has been directed to current and future ‘problems’, and critical thinking about the Antarctic future.<sup>13</sup> So, to take just one facet: at a time when some of us are concerned about the changing role of Antarctic science and Antarctic scientists, and perhaps the erosion of boundaries between objective, disinterested science on the one hand and applied research and pecuniary interest on the other,<sup>14</sup> we see a further embedding of a worldview and reflexive claims for the inherent disinterestedness of science that may have been excessive even in 1959. But, for all of us who swim in the small Antarctic pool, it is salutary to discover that (whatever our view on the detail) even the recent spike in Antarctica’s profile has not guaranteed that it enters the mainstream popular imagination. Pulitzer Prize winner Fred Kaplan’s 2009 examination of the allegedly world-altering events of a single year, 1959: *The*

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10 See e.g.: Paul Berkman. “International spaces promote peace”, *Nature* 462 (2009): 412; and Paul Berkman, “Common interests in the international space of Antarctica”, *Polar Record* 46 (2009): 7.

11 Klaus Dodds, “Guest editorial – the 1959 Antarctic Treaty: Reflecting on the 50th Anniversary of a Landmark Agreement,” *Polar Research* 29 (2010): 146.

12 Klaus Dodds and Alan D Hemmings, “Stenographers of Power: Reply to Haward and Bergin,” *Australian Journal of Politics and History* 56 (2010): 617.

13 For a helpful bridge between the past and present, see: Klaus Dodds, “Governing Antarctica: Contemporary Challenges and the Enduring Legacy of the 1959 Antarctic Treaty,” *Global Policy* 1 (2010): 108.

14 In relation to one cutting edge issue, bioprospecting, see: Alan D Hemmings, “Does Bioprospecting Risk Moral Hazard for Science in the Antarctic Treaty System?” *Ethics in Science and Environmental Politics* 10 (2010): 5; and: Sanjay Chaturvedi, “Biological Prospecting in the Southern Polar Region: Science-Geopolitics Interface,” in Jessica M Shadian and Monica Tennberg, eds., *Legacies and Change in Polar Sciences: Historical, Legal and Political Reflections on the International Polar Year* (Farnham: Ashgate, 2009), 171.

*Year Everything Changed*, managed to entirely overlook the negotiation and adoption of the Antarctic Treaty without any of his reviewers seeming to notice or care.<sup>15</sup> The reality is that, beyond the hardy perennials of stories about Heroic-Era Antarctic expeditions and contrived modern junkets, and periodic eruptions of nationalism around whaling or resource futures,<sup>16</sup> the Antarctic still has a low public profile. This holds even in the relatively more aware claimant states of the southern hemisphere.

The party is now over and we can begin a more critical examination of the strengths and weaknesses of the ATS, and start to consider what might be necessary if we are to create arrangements in Antarctica for the future. Essential to this project is a cold-eyed appraisal of not only the contingencies around the achievement of the ATS and its subsequent development, but the consequential hollowness of the regime in certain respects. The central argument made here is that quite aside from a certain inherent hollowness of the ATS, arising from the peculiar legal circumstances of Antarctica, a more recent and substantial hollowing has arisen as a result of the challenges of globalism. There is nothing irreversible about either. The former presents a more substantial challenge, for reasons that will be explained; the challenges posed by globalism are both more tractable and resolvable over a shorter time span. The question is largely one of political will.

### **Achieving the Antarctic Treaty System**

The politico-legal regime provided by the ATS evolved to deal with a place apart, both spatially and geopolitically. Antarctica was effectively isolated, legally as well as physically, from the rest of the planet. Very little activity occurred within the area and what did was restricted in scope, largely discontinuous, and conducted by governments. Overwhelmingly this activity consisted of scientific research or the provision of its associated infrastructure and logistics support, notwithstanding deeper strategic drivers emanating in nationalism and global ideological competition. Until the mid-1970s there was also negligible human activity in the oceanic band immediately surrounding Antarctica, further insulating it.<sup>17</sup> The geopolitical focus for action was relations between states, and the rationale for collective international management of the region was to overcome that most corrosive and dangerous friction point of inter-state relations: disputation over territory.

The key unresolved issue in Antarctica was (and remains) territorial sovereignty: seven claimants,<sup>18</sup> three of whom claim essentially the same area,<sup>19</sup> two superpowers who dispute all seven claims but reserve a basis to claim themselves,<sup>20</sup> with cross recognition of claims confined to five of the

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15 Fred Kaplan, 1959: *The Year Everything Changed* (Hoboken NJ: John Wiley, 2009).

16 See e.g.: Klaus Dodds and Alan D Hemmings, "Frontier Vigilantism? Australia and Contemporary Representations of Australian Antarctic Territory," *Australian Journal of Politics and History* 55 (2009): 513.

17 On the historical phases of Antarctic development see: Alan D Hemmings, "Globalisation's Cold Genius and the Ending of Antarctic Isolation" in *Looking South: Australia's Antarctic Agenda*, ed. Lorne K Kriwoken, Julia Jabour and Alan D Hemmings (Leichardt: The Federation Press, 2007), 176.

18 Argentina, Australia, Chile, France, New Zealand, Norway, United Kingdom.

19 Argentina, Chile and the United Kingdom.

20 United States and the Soviet Union (now Russia).

claimants,<sup>21</sup> and no explicit recognition of claims by any other existing state. From the late 1940s, the consequential “Antarctic Problem” was seen in both pan-Antarctic and Antarctic regional contexts. E.W. Hunter Christie’s celebrated 1951 volume focused on the increasingly intense three-way dispute around territorial sovereignty in the Antarctic Peninsula,<sup>22</sup> which subsequently led the United Kingdom to seek a resolution through the International Court of Justice.<sup>23</sup> Soviet and American international lawyers were mindful of the Peninsula, but focused on the wider Antarctic problem.<sup>24</sup> Further, with no indigenous or permanent residents, in the particular circumstances of Antarctica in the post-War world, states were not only formally responsible for any international obligations entered into there *as states*, but they were by far the most likely direct *operators* of any Antarctic activity. There were very few private expeditions, and whaling activities were conducted under an entirely separate non-ATS instrument, through the International Whaling Commission.<sup>25</sup>

As we know, an international mechanism to address the Antarctic Problem was found in the 1959 Antarctic Treaty. Difficult as the issues were, they were eased to some considerable degree by two realities: that the settlement involved a comparatively small number of states,<sup>26</sup> and that the technical capacity of even these states and the circumstances of the global economy meant that there was no immediate likelihood of substantial human activity apart from scientific research being considered in the extremely difficult Antarctic environment. However, the possibility of commercially viable raw materials “over the long run” was already anticipated.<sup>27</sup>

The achievement of the Antarctic Treaty created a balm for the *immediate* problems posed by territorial sovereignty. Article IV did not of course finally resolve the issue,<sup>28</sup> but it created the space for the development of the inter-state system that became the ATS. With open territorial disputation at least set to one side, the Antarctic Treaty could bumble along

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21 Australia, France, New Zealand, Norway and the United Kingdom. The claims of Australia, New Zealand and the United Kingdom have of course a common Imperial British root.

