EXCLUSIVE ECONOMIC ZONES: SHOULD THEY BE ALLOWED IN ANTARCTIC WATERS?

Graduate Certificate in Antarctic Studies 2002-2003
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24 January 2003
ABSTRACT

In the first half of the twentieth century, seven states made claims, in some instances conflicting claims, to parts of Antarctica. Political, practical and scientific factors during this time led to the 1959 Antarctic Treaty being agreed upon. This accord placed all existing claims to Antarctic territory in abeyance and prevented new claims from being asserted.

Concurrently, the international "law of the sea" was being negotiated. Several versions were elaborated, with the final document, the United Nations Convention on the Law of the Sea (UNCLOS), entering into force in 1994. UNCLOS provides for and defines the delimitation of maritime zones, which includes exclusive economic zones (EEZs).

Recently, some Antarctic claimant states have indicated that they intend to establish an EEZ which would extend into the Southern Ocean from their Antarctic territory. This paper considers the international law applicable to establishing an EEZ in Antarctic waters and concludes:

- The declaration of an EEZ is a declaration of sovereignty and is therefore a breach of Article IV of the Antarctic Treaty;
- the recognition of an Antarctic EEZ would not lend credence to any of the terrestrial claims held in abeyance under the Antarctic Treaty;
- the issue of EEZs in Antarctic waters is unlikely to destabilize the Antarctic Treaty System; and,
- the present-day application of exclusive economic zones in the Antarctic is inoperable until the Antarctic Treaty dissolves and territorial sovereignty on the continent is resolved. This scenario is undesirable and arguably unworkable as there is a strong case for Antarctica and the Southern Ocean being preserved as the common heritage of mankind.
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1 INTRODUCTION

1.1 SCOPE OF PAPER

In the first half of the twentieth century, seven states made claims to parts of Antarctica. Political, practical and scientific factors during this time led to the 1959 Antarctic Treaty being agreed upon. This accord placed all existing claims to Antarctic territory in abeyance and prevented new claims from being asserted.

Concurrently, the international "law of the sea" was being negotiated. Several versions were elaborated, with the final document, the United Nations Convention on the Law of the Sea (UNCLOS), entering into force in 1994. UNCLOS provides for and defines the delimitation of maritime zones, which includes exclusive economic zones (EEZs).

Recently, some Antarctic claimant states have indicated that they intend to establish an EEZ which would extend into the Southern Ocean from their Antarctic territory. This paper asks the questions:

- Is the declaration of an EEZ a declaration of sovereignty, and therefore a breach of the Antarctic Treaty?
- Where does the declaration of an EEZ leave other Antarctic Treaty System (ATS) members?
- Will the recognition of an Antarctic EEZ lend credence to any terrestrial claims or will it destabilize the ATS?
- Antarctica is considered part of the common heritage of mankind, as are the high seas. In this more philosophical context, can any state legitimately lay claim to an Antarctic EEZ?
In addressing these questions, this paper begins by setting the scene. It determines why it is in the best interests of humankind to protect and preserve the environment of the continent and Southern Ocean, and identifies key risks to the Antarctic environment that may arise if EEZs are designated in the Antarctic. The legal framework specific to the Antarctic, the Antarctic Treaty System (ATS), is explored in chapter two. The status of claims and associated sovereignty issues are discussed here alongside the mechanisms and weaknesses of the Antarctic Treaty System. In chapter three the parts of UNCLOS that are relevant to defining and delimiting EEZs are analysed. A brief overview of UNCLOS is also detailed here. Chapter seven looks specifically at the case studies of Australia, Chile and Argentina and New Zealand. The implications of the success (or failure) of an Antarctic EEZ claim is critiqued, together with an analysis of whether an EEZ claim constitutes a breach of the Antarctic Treaty. Conclusions are drawn in the final part of this paper.

1.2 HUMAN OCCUPATION AND GOVERNANCE IN ANTARCTICA

Antarctica does not have an indigenous human population due to its extreme climate. It was first sighted in 1820 but it wasn’t until the twentieth century, when technologies had developed sufficiently to allow easier access to and survival on the continent, that permanent bases were established.\(^1\) Currently there are forty-four year-round bases in Antarctica\(^2\) where 1200 personnel “winter over” each year.\(^3\) Twenty-seven different countries operate these bases.\(^4\) The summer months see the number of visitors (scientists, tourists and support staff) to the region increase to 6000-15000 people.\(^5\)

Despite the activity that occurs on the continent, no state “owns” Antarctica, although seven states - Australia, New Zealand, the United Kingdom, France, Norway, Chile, and


\(^4\) See supra note 5.

Argentina - have historical claims to pie-shaped sections of the continent. Notably, the territorial claims of Chile, Argentina and the United Kingdom overlap. The US and Russia (formerly the USSR) reserve the right to make Antarctic claims and there is also an unclaimed area of the continent.\(^6\) Elliot (1994) explains the tensions surrounding the claims and the differing opinions over how various states responded to these seven Antarctic claims. In summary:

- Argentina, Chile and Great Britain claim overlapping areas – Chile and Argentina disagree upon their respective territorial boundaries in this area but agree that the Antarctic Peninsula should be South American. Naturally, Great Britain disputes this assertion.
- Great Britain, New Zealand, Australia, Norway and France mutually recognise each other’s claims.
- non-claimant states, notably the US and USSR, view the claims as illegitimate due to several points of international law, including lack of “effective occupation”\(^7\).

The Antarctic Treaty\(^8\) holds these claims in abeyance and prevents new claims from being made. It also stipulates that Antarctica is, and must remain, a place of peace, international co-operation and scientific freedom. The forty-four states who are party to the Antarctic Treaty have consistently upheld these values since it came into force in 1961.

1.3 WHY DO STATES WANT AN ANTARCTIC EEZ?

The reason for pursuing a claim to an Antarctic EEZ is primarily that, should the claim be accepted, the claimant state would have control of resources in the defined area. Resources could potentially include fisheries, mineral deposits, ice, access to areas of

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\(^7\) Elliott, L.M. *International Environmental Politics: Protecting the Environment* (1994)

\(^8\) See text, infra Section 3.1.
scientific importance or tourism value and biological resources. The predicted gloomy effect of bio-prospecting would not necessarily come to fruition, as the concept behind bio-prospecting is to extract quantitatively small samples, and then to use these samples to synthesise products in the laboratory. So, even though there may be more science events, personnel movements and logistics as a result of this, it will not automatically mean an exponential increase in bio-extraction activity.

1.4 THE SIGNIFICANCE OF THE ANTARCTIC REGION

The protection of the Antarctic continent, and the great Southern Ocean surrounding it, is important for the citizens of the world. This region is the world’s last unspoiled wilderness. Antarctica drives the world’s climate, and has a central role in regulating the earth’s environmental processes, including the world’s atmospheric and oceanic systems, global tides and sea levels. Its preservation and well-being is therefore vital to the health of the rest of the planet, and impacts to Antarctica’s environment could have global effects.

The passage above succinctly expresses the significance of Antarctica’s global role and the contemporary relevance of protecting its environment. Scientific research and monitoring on the continent provides an understanding of the earth’s natural history and its present state. It also identifies future research applications and predicts potential environmental changes of concern. Damage to the Antarctic environment could result in the loss of information critical to the understanding of the earth’s health.

Antarctica is also unique in that it is a “model for peaceful international cooperation, the only non-militarized and nuclear-free zone on earth”. It is special in that it is a “real life” example of what international cooperation can achieve. Using the Antarctic model or variation thereof, it is perhaps conceivable that, in due time, differences could be put aside in other regions of the world in the pursuit of common goals.

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10 See supra note 5.
11 See supra note 5.
1.5 ACTIVITIES AND RISKS IN THE ANTARCTIC REGION

Human activities in the Antarctic are primarily those of scientific research, tourism, logistical support and fishing, each of which has a level of environmental risk associated with it. Significant work has been undertaken by Antarctic organisations to determine the probability and extent of environmental damage from human misadventure. By identifying activities that could potentially cause significant harm to Antarctica, strategies have been implemented to avoid or mitigate any environmental damage.\textsuperscript{12} These are important as greater numbers of people are visiting the region each year.

The introduction of EEZs would probably lead to increased activity in the Southern Ocean and a resulting increase in human visitation to the Antarctic continent. Both of these factors would intensify the existing environmental pressures on the region. Therefore strong environmental obligations and liability provisions must accompany an EEZ regime.

1.6 ANTARCTICA AS A GLOBAL COMMONS

Many commentators view Antarctica as a Global Commons area, and part of the Common Heritage of Mankind, akin to Outer Space, the Deep Sea Bed and the High Seas.\textsuperscript{13} Historically, the natural conditions unique to each of these areas meant that they had open access, so that if a country had the desire and capability to explore these areas, then they freely could. Nussbaum (1993) argues that if a legal regime which were to restrict universal access to Antarctica, and limit the open use of the surrounding waters, was to be established, such as EEZs, that this would contradict the historical open access to a Global Commons area.\textsuperscript{14}

However, some consider that the Antarctic Treaty System already does this, by having twenty-seven Consultative Parties, which includes all seven claimant states, and seventeen Non-Consultative Parties, in effect governing a Global Commons area.


\textsuperscript{13} Joyner (1998).

\textsuperscript{14} Nussbaum, U. \textit{Legal Status of Antarctic Off-Shore Area} (1993) 3.
Although these forty-four states who are party to the Antarctic Treaty represent approximately 70% of the world's population, there is an under-representation of African, Central American and Middle Eastern states\textsuperscript{15}, which explains why the ATS has sometimes been referred to as a "white boys club"\textsuperscript{16}. Coupled with this under-representation is the fact that the twenty-seven ATCPs, with the twelve original signatories having the greatest presence on the continent, are the ones who make the political decisions, with the Non-Consultative Parties, although adhering to the Treaty, attending ATCMs in an observer capacity only. Is it in the best interest of Antarctica, as a Global Commons area, to be governed by these twenty-seven countries?

1.7 SUMMARY

The Antarctic environment is fragile. It is a vital indicator of the earth's health and provides important information about the present day global environment and the earth's history. It is critical to preserve and protect the region for science and therefore the benefit of humankind.

The need or desire for marine resources, either presently or in the future, could propel the claimant states into active pursuit of an Antarctic EEZ under the UNCLOS provisions. This paper will assess the implications to Antarctic relations of successful EEZ claims in the Antarctic region.

\textsuperscript{15} Antarctica Connection Internet site, \url{http://www.antarcticconnection.com/antarctic/treaty/index.shtml}, viewed 9 December 2002.

\textsuperscript{16} Personal Communication, Klaus-John Dodds, Royal Holloway, University of London, 12\textsuperscript{th} December 2002.
2 THE ANTARCTIC TREATY SYSTEM

2.1 THE ANTARCTIC TREATY 1959

Nobody lives permanently in Antarctica, owing to its extreme cold, severe storms, and frozen ocean.... Although tourism is increasing on the continent, its only long-term human residents are scientists and support personnel living on seasonal or year-round national bases. Whether they are public or private, all of these expeditions come from just a handful of the world’s countries. Therefore, the laws that govern Antarctica are the agreements negotiated by nations capable of maintaining a presence on the southern continent.\(^\text{17}\)

Signed in 1959 and in force by June 1961, the Antarctic Treaty is one of the more unusual international legal agreements. It evolved during the Cold War era, fundamentally as a response to nervousness around the establishment of United States and Russian military bases on the Antarctic continent, and therefore the potential threat of military uses of the continent.\(^\text{18}\) The success of the United Nations’ “International Geophysical Year”\(^\text{19}\) (July 1957 – December 1958) is also credited with having significant influence in the formation and adoption of the Treaty. States that worked together on Antarctic science programmes during this time committed to continuing the “co-operative spirit and peaceful use of Antarctica as a giant scientific laboratory” \(^\text{20}\) as parties to the Antarctic Treaty. They recognised that in their Antarctic operations the pooling of resources was mutually beneficial, if not essential, given the expense and practicalities of working in the polar environment.