22 E W Hunter Christie, *The Antarctic Problem* (London: George Allen & Unwin, 1951).

23 International Court of Justice Pleadings, Oral Arguments, Documents: Antarctica Cases (United Kingdom v Argentina; United Kingdom v Chile) Orders of March 16th 1956: Removal From the List (The Hague: International Court of Justice, 1956).

24 P A Toma, “Soviet Attitudes Towards the Acquisition of Territorial Sovereignty in the Antarctic,” *The American Journal of International Law* 50(3) (1956): 611; and R D Hayton, “Polar Problems and International Law,” *The American Journal of International Law* 52(4) (1958): 746.

25 See: Alan D Hemmings, “Environmental Law – Antarctica” in *The Encyclopedia of Sustainability*, Volume 3: The Law and Politics of Sustainability, ed. K Bosselmann, D Fogel and J B Ruhl, (Great Barrington MA: Berkshire, 2010), 188.

26 The 12 states which had participated in the 1957-58 International Geophysical Year in Antarctica: The seven claimants: Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom; the United States and the Soviet Union which both argued a basis to claim; and Belgium, Japan and South Africa.

27 R D Hayton, “The Antarctic Settlement of 1959,” *The American Journal of International Law* 54(2) (1960): 348.

28 For some considerations on territorial sovereignty see: Alan D Hemmings, “Beyond Claims: Towards a Non-Territorial Antarctic Security Prism for Australia and New Zealand,” *New Zealand Yearbook of International Law* 6 (2009): 77.

quite nicely, with relatively little activity and at low cost for the next several decades. Whilst the number of parties to the Antarctic Treaty thereafter began to increase slightly, in its first decade and a half what was actually being governed in Antarctica was small-scale scientific activity at and around the few dozen generally small scientific facilities of just the 12 original Antarctic Treaty Consultative Parties.<sup>29</sup> And, there were no significant intrusions into the Antarctic of activities or norms generated outside the Antarctic community.<sup>30</sup> The effective isolation of the Antarctic in both a geophysical and a geopolitical sense allowed the emergence of a regionally-orientated Antarctic exceptionalism as the implicit ideological basis for the ATS.<sup>31</sup>

One seemingly substantive indicator of the real activity levels in the early Antarctic political regime is the fact that until the adoption of the Madrid Protocol in 1991, strategic Antarctic management was largely achieved through *biennial* Antarctic Treaty Consultative Meetings.<sup>32</sup> However, from its inception in 1980 the Commission established under the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR)<sup>33</sup> met annually, and in the course of elaborating the Convention for the Regulation of Antarctic Mineral Resource Activities (CRAMRA)<sup>34</sup> during the 1980s, special meetings were held at a rate of several a year over a number of years. Resource issues, plainly, triggered a much more intense work schedule. But, the two-year gaps between ATCMs, and the fact that at this time there was no professional secretariat, says something about the generally low level, and uncomplicated nature, of traditional non-resource focused Antarctic activity.

To an extent, the ATS has always been a hollow<sup>35</sup> system in that the peculiarities of the Antarctic meant that the formal edifice of the international institution addressing it would necessarily be a structure both lightly built and somewhat isolated. The dance around territorial sovereignty made this almost inevitable. Absent a resident population, and with (to this day) its highest forum an annual meeting of officials, with no systemic political forum in which Ministers would address the hard issues (and in particular, as the

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29 The close point for this early period is taken here as the VIII ATCM in Oslo in 1975.

30 Note that even the Antarctic Treaty Article V(2) provision that the rules agreed under any future international agreement concerning use of nuclear energy, nuclear explosions and disposal of radioactive waste material – perhaps the clearest coupling of the Antarctic regional arrangement with possible global arrangements – had not (and has not since) been realized.

31 On Antarctic exceptionalism, and challenges to, see: Alan D Hemmings, “Globalisation’s Cold Genius and the Ending of Antarctic Isolation” in *Looking South: Australia’s Antarctic Agenda*, ed. Lorne K Kriwoken, Julia Jabour and Alan D Hemmings (Leichardt: The Federation Press, 2007), 176; and Alan D Hemmings, “From the New Geopolitics of Resources to Nanotechnology: Emerging Challenges of Globalism in Antarctica”, *The Yearbook of Polar Law* 1 (2009): 53.

32 For the decision to move to annual meetings see paragraphs 134-136 in Federal Republic of Germany. Final Report of the Sixteenth Antarctic Treaty Consultative Meeting, Bonn, 7-18 October 1991. An ATCM was held in 1992, but then not again until 1994.

33 Convention on the Conservation of Antarctic Marine Living Resources. Adopted Canberra 20 May 1980, entered into force 7 April 1982.

34 Convention on the Regulation of Antarctic Mineral Resource Activities. Adopted Wellington 2 June 1988, not in force.

35 The concept of ‘hollowing’ has had widespread use in the context of internal state administrative reforms. See for example: R A W Rhodes, “The Hollowing Out of the State: The Changing Nature of the Public Service in Britain,” *The Political Quarterly* 65 (1994): 138.