\(^{19}\) The International Geophysical Year ran from 1 July 1957 to 31 December 1958.
The Antarctic Treaty is the foundation of what is known as the Antarctic Treaty System (ATS). The ATS comprises “the treaty itself and a number of related agreements. It also includes a range of organisations that contribute to the work of the decision making forums.”21 This section discusses only the aspects of the Antarctic Treaty relevant to Antarctic EEZ claims, and briefly addresses the remaining components of the ATS.

The Antarctic Treaty had twelve original signatories.22 They were the United Kingdom, South Africa, Belgium, Japan, United States, Norway, France, New Zealand, the Soviet Union23, Argentina, Australia and Chile. Currently there are forty-four states who are party to the Antarctic Treaty. Of these the original twelve, and fifteen other states24 that have acceded to the treaty, are the Antarctic Treaty Consultative Parties (ATCPs). These states participate in the Antarctic Treaty Consultative Meetings (ATCMs) that are held every one to two years. The remaining seventeen signatory states25 have “non-consultative” status, which requires adherence to the Treaty and allows attendance at the ATCMs as observers only.

The forty-four parties to the Antarctic Treaty represent approximately two thirds of the world’s population:

“Member governments, though numbering less than one quarter of the UN’s membership, account for 70% of the world’s population, and include all permanent members of the UN Security Council, most European states, all the Group of Seven states, plus several major developed… and developing states… For the ATS’s critics, however, its wide ranging membership has not negated

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23 Ibid. Russia now represents the USSR. Russia adopted the former Soviet Union’s Antarctic Treaty signatory privileges and responsibilities in December 1991.
24 Ibid. ATCP’s who have acceded to the Antarctic Treaty are the Netherlands, Germany, Brazil, Bulgaria, Uruguay, Italy, Peru, Spain, China, India, Sweden, Finland, South Korea, Ecuador and Poland.
25 Ibid. Austria, Canada, Columbia, Cuba, Czech Republic, Denmark, Greece, Guatemala, Hungary, North Korea, Papua New Guinea, Rumania, Slovak Republic, Switzerland, Turkey, Ukraine and Venezuela are currently non-consultative parties to the Antarctic Treaty.
their misgivings, given the lack of substantial African, Central American and Middle Eastern participation."  

Consequently, a key potential weakness of the ATS is that only its signatories are bound by its rules. Potentially a non-member state could lay claim recklessly to the Antarctic and its resources. However, diplomatic pressure, logistics, economics, education by ATS member states and other international legal instruments to which they are party, would most likely deter a non-member state from taking such action.

The Antarctic Treaty’s purpose, as outlined in the preamble, is to ensure that Antarctica remains a place of peace, freedom of scientific investigation and international cooperation. These three principles are in recognition of “the substantial contributions to scientific knowledge resulting from international co-operation in scientific investigation in Antarctica” and “that it is in the interest of all mankind that Antarctica shall... be used exclusively for peaceful purposes and shall not become the scene or object of international discord”. 27 By securing the Antarctic continent for peaceful, collaborative activities, the Treaty also aims to “further the purposes and principles embodied in the Charter of the United Nations”.

The jurisdiction of the Antarctic Treaty applies to the area south of 60° south latitude, an area which encompasses ten percent of the Earth’s land surface and ten percent of the earth’s oceans. 28 It includes the continent itself, ice shelves and parts of the Southern Ocean and is commonly called the Antarctic Treaty Area (ATA). It is stated that “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 [the Treaty] area”. 29 This relates to the concomitant development of the international Law of the Sea.

27 Antarctic Treaty 1959, Preamble.
29 Antarctic Treaty 1959, Article VI.
Articles II and III of the Treaty set out the requirements for international co-operation in Antarctica, particularly with respect to scientific projects. The right to collaborative "freedom of scientific investigation in Antarctica" is preserved in Article II. Article III obliges parties to the Treaty to exchange scientific personnel and information "regarding plans for scientific programs" and "scientific observations and results from Antarctica". This must be accomplished to "the greatest extent feasible and practicable". The view of Antarctica New Zealand\textsuperscript{30} is that the scientific cooperation between treaty nations, as called for in these articles, is "genuinely successful".\textsuperscript{31} They use the example of the Cape Roberts Project as evidence that the spirit of collaboration in Antarctic scientific programs is alive and well.\textsuperscript{32}

The success of the Antarctic Treaty is largely due to the provisions of Article IV. At the time of the Treaty’s drafting seven states\textsuperscript{33} had laid claim to a portion of Antarctica. The territorial claims of Chile, Argentina and the United Kingdom overlap, which raised disputes over the sovereignty of these areas.\textsuperscript{34} Additionally, the US and USSR/Russia reserve the right to make Antarctic claims\textsuperscript{35} and this creates the potential for future quarrels over sovereignty in the Antarctic. Article IV essentially freezes territorial claims on the continent. It sets out a politically functional compromise where, under the Treaty, existing claims are not repudiated and states' Antarctic activities do not strengthen or weaken "any basis of claim to territorial sovereignty in Antarctica".\textsuperscript{36} New claims and the

\textsuperscript{30} "Antarctica New Zealand is responsible for developing, managing and administering New Zealand activities in Antarctica and the Southern Ocean, in particular the Ross Sea Dependency." - Antarctica New Zealand internet site, \url{http://www.antarcticznz.govt.nz/Pages/WhoWeAre/Organisation.msa}, viewed 6 October, 2002.

\textsuperscript{31} Antarctica New Zealand internet site, \url{http://www.antarcticznz.govt.nz/Pages/International/ATCM.msa}, viewed 13 September, 2002.

\textsuperscript{32} Antarctica New Zealand Internet site, \url{http://www.antarcticznz.govt.nz/Pages/International/CapeRoberts.msa}, viewed 6 October, 2002. The Cape Roberts Project included participants from Australia, Germany, Italy, the Netherlands, New Zealand, the United Kingdom and the United States. It involved drilling out three 500 - 1000m deep ice cores over three field seasons to gain knowledge of the earth's climate throughout the ages as well as further understanding of the Antarctic continent's glacial history.

\textsuperscript{33} Australia, New Zealand, the United Kingdom, France, Norway, Chile, and Argentina.

\textsuperscript{34} Joyner J, \textit{Governing the Frozen Commons: the Antarctic Regime and Environmental Protection} (1998) 16.


\textsuperscript{36} Antarctic Treaty 1959, Article IV (1)(a) and (b).
expansion of existing claims are expressly prohibited. To date there have been no challenges to Antarctica’s “international status” as accorded by Article IV, which suggests that this feature of the Treaty is producing the intended results. However, if a state should successfully establish an Antarctic EEZ, the equilibrium provided by Article IV could be disturbed. This issue will be dealt with in more detail in chapters five and six.

Article VI of the Antarctic Treaty gives the “High Seas” provisions in UNCLOS primacy over the Antarctic Treaty. However it does not mention and therefore does not give primacy to the exclusive economic zones provisions of UNCLOS. Where the high seas begin and end for the Southern Ocean remains an unresolved question as different states have different interests in preserving the Antarctic region as the common heritage of mankind (CHM). It should be noted that Article 136 of UNCLOS enshrines the high seas and “its resources as the common heritage of mankind”. By default, while the Antarctic Treaty is in force, the Southern Ocean can be considered the high seas and therefore, under UNCLOS and Article VI of the Antarctic Treaty, part of the CHM. Should the Antarctic Treaty System dissolve and Antarctic territorial claims become sovereign the UNCLOS maritime zones, including EEZs could then be applied. However the latter scenario is unlikely and will be elaborated on in chapters three, five and six.

An important procedural component of the Antarctic Treaty is the establishment under Article IX of the Antarctic Treaty Consultative Meeting (ATCM). It is “for the purpose of exchanging information, consulting... on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending... measures in furtherance of the principles and objectives of the Treaty”. Article IX specifies that the meeting is to be held “at suitable intervals” and it is now convened on an annual basis. A key provision is that the adoption and implementation of the measures agreed at ATCMs

37 Ibid, Article IV (2).
39 Article VI: The provisions of the present Treaty shall apply to the area south of 60 deg. 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.
is by the *consensus* of participating states.⁴⁰ States are eligible to participate in the ATCMs if they have acceded to the Antarctic Treaty and "[the] Contracting Party demonstrates its interest in Antarctica by conducting substantial scientific research activity there."⁴¹ Therefore any state which is eligible to participate in the ATCMs has the power of veto. Non-governmental organisations and states who are a party to the Antarctic Treaty but do not have an active scientific programme on the continent may attend ATCMs as observers and provide advice.

**2.2 OTHER COMPONENTS OF THE ANTARCTIC TREATY SYSTEM**

There are four additional agreements that are in force which, together with the Antarctic Treaty, comprise the ATS.⁴² They are:

1. The Agreed Measures for the Conservation of Antarctic Fauna and Flora 1964, which provides for the protection of wildlife and plants native to the Antarctic and sets out rules to prevent the uncontrolled introduction of foreign organisms.

2. The Convention for the Conservation of Antarctic Seals 1972 (CCAS), which was negotiated to provide a means of regulating commercial sealing, in the event that this industry would resume its activities.

3. The Convention on the Conservation of Antarctic Marine Living Resources 1980 (CCAMLR), which was adopted to ensure that fishing was regulated in a way that protects the Antarctic and Southern Ocean ecosystem as a whole. The convention specifies fishing regions and methods, times for when fishing may occur and catch limits in support of achieving this aim.


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⁴² A fifth Antarctic legal instrument, the Convention on the Regulation of Antarctic Mineral Resource Activities 1988 (CRAMRA), failed to be adopted by the ATCPs after six years of negotiation. It was vetoed by Australia and France who argued that environmental degradation would be inevitable by allowing minerals prospecting under the terms of the proposed convention. See *Joyner* (1998) 149.
environment and dependent and associated ecosystems” and, significantly, designates Antarctica to be “a natural reserve, devoted to peace and science.” Its premise is:

The protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica, including its wilderness and aesthetic values and its value as an area for the conduct of scientific research, in particular research essential to understanding the global environment, shall be fundamental considerations in the planning and conduct of all activities in the Antarctic Treaty area.  

In other words, the Protocol places a mandatory requirement on Parties to accord the highest priority to protection of Antarctica’s environment and intrinsic values when preparing for or carrying out activities in the region. It also prohibits mineral extraction in the Antarctic Treaty Area.

2.3 SUMMARY
The Antarctic is governed by several agreements which comprise the ATS. The Antarctic Treaty is the cornerstone of this system. The Treaty freezes territorial claims and focuses on scientific gain from and peaceful use of the continent by those states that have an interest in the region. The four agreements, which together with the Treaty make up the ATS, ensure the effective and sustainable management of the ATS area. The Madrid Protocol comprehensively covers all aspects of environmental protection and notably prohibits mining in the ATA.

Articles IV and VI of the Antarctic Treaty are the provisions which create tension with UNCLOS with respect to establishing EEZs in Antarctic waters. The issues arising from this tension will be discussed in chapters five and six.

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44 Ibid. at Article 3(1).
3 UNCLOS

The United Nations Convention on the Law of the Sea (UNCLOS) was a major milestone in international law. In many ways it is as much of an achievement as the Antarctic Treaty. There were not just twelve states to deal with, but 154 by the time negotiations ceased in 1982. It then took another twelve years to adopt the convention due to disagreements between industrialised and non-industrialised states.

3.1 PURPOSE
The main purpose of UNCLOS is two-fold. Firstly, it sets out a state’s rights and responsibilities in regard to its coastal waters. It also sets out the ways a state can define its various maritime zones, i.e. territorial seas, exclusive economic zones and contiguous zones, etc.

3.2 HISTORY
The origins of UNCLOS can be traced back to the 28th of September 1945 when Harry S. Truman, then President of the United States, made the following proclamation – that the United States Government “regards the natural resources of the subsoil and the seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.”