ATS evolved, resolve issues that crossed the separate ATS instruments), the political profile of Antarctic discourse was bound to be limited. There have been two attempts to engage Ministers in Antarctic meetings, the first a meeting in Antarctica organized by New Zealand in January 1999, the second a special session in Washington DC associated with the 50<sup>th</sup> anniversary ATCM in 2009.<sup>36</sup> In both cases, Ministerial attendance was patchy and generally low level, so one should have no illusions that establishing regular Ministerial engagement would be easy. Further, the original structure did not cover the entire field in Antarctica. The Antarctic Treaty left high seas freedoms in the region intact, and whaling was already subject to regulation by a global instrument. In relation to whaling, the ATS has adopted a practice of complete subsidiarity to the International Whaling Commission (IWC),<sup>37</sup> beyond that necessarily required under the letter of the various ATS instruments.<sup>38</sup> As a result, the present Australian case against Japan in the International Court of Justice makes no reference to the ATS or any obligations under its instruments.<sup>39</sup> This historic isolation has posed some interesting issues around how the protection of the Antarctic environment central to the purposes of both CCAMLR and the Madrid Protocol, and the particular responsibilities of Antarctic Treaty Consultative Parties (ATCPs) in relation to this protection, can be achieved in practice, if institutional responsibility is fractionated.<sup>40</sup>

Resolving the deep structural hollowness of the ATS would require, in my view, a fundamental reassessment of the core of the 'Antarctic Problem', the question of territorial sovereignty.<sup>41</sup> This is no slight project, and even if claimants are prepared to entertain it all, its realization will likely take considerable time. In short, addressing the original structural hollowness of the ATS will not be achieved any time soon.

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36 See: Antarctica New Zealand, Ministerial on Ice: An Historic Meeting (Christchurch: Antarctica New Zealand, 1999) and "Antarctic Treaty Consultative Meeting XXXII Washington Ministerial Declaration on the Fiftieth Anniversary of the Antarctic Treaty," in Secretariat of the Antarctic Treaty, Final Report of the Thirty-second Antarctic Treaty Consultative Meeting (Buenos Aires: Secretariat of the Antarctic Treaty, 2009), 161-162.

37 See: Alan D Hemmings, Karen R Scott and Michelle Rogan-Finnemore, "Broadening the Duty in Relation to Environmental Impact Assessment across the Legal Instruments Applying in Antarctica" (paper presented at the 15th Annual Conference of the Australian and New Zealand Society of International Law, Restoring the Rule of Law in International Affairs, Canberra, 28-30 June 2007).  
<http://www.worldlii.org/int/journals/IHLRes/2007/11.html#fn1>

38 See discussion in: Donald R Rothwell, (Chair), Tim Stephens (Rapporteur), Alan D Hemmings, Stuart Kaye, Joanna Mossop and Gillian Triggs, Japan's 'Scientific' Whaling Program and the Antarctic Treaty System – Independent Panel of Legal and Policy Experts: Report of the Canberra Panel, (Sydney: International Fund for Animal Welfare, 12 January 2009).  
[http://www.ifaw.org/ifaw\\_asia\\_pacific/media\\_center/press\\_releases/01\\_20\\_2009\\_51771.php](http://www.ifaw.org/ifaw_asia_pacific/media_center/press_releases/01_20_2009_51771.php)

39 Australia, Application Instituting Proceedings. (The Hague: International Court of Justice, 31 May 2010). <http://www.icj-cij.org/docket/files/148/15951.pdf>

40 Noting that, e.g. the Madrid Protocol at Article 2 (Objective and Designation) commits Parties to "the comprehensive protection of the Antarctic environment and dependent and associated ecosystems".

41 This issue is the subject of a separate research project. A preliminary discussion can be found in Alan D Hemmings, "Beyond Claims: Towards a Non-Territorial Antarctic Security Prism for Australia and New Zealand", *New Zealand Yearbook of International Law* 6 (2009): 77.

### The Broadening of Antarctic participation

With the appearance (re-appearance in the case of sealing) of specific resource interests from the 1970s, and consequential adoption of new legal instruments, ATS participation broadened beyond the narrowly governmental pattern of the early years and 12 original signatories. Today the ATS involves 54 states<sup>42</sup> (for the Antarctic Treaty: 28 ATCPs; 20 Contracting Parties; plus Malaysia, which has a *de facto* membership as a seemingly permanent invitee to ATCMs; for CCAMLR 34 states: 25 Commission Members and 14 Contracting Parties).<sup>43</sup> Commercial interests brought non-state actors into the Antarctic in the form of marine harvesters, tourists, and tourism operators (and at one stage, potentially sealers and miners), hoping to realize resource benefits or (later with the appearance of environmental NGOs such as Greenpeace) to argue for non-material values and specifically against particular resource exploitation futures. Three strictly non-governmental organizations: the Antarctic and Southern Ocean Coalition (ASOC), the International Association of Antarctica Tour Operators (IAATO) and the Coalition of Legal Toothfish Operators (COLTO) joined two other long-standing observer organizations (the Scientific Committee for Antarctic Research (SCAR) and the World Conservation Union (IUCN)) in the ATS fora.<sup>44</sup>

Whilst subsequent attention to managing resource issues around sealing, fishing, and mining, and a new focus on the environment, reflected the presence of non-state actors in Antarctica, and allowed a limited formal participation, in practice the changes to the system were limited. The ATS continued to be predicated on the appropriateness of regional arrangements and the continuing validity of Antarctic exceptionalism in managing small-scale and discontinuous human activity. Critically, the consensus decision-making that remains at the core of the ATS and the *modus vivendi* over territorial sovereignty positions, remained the prerogative of ATCPs and CCAMLR Commission Members. Contracting Parties, let alone Observers and Experts, have no substantive role in decision-making anywhere in the ATS. These new participants—whether operationally active in Antarctica or successful in achieving a formal standing within the institutions of the ATS—might acquire influence or even periodic power, but this was achieved, and reflected, through informal routes (effective lobbying of particular national delegations or governments at home, public opinion, contributions via technical fora, and so on).

Even within the Madrid Protocol, the most recently added instrument, the *modus operandi* are still very largely predicated on a norm of Antarctic activity as something conducted by governments, notwithstanding the now

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42 In CCAMLR this includes what is still termed there the European Community.

43 Sources: For the Antarctic Treaty and Madrid Protocol – United States, “Report of the Depository Government of the Antarctic Treaty and its Protocol in accordance with Recommendation XIII-2,” Information Paper 102 tabled at XXXIII Antarctic Treaty Consultative Meeting, Punta del Este, Uruguay, 3-14 May 2010. For CCAMLR – see the Treaty Status List maintained by Australia as the Depository State at [http://www.austlii.edu.au/au/other/dfat/treaty\\_list/depository/CCAMLR.html](http://www.austlii.edu.au/au/other/dfat/treaty_list/depository/CCAMLR.html)

44 A number of other intergovernmental organizations, such as the International Maritime Organisation (IMO) are also invited experts.



formally wider catchment. One sees the consequences of this most obviously in the context of Antarctic Environmental Impact Assessment (EIA), where some sorts of tourism activities are difficult to accommodate within a framework evolved essentially around fixed-point national programme activities.<sup>45</sup> Whereas much national programme activity is centred on long-occupied stations and particular long-term research sites about which a great deal of environmental knowledge has been acquired, tourism generally involves transient, short-term visitation to many sites. In the latter instance there is less likelihood that the environment will be well understood, and negligible capacity to actually monitor effects. There are also greater uncertainties in relation to *where* non-governmental activities are actually organized (possibly wherever the expedition leader happens to be when they turn their laptop on). So that, unlike (say) Antarctica New Zealand or other national Antarctic programmes, it is often unclear which state is formally responsible for the legal reporting obligations around advance notice and EIA.

This may not in fact cast the ATS as significantly different in practice from some other multilateral systems, although there sometimes seems an inclination within the ATS itself, to see itself as a particularly progressive and open system. Without consideration of other systems, these are necessarily speculative reflections, albeit based on direct participation in some 37 ATS meetings between 1989 and 2009. What seems clearer is that the ATS operates in a thinner public-policy field than many other areas of international affairs. Absent the clear domestic constituency provided by the existence of residents within an area under consideration and the slight chance that any particular citizen will have been to Antarctica, with public policy rarely involving overt participation by political leaders, with the complexities and sensitivities of territorial sovereignty amongst claimants often eliciting little more than knee-jerk nationalism in the public discourse, general understanding of Antarctic governance is extremely weak. This risks leaving the limited and thin international governance regime provided by the ATS with very little by way of external support. To get a sense of this, imagine for a moment the contexts in which any other problematical international issues exist, say the Palestinian Question, climate change, or genetically modified organisms. It is surely indisputable that these issues, whatever one's particular stance on them may be, exist in a vastly 'thicker' setting than any likely Antarctic issue.<sup>46</sup>

Institutionally, the ATS developed through the decadal accretion of new instruments specifically addressing each new issue (essentially resource issues) as they arose: sealing through the Convention for the Conservation of Antarctic Seals (CCAS) in 1972,<sup>47</sup> fishing through CCAMLR in 1980, mining through CRAMRA in 1988, and generic environmental protection as well as the closing of the mining option, once CRAMRA was abandoned, by the Madrid Protocol in 1991. The approach of the ATS was to assume an exclusive responsibility for each emergent issue in the area south of 60 degrees South,

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45 Alan D Hemmings and Ricardo Roura, "A Square Peg in a Round Hole: Fitting Impact Assessment under the Antarctic Environmental Protocol to Antarctic Tourism," *Impact Assessment and Project Appraisal* 21(1) (2003): 13.

46 It is arguable that in the late 1980s, the question of Antarctic minerals activity attracted, for a short while, a "thick" setting.

47 Convention for the Conservation of Antarctic Seals. Adopted London 1 June 1972, entered into force 11 March 1978.

or south of the Antarctic Convergence in the case of marine harvesting. With the exception of the Antarctic manifestation of global whaling, which was already subject to its own separate International Convention for the Regulation of Whaling (ICRW) before the Antarctic Treaty was adopted,<sup>48</sup> the ATS sought to own and regulate any substantive in-area activities.

### **The end of Antarctic exceptionalism**

A conjunction of events including the ending of the Cold War, the rise of globalism and transformation of some states into quasi-market states,<sup>49</sup> the dramatic expansion of human activities not just in Antarctica but surrounding it, and the growth in the number of global instruments that also apply in Antarctica, has now undermined this *modus operandum*.<sup>50</sup> Emergent issues are now (apparently) construed by ATCPs as either inherently less problematical (and thus do not require new dedicated regulation), or merely a regional manifestation of a global activity (and thus best left to either global regulation, or the informality of market forces). The pattern of *past* ATS development may also have a bearing. Because each successive additional instrument in the ATS was without prejudice to pre-existing instruments, the ATS has internal inconsistencies and rather more complexity than is really justified. The difficulties increase with the number of instruments, and this may now also be a disincentive to further ATS development. But the substantive change is in the global context, where the historic Antarctic regional approach is now orphaned. The ATS as a body has yet to formally determine whether it is content to allow this to continue, or whether (and if so, how) it might establish a new basis for the regional management of Antarctica.

But in the meantime, the ATS has adopted no new substantive instrument since the Madrid Protocol in 1991, and the two industries which have largely developed in the period since—tourism and bioprospecting, over 20 and 10 years respectively—have not yet been subject to the sort of specific treaty regulation seen with earlier Antarctic commercial activities. They are subject to the generic obligations of the Antarctic Treaty and the Madrid Protocol (and some forms of bioprospecting in the marine environment may be subject to CCAMLR; for other types it is not clear). The specific obligations amount to only two hortatory Resolutions in the case of bioprospecting and a small number of legally binding Measures applying to tourism and non-governmental activities,<sup>51</sup> (and nothing under CCAMLR). This situation is a

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48 International Convention for the Regulation of Whaling. Adopted in Washington DC 2 December 1946, entered into force 10 November 1948.

49 “Market State” sensu Philip Bobbitt. See: Philip Bobbitt. *The Shield of Achilles: War, Peace and the Course of History* (London: Allen Lane, 2002) – see particularly Chapter 10 “The Market State”, 213-242.

50 Alan D Hemmings, “Globalisation’s Cold Genius and the Ending of Antarctic Isolation” in *Looking South: Australia’s Antarctic Agenda*, ed. Lorne K Kriwoken, Julia Jabour and Alan D Hemmings (Leichardt: The Federation Press, 2007), 176; and Alan D Hemmings, “From the New Geopolitics of Resources to Nanotechnology: Emerging Challenges of Globalism in Antarctica,” *The Yearbook of Polar Law* 1 (2009): 55.