This led to many countries making similar proclamations, although these tended to vary between states, due to the lack of a consistent framework. Some states claimed the

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traditional three nautical miles (nM) for their territorial sea, others decided on twelve nM and the more adventurous went for 200 nM.\textsuperscript{47}

The United Nations (UN) was formed in 1945, at the conclusion of the Second World War, with fifty-one original signatories. This new organisation requested that the International Law Commission organise the various existing laws relating to the oceans into some sort of system and much needed order. This began in 1949 and took nine years.\textsuperscript{48}

In 1958 four separate draft Law of the Sea conventions were drawn up and were adopted at the First UN Conference on the Law of the Sea. The convention brought together laws on territorial seas, contiguous zones, fisheries, conservation of biological resources and the high sea, and came into force between 1962 – 1966, at the height of tensions between east and west.\textsuperscript{49}

There were problems though. Instead of providing any forward planning for the future, it tended to look back to the past. This was due to the fact that it was a reorganisation of laws that states had made in haste after the United States proclamation of 1945. The 1958 convention also failed to address the maximum breadth of the territorial seas, which varied between countries, also because of the proclamations following 1945. By the time the Law of the Sea had entered into force the UN had 118 members, and many felt as if they had not contributed to the drafting of the convention. Despite all of these issues, the convention was at least a good starting point and brought some consistency into international legislation regarding laws of the ocean.\textsuperscript{50}

On November 1 1967, the Ambassador from Malta asked the General Assembly to look into the question of the legal status of the seabed and the ocean floor beyond the limits of national jurisdiction. In the first instance, this led to the United Nations General

\textsuperscript{47} Levy (2000) 8
\textsuperscript{48} Ibid 8
\textsuperscript{49} Ibid 9
\textsuperscript{50} Levy (2000) 9
Assembly making the following declaration in 1970: the Declaration of the Principles Governing the Sea Bed and Ocean Floor, and the Subsoil Thereof, beyond the limits on National Jurisdiction. The Assembly declared, *inter alia*, that “the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the area, are the common heritage of mankind.” It also led to the Third Conference of the United Nations Law of the Sea (1972-1982), the Second Conference (1967) considered as being anything but a success.

The Convention on the Law of the Sea opened for signing on the 10th of December 1982, and was signed by 159 countries on the first day. However, the convention did not enter into force until twelve years later, due to a lack of support from industrialised states, who were unhappy about the role of the International Seabed Authority (ISA), and the power it had over deep sea mineral resources. In 1994 an amendment was made, which gave less power to the ISA. Following this amendment industrialised states quickly adopted UNCLOS, though the United States is still unhappy about the role of the International Seabed Authority and has still not adopted it.

### 3.3 MARITIME ZONES

There are five maritime zones outlined by UNCLOS – the territorial sea; contiguous zone; exclusive economic zone; continental shelf and the high seas (see Figure 1). Each area gives a state certain rights and responsibilities.

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51 United Nations Resolution 2749 (XXV).
52 Ibid 9
Figure 1: Maritime zones and their relationship to sub sea topography (source: (Australian Geological Survey Organization)

Territorial Sea
This is defined as being twelve nM from a state’s baselines, one nautical mile being one minute of latitude at the equator, or more precisely 1852m. A state has rights of sovereignty over the territorial sea. Ships of all states have the right of innocent passage through a state’s territorial sea. There is a list of activities that defines what is not considered innocent passage. In straits which are less than twenty-four nM between adjoining countries there is freedom of navigation. This means that vessels, submerged

53 UNCLOS Article 3
54 UNCLOS Article 39 Part 3
vessels and overflying aircraft have transit of passage\textsuperscript{55} through these straits, i.e. they do not require a state’s authorisation.

**Contiguous Zone**

Originally this limit was set at twelve nM. After the Third Conference on the Law of the Sea (1973-1982), it was decided to extend this to twenty-four nM. Control of the state within this zone is limited to customs, immigration, and fiscal laws.

**Exclusive Economic Zone**

An exclusive economic zone (EEZ) extends 200 nM out from the edge of a state’s terrestrial territory. Within an EEZ the rights of a state to overfly and navigate are maintained. The coastal state has the rights to the resources within the EEZ – both living and non-living. There are jurisdictional rights as well, such as controlling scientific research, the use of artificial islands and the responsibility of the state to protect and preserve the marine environment.\textsuperscript{56} There are a number of articles that relate to the concept of the management of migratory fish stocks and straddled fisheries (when fish migrate out of EEZs – i.e. they do not adhere to human boundaries).\textsuperscript{57}

**Continental Shelf**

The outer limits of the continental shelf can be determined by scientific information presented to the Commission on the Limits of the Continental Shelf (CLCS) in New York (which is a UN body set up to specifically deal with continental shelf issues). The details of how to define the continental shelf is given in Article 76 of UNCLOS.\textsuperscript{58} Once beyond the 200 nM EEZ a state has no jurisdiction over resources living in the water column. It does however have control of the resources of the seabed and subsoil, both living and non-living.\textsuperscript{59} The living resource must live within the benthic environment. If mineral resources are going to be exploited or used within the continental shelf then payments and contributions have to be made to the International Sea Bed Authority (ISA), whose

\textsuperscript{55} Ibid 10
\textsuperscript{56} UNCLOS Article 56
\textsuperscript{57} UNCLOS Article 63 - 64
\textsuperscript{58} UNCLOS Article 76
\textsuperscript{59} UNCLOS Article 77
role is discussed later in this section. The needs and interests of developing states also need to be taken into account.\textsuperscript{60} The rights of states regarding navigation and the right of passage default to the same rights as those under the high seas.\textsuperscript{61}

**High Seas**

These are all areas that are not within an EEZ which were first defined in the 1609 document *Mare Liberum*. The high seas provides six freedoms – freedom of navigation; freedom of over flight; freedom of fishing; freedom to lay pipelines and cables; freedom to construct artificial islands and freedom to conduct scientific research. States are not allowed to inhibit other states exercising these rights.\textsuperscript{62}

**Defining Limits and Boundaries**

Defining any limit off Antarctica, be it the continental shelf or any other boundary, is not easy. Defining baselines is complicated by ice shelves, as UNCLOS does not define where a baseline extending from an ice shelf would start. Would it be from the edge of the permanent ice shelf or from where the ice shelf is grounded? This problem is not unique to Antarctica; it is also faced by a number of countries in the Arctic. Ice shelves tend to fluctuate due to calving,\textsuperscript{63} making it hard to legislate them into international law. This may be why UNCLOS does not deal with this issue.