51 Whereas ATS responsibility for tourism seems to clearly reside with Antarctic Treaty Consultative Parties, exercising rights and duties under the Antarctic Treaty and Madrid Protocol, in the case of bioprospecting there is a dual responsibility under not only these

long way from the regulatory model provided by CCAS, CCAMLR and (putatively) CRAMRA – or even, for all its obvious difficulties, ICRW.

Whatever the arguments for or against equivalent instruments for these later commercial activities, the fact that we do not presently see this means that a very large part of current Antarctic activity (particularly in relation to tourism) is not substantively regulated *by the ATS*. There are some informal mechanisms, but most of these devolve to relationships between the tourism industry and particular states. These include: access arrangements concerning visits to research stations, the location of tourism interpretation facilities at stations, reciprocal logistics arrangements, medivac agreements, and access to historic huts for which particular stations hold the key. In the case of bioprospecting, the fact that most of this activity still occurs as an integral part of national Antarctic science programmes also allows a degree of informal control. Contractually-based legal mechanisms at the national level may also have some role in relation to bioprospecting in some jurisdictions. But again, this is not a systematic ATS regulation.

This situation, which has essentially arisen since the adoption of the Madrid Protocol, represents a new departure point in ATS practice. Up to this point, relatively soon after an incipient industry appeared on the horizon, the ATS would always start to negotiate a responsive regime. The ATS reinforced its sense of “the special responsibility of the Antarctic Treaty Consultative Parties to ensure that all activities in Antarctica are consistent with the purposes and principles of the Antarctic Treaty”,<sup>52</sup> by creating specific regulatory structures through new legal instruments. These structures, whilst formally legally autonomous (and thus able to attract particular and differing state memberships appropriate to the activity) were coupled to the preceding ATS instruments. In particular, through the coupling to the Antarctic Treaty, both directly and via the duplicated articles in subsequent instruments, ATS-regulated activities have been deliberately tied into the particular and careful geopolitical framework established in 1959. That framework was part and parcel of the broader Cold War and still active colonial geopolitics, now overtaken by history without any substantive readjustments having yet been made within the ATS. At the heart of the framework is the artfully crafted containment of territorial sovereignty in Article IV of the Antarctic Treaty, the issue that has still not been resolved, and which came again to the fore in relation to the extended continental shelf issue.

Coastal states are entitled under Article 76 of the UN Convention on the Law of the Sea (UNCLOS)<sup>53</sup> to certain rights over the continental shelf beyond 200 nautical miles if they can demonstrate its extent through data submitted to the Commission on the Limits of the Continental Shelf (CLCS). The seven territorial claimants in Antarctica see themselves as coastal states *sensu* UNCLOS, and have variously sought to reserve their rights as such in relation to the continental shelf appurtenant to their Antarctic claims. The details of the particular decisions taken by claimant states in relation to the extended continental shelf (ECS) in the Antarctic Treaty area need not concern

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instruments but, for the Antarctic marine environment under CCAMLR – and no material consideration of bioprospecting has occurred under that instrument.

52 From Third Recital, Preamble, Madrid Protocol.

53 United Nations Convention on the Law of the Sea. Adopted in Montego Bay, Jamaica 10 December 1982, entered into force 16 November 1994.

us here.<sup>54</sup> The issue here is that over the past decade,<sup>55</sup> although the continental shelf has been a major Antarctic geopolitical issue, raising legal questions relating to territorial positions,<sup>56</sup> and stimulating non-claimant ATCPs to lodge notes with the CLCS reiterating non-recognition of territorial claims and the provisions of Article IV of the Antarctic Treaty,<sup>57</sup> absolutely no consideration of it has occurred in the fora of the ATS.<sup>58</sup> One may search in vain for any reference to the issue in the Final Reports of any ATCM. To an objective observer, surely, the absence of formal consideration of such a significant issue in the very system established to manage Antarctic interests is very strange.

Nonetheless, there were discussions on the margins of the ATS. The claimant states, and particularly the subset that recognize each other's claims (Australia, France, Norway, New Zealand and the United Kingdom) caucused so as to arrive at as common a position as possible in relation to how they argued the benign nature of their interests to other ATCPs. There were discussions across a wider group of ATCPs, particularly involving the United States, on the margins of the Antarctic Treaty Meeting of Experts on tourism in Norway in 2004, and at the United Nations in New York in the same year around informal discussions on the Antarctic liability negotiations.<sup>59</sup> The first CLCS submission by an Antarctic claimant (Australia) occurred in November 2004.

### **Capacity to respond to developments**

The Madrid Protocol was developed as a framework convention, with technical standards specified in a set of annexes, which could be updated

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54 For details and sources in relation to ECS in the Antarctic see: Alan D Hemmings and Tim Stephens, "Australia's Extended Continental Shelf: What Implications for Antarctica?" *Public Law Review* 20(1) (2009): 9; Alan D Hemmings and Tim Stephens, "Reconciling Regional and Global Dispensations: The Implications of Subantarctic Extended Continental Shelf Penetration of the Antarctic Treaty Area," *New Zealand Yearbook of International Law* 6 (2009): 273; and Alan D Hemmings and Tim Stephens, "The Extended Continental Shelves of sub-Antarctic Islands: Implications for Antarctic Governance," *Polar Record* (2010).

55 The period may reasonably be said to begin in 1999 with an Australian Media Release: Robert Hill, Minister for the Environment and Heritage and Alexander Downer, Minister for Foreign Affairs. "Move to Claim Extended Antarctic Continental Shelf" - Joint Media Release, 2 December 1999. [http://203.6.168.72/releases/1999/fa132b\\_99.html](http://203.6.168.72/releases/1999/fa132b_99.html)

56 For a consideration of the issues see: Stuart B Kaye, "The Outer Continental Shelf in the Antarctic," in A G Oude Elferink and Donald R Rothwell, eds., *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (The Hague: Martinus Nijhoff, 2001), 125.

57 See Hemmings and Stephens (2009) and (2010) above.

58 Personal observation of the author. See also the statement by senior Swedish diplomat Marie Jacobsson that although the claimants, Russia and the US had held consultations, "no formal or informal consultations with the rest of the Parties were held" page 6 in Marie Jacobsson, "The Antarctic Treaty System: Legal and Environmental Issues – Future Challenges for the Antarctic Treaty System" in Gillian Triggs and Anna Riddell, eds., *Antarctica: Legal and Environmental Challenges for the Future* (London: British Institute of International and Comparative Law, 2007), 1.