**Defining the Continental Shelf**

The basic understanding of how the continental shelf is defined is important, as it opens up a number of interesting issues. The limit of a continental shelf is primarily determined by the morphology of the seabed, and its secondary restraint is adjacent states\textsuperscript{64}. An initial attempt to define the outer limits of the continental shelf usually starts with a preliminary study, which comprises all available data of the area, such as ship tracks, benthic information, and oceanographic charts. This helps to determine what data needs to be collected for a possible submission on a continental shelf. The continental shelf

\textsuperscript{60} UNCLOS Article 82
\textsuperscript{61} Levy (2000) 12
\textsuperscript{62} Ibid 13
\textsuperscript{63} Joyner Antarctica and the Law of the Sea (1982) 82
\textsuperscript{64} Levy (2000) 12
to be collected for a possible submission on a continental shelf. The continental shelf
defines where the thick continental crust meets the deep ocean crust. Figure 2 highlights
this concisely, with the dark blue area indicating the thin heavy ocean crust and the
yellow and red area indicating the thick lighter continental crust. The process of defining
a state’s boundary is shown in Figure 3. 65

Figure 2: The continental Shelf around New Zealand (source: NIWA) 66

65 Smith and Taft, Continental Shelf Limits – the Scientific and Legal Interface (2001)
66 National Institute of Water and Atmospheric Research’s web site:
Figure 3: Flowchart illustrating the entire procedure for a coastal state to establish the outer limit of its continental shelf. 

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Smith and Taft Legal Aspects of the Continental Shelf In: Continental Shelf Limits - The scientific and Legal Interface. 17 -24.
The main methods used to define the continental shelf are defining the foot of the slope or using a sediment equation. The foot of the slope can be defined by finding where the greatest change in gradient occurs at the base of the continental shelf, sixty nM is then added to this. This defines the outer limit of the continental shelf. A 1% sediment thickness sediment rule can also be applied. This is a complex equation involving 1% of the sediment thickness in relation to the distance to the foot of the slope.\(^68\)

The maximum possible claim from the foot of the slope is constrained by two factors:

1. a 350 nM maximum limit from a state’s baselines; or
2. a 100 nM maximum limit extending from a 2500m continuous isobath.\(^69\)

A continuous isobath can be in the form of a submarine ridge or plateau (see Figure 2), as long as it is continuous with the continental shelf. In fact the continental shelf can extend into another state’s EEZ. A situation may then arise where one state has jurisdiction over the resources in the water column and the other state has control of the benthic resources. This actually occurs between Australia and East Timor.

**3.4 KEY BODIES ESTABLISHED UNDER UNCLOS**

**Commission on the Limits of the Continental Shelf (CLCS)**

The role of this Commission is set out in Annex II of UNCLOS as stated below.

(a) To consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with Article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea;

(b) To provide scientific and technical advice, if requested by the coastal State concerned during preparation of such data.\(^70\)

"In accordance with Article 76(8), the Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their

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\(^68\) United Nations Law of the Sea VI (76)  
\(^69\) Ibid  
\(^70\) United Nations Law of the Sea Annex II(3)
continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.\textsuperscript{71}

The commission on the continental shelf is made up of twenty-one experts in oceanography, geophysics and hydrology from a range of countries.\textsuperscript{72}

If a country is submitting material to the commission, then there are to be no experts from that country on the commission at the time the submission is heard. This has interesting implications for states that plan to make a submission based on their Antarctic territory. It is highly likely that when a state submits its evidence most, if not all, the experts on the commission will not recognise the Antarctic territory that the claimant state is basing its claim on. Australia, Britain, New Zealand, France and Norway are the only countries that recognise each other's claims. This is a moot point though, as all territorial claims are frozen for the duration of the Treaty.

Each country initially had a ten year time frame to make its submission to the commission after the UNCLOS convention has been ratified in law by the state.\textsuperscript{73} If a state fails to make a submission to the commission with regard to its continental shelf then the states outer continental limit will default to the 200 nM limit.\textsuperscript{74} This deadline has been extended by two and a half years, due to concern raised by Pacific Forum countries that they might not be able to meet this date due to a lack of knowledge and technology. This now gives states twelve and a half years to present evidence to the commission. The reason for this extension is to allow a transfer of technology to developing countries.\textsuperscript{75}

\textbf{International Seabed Authority (ISA)}

This is an independent international organisation from the UN and was set up in Jamaica


\textsuperscript{72} Commission on the Limits of the Continental Shelf (CLCS) Members of the Commission, \texttt{http://www.un.org/Depts/los/clcs_new/commission_members.htm#Members} viewed 14\textsuperscript{th} of January 2003

\textsuperscript{73} United Nations Law of the Sea Annex II(3-4)

\textsuperscript{74} United Nations Law of the Sea Annex II(4)

on the 16th November 1994, and became fully operational in June 1996. The ISA is made up of several different bodies. It has an Assembly, a Council, a Legal and Technical Commission, and a Finance Committee. The main role of the ISA is to administer the use of resources of the sea floor.

**The International Tribunal on the Law of the Sea (ITLOS)**

In 1996 the International Tribunal on the Law of the Sea was set up in accordance with Annex 6 of UNCLOS. Currently there are twenty-one members. The tribunal is based in Hamburg Germany. One of the purposes is to sort out disputes between states. A state can bring a dispute to the Tribunal. The tribunal then has the power to prescribe provisional measures and to give advisory opinions. Disputes are decided by a majority vote of the members of the tribunal, with decisions being final and binding between the parties involved in the dispute. Disputes over UNCLOS claims and the ATS could easily end up here. The tribunal has already been used to settle UNCLOS disputes in Antarctic waters. In 2002, Australia detained a Russian trawler for illegal fishing. Australia was later ordered to release the trawler once a suitable bond had been posted.

**3.5 SUMMARY**

UNCLOS is an important international agreement. Its main purpose is the allocation of marine resources and the resolution of marine disputes. It brought together the international conflicting laws of individual states into one document, and established continuity. It was developed from 1957 – 1982 and came into force in 1994. UNCLOS also outlined five marine zones for states, territorial sea, continuous zone, EEZ, the continental shelf and the high seas. It also established a number of international committees and bodies to deal with the delimitation of the various marine zones, and the administration of marine resources on the continental shelf and the high seas.