59 Alan D Hemmings, "Claimant Stances on Outer Continental Shelf in the Antarctic Treaty Area and the Consequences for Antarctic Collective Governance", Paper presented at New Resource Frontiers? Arctic and Antarctic Continental Shelves, The British Library, London, 21 September 2010. Preliminary summary at <http://polargeopolitics.wordpress.com/seminars/seminar-2-outcomes-and-statements>.

periodically as required. The ATCM accepted the advice of its Committee for Environmental Protection (CEP) in 2001 that Annex II (Conservation of Antarctic Fauna and Flora) would be the first annex to undergo updating.<sup>60</sup> Various aspects of the Annex were seen as overtaken by scientific knowledge or environmental best practice. However, an imbroglio developed around whether some proposed amendments amounted to more than a technical updating and in fact constituted a more fundamental attempt to relitigate principles of the Madrid Protocol. The argument that it risked becoming the latter was made particularly by the United States, which was supported by a small number of marine harvesting states (including Japan, South Korea and to an extent China and Russia) who were anxious to prevent any expansion of coverage to marine species, or the creation of potential precedents for this later). The end result of this was that a quite modestly amended Annex was only adopted in 2009.<sup>61</sup> This amendment makes no reference to genetically modified organisms or other novel materials. It does not (of course) affect the management of fish or cetaceans. It adds a qualified duty to include the Agreement on the Conservation of Albatrosses and Petrels as a source of advice, but otherwise seems a very slight advance on the original annex, whose own roots were back in the 1964 Agreed Measures for the Conservation of Antarctic Fauna and Flora. The amendment of just the first technical annex (selected because it was judged to be the *simplest* annex to amend) took eight years, compared to the year it took to negotiate and adopt the Madrid Protocol itself. It seems slim pickings for such an extended process. Such has been the disappointment with this process within the CEP that nobody appears enthusiastic about commencing amendment of any other annex (there are five in force and a sixth adopted in 2005 which is not yet in force). Annex III on Waste Disposal and Waste Management probably needs updating, but one cannot be sanguine about the willingness to consider such contemporary issues here as new organic pollutants and nanomaterials.

One might ask why the two most recent Antarctic resource activities have not been addressed in a “Convention on the Regulation of Antarctic Tourism” and a “Convention on the Regulation of Antarctic Biological Prospecting” respectively. This would be consistent with earlier ATS practice in relation to emergent Antarctic industries (sealing, marine harvesting and mineral resources). The short answer based on the ATS track record would, presumably, be that they are not deemed to require any regulation, or that they are already sufficiently regulated through generic ATS mechanisms, perhaps most particularly the Madrid Protocol. These are not answers that appear terribly compelling to me.

It would be rash to suggest that ATCPs intend that tourism and bioprospecting be cut loose from the geopolitical imperatives at the heart of the ATS. But, the consequence of the fact that they are not subject to traditional ATS institutional regulation is still a relative weakening of those imperatives. And, whilst again this may not be *intended*, the fact that nominal ‘regulation’ of tourism and bioprospecting is thereby left to instruments not

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60 See paragraph 40 in Russia, Final Report of the Twenty-fourth Antarctic Treaty Consultative Meeting (Moscow: Ministry of Foreign Affairs, 2002).

61 Measure 16 (2009) Amendment of Annex II to the Protocol on Environmental Protection to the Antarctic Treaty: Conservation of Antarctic Fauna and Flora in Secretariat of the Antarctic Treaty, Final Report of the Thirty-Second Antarctic Treaty Consultative Meeting (Buenos Aires: Secretariat of the Antarctic Treaty, 2009).

designed to do so is not without effect on them. The danger is that in requiring them to address the new activities, their functionality in relation to activities that they *were* crafted to address is compromised. Although a proper consideration of this lies outside the present paper, there may be a risk that one consequence of relying on the Madrid Protocol to manage tourism and/or bioprospecting may be to subtly move this instrument's norms towards the sort of 'rational use' interpretation of 'conservation' established under CCAMLR.<sup>62</sup>

Over the last decade, a very substantial part of each ATCM has been given over to discussing tourism and its implications. As well as this, three dedicated Meetings of Experts have also been convened. The level of tourism activity has shown a steep upward climb (albeit currently affected, like much else, by the Global Financial Crisis),<sup>63</sup> and we have seen a steady stream of serious maritime incidents in Antarctic waters.<sup>64</sup> Despite all the talk, there is still no new mechanism to resolve these issues. On the face of it, these circumstances indicate at least a comparable need for action to any of the other developments that led in the past to new ATS instruments. The difficulty surely lies elsewhere. In my judgement, it is a consequence of a globalism that now undercuts Antarctic exceptionalism – the traditional ATS framing that saw each Antarctic issue as necessarily requiring a specifically *Antarctic* resolution within the framework of the ATS.<sup>65</sup>

Whilst tourism and bioprospecting have at least been discussed within the ATS, with some low-key responses agreed in restricted areas, some other issues appear to have been so sensitive that to date there has been no willingness to even do this. These include the question of the extended continental shelf considered above and jurisdiction over individuals.

The text of the Antarctic Treaty is, *inter alia*, interesting in its specific identification of the location (Canberra) of its first meeting following entry into force of the instrument.<sup>66</sup> It does this in Article IX(1), which itemizes some "measures in furtherance of the principles and objectives of the Treaty" which the Representatives of Parties may wish to consider at the Canberra, or subsequent meetings (the meetings that we refer to as Antarctic Treaty Consultative Meetings). Amongst these are "(e) questions relating to the exercise of jurisdiction in Antarctica". Whereas the other measures itemized have, to varying extents, indeed provided the basis for subsequent ATCM discussion and specific outcomes, the question of jurisdiction was left alone,

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62 CCAMLR Article II(2) "For the purposes of this Convention, the term 'conservation' includes rational use."

63 Kees Bastmeijer and Ricardo Roura, "Regulating Antarctic Tourism and the Precautionary Principle," *The American Journal of International Law* 98(4) (2004): 763.

64 Itemized in: New Zealand, "Antarctic Treaty Meeting of Experts on the Management of Ship-borne Tourism in the Antarctic Treaty Area: An Overview", Working Paper 1 tabled at the Antarctic Treaty Meeting of Experts, Wellington, New Zealand, 9-11 December 2009.

65 Alan D Hemmings, "Globalisation's Cold Genius and the Ending of Antarctic Isolation" in *Looking South: Australia's Antarctic Agenda*, ed. Lorne K Kriwoken, Julia Jabour and Alan D Hemmings (Leichardt: The Federation Press, 2007), 176; and Alan D Hemmings, "From the New Geopolitics of Resources to Nanotechnology: Emerging Challenges of Globalism in Antarctica", *The Yearbook of Polar Law* 1 (2009): 53.

66 I acknowledge Donald R Rothwell for drawing attention to this fact, which as he noted seems not to have previously attracted particular attention, at a 2009 workshop in which we were both participants.

until 1992, when Uruguay tabled a paper under the title: “Issues relating to the exercise of jurisdiction in Antarctica”.<sup>67</sup>

This paper was stimulated by a January 1992 incident involving a member of Uruguayan station in which a Russian was killed at a nearby Russian station on King George Island.<sup>68</sup> To summarize the juridical complexities around this incident (which the Uruguayan paper itself did not state, possibly on the grounds that these were clear enough to at least some of their fellow ATCPs): here we had a citizen from a non-claimant ATCP (Uruguay) involved in the death of a citizen of a state (Russia) which rejects territorial claims but asserts that it has a basis to claims itself, at a Russian station, in a part of the Antarctic subject to mutually exclusive territorial claims by three states (Argentina, Chile, United Kingdom). This obviously presents an interesting juridical situation where we have unresolved territorial sovereignty.

Although an agenda item was established for the ATCM: “Item 18. Question Related to the Exercise of Jurisdiction in Antarctica”, there was no substantive discussion of this paper on the floor of the meeting, and the ATCM Final Report carried a single short paragraph:

“(131) One Delegation submitted a Working Paper on item 18 (XVII ATCM/WP 17). The Meeting agreed that this question should be considered at the next Consultative Meeting”.<sup>69</sup>

The next ATCM was held in 1994. The agenda item was again duly included and Uruguay again tabled a paper (seemingly identical to its 1992 paper down to typographical errors in the English version).<sup>70</sup> In the space of two days, two revisions of this paper were issued, excising reference to the death incident and softening the analysis.<sup>71</sup> The Final Report reflected the brief discussion as follows:

“(122) A working paper (XVIII ATCM/WP 32) on this item was tabled and introduced by Uruguay.

The Meeting recognized the importance of this question, the solution of which was left deliberately open in Article IX (1) of the Antarctic Treaty. But it was also understood that the question raises some delicate and sensitive problems which need more, and careful, deliberations.

(123) The Meeting therefore agreed to leave the item out of the Agenda of the XIXth ATCM and put it again on the Agenda of the XXth ATCM in order to give all Parties sufficient time to elaborate ways and means how to approach the question again in order to find an agreeable solution.”

The invocation of a supposedly deliberate openness in Article IX(1) of the Antarctic Treaty is curious, since a reading of that article (above) suggests that this issue was specifically recognized as something that would be discussed at

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67 Uruguay, “Issues Relating to the Exercise of Jurisdiction in Antarctica,” Working Paper 17 tabled at XVII Antarctic Treaty Consultative Meeting, Venice, 11-20 November 1992.

68 Ibid. Page 2.

69 Italy, Final Report of the Seventeenth Antarctic Treaty Consultative Meeting (Rome: Ministry of Foreign Affairs, 1992).

70 Uruguay, “Issues Relating to the Exercise of Jurisdiction in Antarctica,” Working Paper 32 tabled at XVIII Antarctic Treaty Consultative Meeting, Kyoto, 11-22 April 1994.

71 Ibid. Rev 1 (14 April 1994) and Rev 2 (15 April). Copies on file with author.

a future meeting. However, consistent with paragraph 123 of the Final Report of XVIII ATCM, the issue was next put on the agenda of the XX ATCM in 1996. With no substantive discussion on the floor, this ATCM essentially closed down the discussion. The Final Report included two short paragraphs, the first reiterating the sentiments of paragraph 123 of 1994, and the second reading:

“(74) The Meeting agreed that the Delegations had not yet had sufficient time to duly consider the issue, and decided to omit the item from the Agenda of the following Consultative Meetings until a request was made by a Consultative Party to reinclude it.”<sup>72</sup>

So, a paper raising issues around jurisdiction (seemingly recognized at the adoption of the Antarctic Treaty in 1959 as an issue that needed attention), triggered by a serious incident in the Antarctic, was kicked around for four years after its introduction, before being punted out of the ground. Fourteen years on from this, no Consultative Party seems to have requested the re-inclusion of this agenda item, and no discussion of jurisdiction along these lines has occurred, despite the fact that incidents of the sort that exercised Uruguay have been the nightmare of many officials considering worst-case scenarios in an increasingly multinational Antarctic. King George Island is not the only location in Antarctica where several national programme stations may now be found in close proximity, and/or multiple nationalities are present at a station. Although different to the 1992 incident, potentially complex juridical situations around death or injury have also arisen in several other instances. The problem of jurisdiction remains to be resolved.

### **The Antarctic Problem today**

The contemporary Antarctic problem combines both the traditional inter-state contestation of Antarctic territorial sovereignty evident in the 1950s and the new technology-enabled frictions of actual and reasonably foreseeable commercial activities. Whereas, the pre-Antarctic Treaty problem was that territorial sovereignty issues (given further edge by their situation alongside the global ideological bipolarity of the Cold War) occurred outside any institutional framework, the present problem occurs despite the operational continuation of that framework, the ATS. Indeed, in some respects the sheltering of territorial sovereignty within the Antarctic Treaty may even have exacerbated the problem.<sup>73</sup> Without regular and active contestation, the costs to a claimant of maintaining a contested position have been quite slight. Why then would it feel under any pressure to revisit its position, particularly over the decades when operational limitations, lack of knowledge or a potential market for a particular resource, meant it was not actively seeking to realize supposed rights? Now, not only is the possibility of resource/commercial activity which was all but impossible in the 1950s a reality, but formal sanctions for these activities are present (or asserted to be) in both ATS and non-ATS global regimes. Further, with the dominant planetary ideology now globalism and neoliberalism, it has proven increasingly difficult to agree any substantive Antarctic-specific governance

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72 The Netherlands, Final Report of the Twentieth Antarctic Treaty Consultative Meeting (The Hague: Ministry of Foreign Affairs, 1996).