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4 OVERLAPPING JURISDICTIONS

4.1 THE INTERSECTION OF UNCLOS AND THE ATS

There are two main overlapping legal regimes in Antarctic waters, UNCLOS and the ATS. The Antarctic Treaty applies to the area south of 60 degrees South latitude, although it does not specifically deal with marine resources. The main tool under the ATS system which deals with marine resources is the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), which applies to the Antarctic and Southern Ocean ecosystem south of the Antarctic Convergence. The Antarctic Convergence is not a definitive boundary - it fluctuates between 45 and 60 degrees South latitude\(^{79}\), and was chosen as the boundary for CCAMLR because it is the natural northern feeding and breeding limit of many marine species (see Figure 4). This boundary demarcation allows a holistic ecosystem approach to be used by CCAMLR in managing this area.

Figure 4: Map showing the Antarctic Treaty and CCAMLR areas

UNCLOS applies to all the world’s oceans. UNCLOS has jurisdiction over these areas, including the CCAMLR area and the Antarctic Treaty area. However, in the Antarctic, the jurisdictional capacity of the UNCLOS is not generally exercised unless a state which is party to UNCLOS requests that the International Tribunal on the Law of the Sea (ITLOS) intervenes in a situation. In this case ITLOS would provide advice or prescribe provisional measures. For example, in the case of the Volga (Russian Federation v. Australia, December 2002), an illegal Russian fishing boat captured by Australian military personnel in the Southern Ocean, the Russian Federation appealed to ITLOS for the release of the boat and three crew members. Although dealing with an incident in the CCAMLR area, ITLOS was able to make a judgement because it had been asked to by a
state party to UNCLOS (Russia) and the other state concerned (Australia) is also party to UNCLOS.  

From a legal standpoint, the interaction of the ATS is UNCLOS a legal haze. Which treaty has primacy? It depends on the specific issue at hand. Article VI of the Antarctic Treaty makes reference to UNCLOS having primacy with respect to rights of the high seas (see chapter two). However, this does not apply to EEZs. Until sovereignty disputes are resolved, and this issue could be held in abeyance indefinitely, it appears that the ATS will generally supersede the UNCLOS EEZ provisions.

4.2 SUMMARY

In the context of Antarctica, the Antarctic Treaty clearly prevails over territorial claims whilst it is in force. Until the issue of sovereignty is resolved or held in abeyance forever, the application of EEZs to Antarctic waters cannot comfortably be applied under UNCLOS.

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5 INTERNATIONAL LAW IN ANTARCTICA

5.1 SOURCES OF INTERNATIONAL LAW AND ITS DEVELOPMENT IN ANTARCTICA

There is a great deal of debate surrounding what the sources of international law are as the international legal system is highly decentralised and, unlike national or regional legal systems, lacks a hierarchical structure. This section is a simplistic summary of an extraordinarily complicated subject area. However, for purposes of this study it will provide a reasonably sound basis for understanding the equally complicated issues of international law as it applies in the Antarctic. Understanding how international law develops will provide an understanding of why undertaking the process of establishing an Antarctic EEZ potentially raises the likelihood of state control of marine resources. It also potentially strengthens a state’s territorial claim in Antarctica. However, these assumptions may not hold true whilst the Antarctic Treaty is in force.

Article 38 of the Statute of the International Court of Justice (ICJ) provides what is accepted generally as the sources of international law:

The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

b) international custom, as evidence of a general practice accepted as law;

c) the general principles of law as recognized by civilized nations;

d) ...judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
Each item in Article 38 is analysed below in relation to Antarctica:

- “Convention” can also mean “treaty”. A treaty is a formal agreement between two or more states and is considered to be “the major instrument of cooperation in international relations”. Treaty law is also referred to as “hard law” as parties to a treaty are bound by its rules. The Antarctic Treaty and UNCLOS are the two major international agreements applicable to the Antarctic although many others are in force.

- International custom refers to the observation of general rules that are accepted as law such as the practice of diplomatic immunity. Customary law requires consistency and uniformity of state practise. It also requires repetition – a single precedent is not enough to establish a customary rule. Customary norms do not require practice in all states. Therefore, a state may be bound by the general practice of other states unless it continuously protests against the emergence and establishment of a customary rule. In this situation, the dissenting state is a “persistent objector” and the rule is not binding on this state. This is important in terms of claims to Antarctic territory and consequently to Antarctic EEZs which essentially rely upon the existence of sovereign territory for their demarcation.

While the definition and application of an EEZ is set out in a treaty, agreement has not been reached over the legal acceptability of various ways of asserting an Antarctic territorial claim. Claimant states therefore attempt to establish customary rules of international law to validate their claim. However, non-claimant states and states that have made counter-claims necessarily become “persistent objectors” to these attempts, or try to establish alternate or contradictory customary rules in order to protect their own interests.

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82 Ibid, 123
83 Non-claimant states, notably the US and USSR, view Antarctic claims as illegitimate due to several points of customary international law including lack of “effective occupation”. Argentina, Chile and Great Britain have claimed overlapping areas – Chile and Argentina disagree upon their respective territorial boundaries in this area but agree that the Antarctic Peninsula should be South American. Naturally, Great
“Effective occupation” is the most widely accepted form of territorial claim in international law. However, due to Antarctica’s harsh climate it was assumed that this was impossible on the continent. This lead to states attempting to assert claims by reason of discovery and exploration, primacy, contiguity, proximity and propinquity, geological affinity, historic right, the “sector principle” (as applied in the Arctic) and symbolic acts such as setting up post offices in Antarctica.⁸⁴

It is important to note that state practice consists only of what states do and do not do, not what they say they are doing.⁸⁵

- “General principles of law” can mean the general principles of international law, the general principles of national laws or both. Examples are the “precautionary principle” and the principle of state equality.⁸⁶ Where there is a gap in international law it may be addressed by using principles shared by all or most national legal systems.