73 Alan D Hemmings, “Beyond Claims: Towards a Non-Territorial Antarctic Security Prism for Australia and New Zealand,” *New Zealand Yearbook of International Law* 6 (2009): 75.



system for local manifestations of emergent global industries such as tourism or bioprospecting.

Now that Antarctica is seen to possess actually realizable commercial benefits (fishing, tourism, bioprospecting, and, notwithstanding the current minerals resource activity prohibition,<sup>74</sup> the ongoing interest in hydrocarbons and, perhaps further out, other mineral resources), it is even harder for claimants to let go of their supposed territorial rights than it was in the past. This is particularly so if global regimes promise to grant valuable rights to them precisely because they are territorial/coastal states (the UNCLOS Article 76 dilemma). Absent the Cold-War glue and the general technical restraints of a difficult Antarctic environment, in an international milieu of unrestrained commercial competition, the Antarctic regime is extremely vulnerable. It cannot grow; it cannot easily update even those capacities that it has; it faces competition from global regimes (or global norms of market liberalization outside traditional institutional regulation) for jurisdiction over particular fields; and its original problem (territorial sovereignty) is reinvigorated.

This has transformed the ATS from a regional forum wherein substantive policy responses were not only initiated and adopted, but also *operationally managed*, to one which risks becoming merely a limited regional coordinating mechanism, with responses increasingly elaborated elsewhere. What we have seen is a disabling of the substantive core of the ATS, whilst leaving its edifice intact. It has not collapsed, but it has been hollowed out. This hollowing has some significance, not only in relation to a more objective analysis of its recent and contemporary successes and failures, but (particularly) in relation to the future governance of the Antarctic. It seems unlikely to provide a sustainable governance regime for Antarctica if these trends continue.

Possible remedies are, of course, easier to suggest than to implement. Central, in my view, to any project to reinvigorate and in a sense “re-boot” the ATS, is a restoration of confidence in the propriety of an Antarctic exceptionalism. Clearly the historic exceptionalism has gone, at least in any substantive sense. ATCPs are still formally committed to special duties and rights by virtue of being ATCPs, and for claimants in particular there are still some particular benefits to this vestigial exceptionalism. But when it comes to addressing current and emergent issues, there is little evidence of vitality in this approach. Unless a basis for new exceptionalism is crafted, the new issues will either not be addressed at all, or they will be picked up through evolving global instruments or norms. If the latter, then inevitably the particularities of the Antarctic risk being lost, and thus even if global standards *formally* apply in Antarctica, they may in fact not really be appropriate there. Duncan French has, positively, responded to an earlier expression of concern about Antarctica being driven by global norms,<sup>75</sup> by suggesting the need for the ATS to incorporate and operationalise global meta-principles. As he notes, these principles can connect to the ATCP’s legal commitments and political responsibilities as “global trustees of the Antarctic environment”.<sup>76</sup> This seems

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74 Under Article 7 of the Madrid Protocol.

75 Alan D Hemmings, “Beyond Claims: Towards a Non-Territorial Antarctic Security Prism for Australia and New Zealand,” *New Zealand Yearbook of International Law* 6 (2009): 75.

76 Duncan French, “Global Principles, Universal Values and the ATS: Regime Integrity as Antarctic Security,” *New Zealand Yearbook of International Law* 6 (2009): 63.

to me an immensely useful proposal, since it offers a means to not only reinvigorate the ATS but also to enhance the mandate of a regional dispensation with that large part of the international community of states (and, indeed, other actors) which is not itself able to participate in the Antarctic. It is however my sense that the present institutional architecture is not adequate to such a project. Difficult as it is likely to prove to get it up, the ATS now needs a periodic meeting of Ministers if it is to be able to consider substantive political projects of this sort, akin to the sort of annual meetings we see for so many other regional groupings. The largely polar-focused Antarctic bureaucracy that provides the personnel for the officials-operated ATCMs and CCAMLR Commission meetings, is not well equipped to integrate extra-Antarctic political considerations into the ATS. Indeed, it may be unable to really address the intra-ATS problems and the sometimes deliberate fractionation of seemingly common issues across different instruments. A putative “Council of Antarctic Ministers (COAM)” would not substitute for the existing ATCMs or CCAMLR Commission Meetings (indeed, it might be hoped to breath new life into these by creating clearer strategic direction for officials), nor need it meet with the same annual frequency. Perhaps a three-year interval between sessions would be appropriate, but these are merely details.

The establishment of COAM plainly entails risks. These may include the practical one of it only attracting low-level representatives with no real mandate to negotiate anything on the part of their governments, so that one ends up with essentially just another bureaucratic session. If this problem can be avoided, a substantive further risk appears, namely that “political” interests will see principle and the traditional Antarctic values traded away because these people will always have the proverbial bigger fish to fry. In my experience this is the basis upon which most officials privately argue against such a proposition. This is not an entirely unrealistic fear. But it is, in a sense, a counsel of despair. So long as the implicit alternative (an active, progressive ATS mediated by officials) was actually doing something, it could be *argued* that this provided a safer and proven mechanism for Antarctic governance. Due to the current challenges the ATS faces, this may no longer be quite so compelling an argument. If, as I do, one sees problems in the present hiatus in ATS development and the limitations in the present operational management of burgeoning Antarctic activities, alternatives warrant serious examination. How else, apart from the political process, with all its flaws and risks, are we to mediate the increasingly complex array of interests and aspirations evident in Antarctica? A narrow, officials-mediated institution, which accepts advice from only a very few sources, and which is grounded in an ageing and no longer developing ATS, seems an uncertain platform for success.

We need to find a new basis for confidence in a regional governance arrangement in the Antarctic, and that requires new thinking as well as a confidence that some historic Antarctic values are worth defending. If we can reinvigorate and expand the Antarctic Treaty System, so that it can continue to provide the institutional architecture to do this, fine. But if it cannot or will not evolve, there is nothing about the Antarctic situation that will prevent the real power to determine Antarctic futures going elsewhere.