- “Judicial decisions” may be produced by the ICJ itself, national courts or other international judicial bodies such as regional courts, specialist international courts and tribunals. In relation to Antarctica and the establishment of EEZs, international law could arise from the decisions of ICJ dispute resolutions, the findings of the International Seabed Authority, the United Nations Commission on the Limits of the Continental Shelf or possibly statements of the ATCMs.

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⁸⁶ The precautionary principle: where “lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation where there are threats of serious or irreversible damage” - Kiss & Shelton, International Environmental Law (2000) 45; The principle of equality of states has been enshrined in the United Nations Charter, Article 2(1).
• “Publicists” has been interpreted as meaning “learned writers” which may
include, *inter alia*, suitably qualified academics, judges and lawyers.

Other possible sources of international law include the acts of international organisations
and “soft” law.

• The acts of international organizations could constitute a resolution of the General
Assembly of the United Nations, a decision of the European Community or
possibly measures agreed by the ATCM.

• “Soft” (non-binding) law such as a treaty which is not in force, the resolution of
an international conference or guidelines specifically drafted as non-legal. Soft
law may have an “anticipatory effect in judicial or arbitral decision-making as
supporting arguments in interpreting the law as it stands”\(^\text{87}\) and has considerable
influence in shaping states’ behaviours.\(^\text{88}\) It may also transform into hard law over
time. For example, the soft law principles of setting aside territorial claims and
focussing on scientific and international cooperation in Antarctica during the IGY
were later enshrined in the Antarctic Treaty (hard law). Potentially, various
IAATO or COMNAP guidelines could become law under the ATS should they be
practised widely and effectively amongst the parties to the Antarctic Treaty.

Akehurst neatly describes the process of determining which source of international law
prevails: “…the different sources of international law are not arranged in strict
hierarchical order. Supplementing each other, in practice they are often applied side by
side. However, if there is a clear conflict, treaties prevail over custom and custom
prevails over general principles and the subsidiary sources.”\(^\text{89}\) Further, in 1988 the ICJ
stated “[it is] the fundamental principle of international law that it prevails over domestic

\(^{87}\) Malanczuk P(ed), *Akehurst’s Modern Introduction to International Law* (1997), 55
\(^{88}\) Ibid, 54
\(^{89}\) Ibid, 57
law” and “a state cannot avoid its international responsibility by the enactment of domestic legislation which conflicts with its international obligations.”

5.2 WHY STATES OBEY INTERNATIONAL LAW AND WHY THIS MAY HELP TO MAINTAIN THE STABILITY OF THE ATS

“Normative commitment through personal morality means obeying the law because one feels the law is just; normative commitment through legitimacy means obeying a law because one feels that the authority enforcing the law has the right to dictate behaviour.” This is applicable to states too.

For a rule to be effective it must be sufficiently persuasive that those addressed by the rule feel obliged to obey it. When a rule or its application is considered “legitimate” by those to whom it is directed, it is because the rule is made or applied in accordance with an accepted process. It should therefore promote voluntary compliance. International law requires a high degree of voluntary compliance due to the lack of enforcement mechanisms available. It therefore requires a very high degree of legitimacy in its rules. The perceived legitimacy of international law it is a determining factor in whether states obey their international obligations.

Both the Antarctic Treaty and UNCLOS were formed through extensive consultation and negotiations. These processes gave legitimacy to these agreements. Therefore it is unlikely that a state would breach their international obligations under these two treaties.

Stokke and Vidas have analysed extensively the legitimacy of the ATS and conclude that it is a robust regime that “stands forth as more effective and legitimate than ever before”. While the regime faces identified challenges, they predict that its legitimacy will ensure its stability and survival. Furthermore, the UN is arguably the only international body capable of taking governance of the Antarctic region from the ATCM.

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91 Franck, 25  
92 Franck, 26  
However the UN Security Council and the ATCM make decisions by consensus and the key players of both groups are the same. Therefore this is a highly unlikely scenario as these states have an interest in maintaining the ATS.

The stability of the ATS is only likely to be threatened in the event that a hostile state or group of states takes control of Antarctica by use of force. This scenario would be driven by an extreme need for resource extraction as the technology and finance required to achieve this would be enormous. While unlikely it is not out of the question. As this case would be flagrant disregard for international law the perpetrators would not be concerned about establishing EEZs before plundering the Southern Ocean.

If the declaration of an Antarctic EEZ is considered a declaration of sovereignty, then, under customary international law, the declaration could be regarded as initiating the basis of an “historic right”, a “symbolic act” and arguably an “effective occupation”. In time, the act of declaration could therefore be recognized as a legitimate form of territorial claim (see chapter five). However, Article IV of the Antarctic Treaty emphasizes that a state’s Antarctic activities do not strengthen or weaken “any basis of claim to territorial sovereignty in Antarctica”. This provision was included to prevent claims by “stealth” i.e. it precludes states from using customary international legal norms to “build up” their claim for the duration of the Treaty. For that reason, the declaration of an Antarctic EEZ will not lend credence to any terrestrial territorial claim while the Antarctic Treaty is in force.

If the declaration of an Antarctic EEZ is not considered a declaration of sovereignty, Article IV of the Antarctic Treaty still applies and the act of declaring an EEZ does not enhance the basis of a continental territorial claim in Antarctica.

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94 US, Russia, France, China and the UK are the five permanent members of the UN Security Council.
95 International agreements breached in this scenario would include, inter alia, the Antarctic Treaty, UNCLOS and the Charter of the United Nations “use of force” provisions.
5.3 SUMMARY

Recognising EEZs

EEZ claims rely on the existence of sovereign territory for their demarcation. However, agreement has not been reached over the legal acceptability of various Antarctic territorial claims under customary international law and therefore the application of EEZs in the Antarctic is highly questionable.

Will the recognition of an Antarctic EEZ lend credence to any terrestrial claims?

Claimant states attempt to use customary rules to validate their claim. Non-claimant states and counter-claimant states become “persistent objectors” to these attempts and also try establishing contradictory customary rules in order to protect their own interests. The Antarctic Treaty sets out that a state’s Antarctic activities do not strengthen or weaken “any basis of claim to territorial sovereignty in Antarctica” i.e. it prohibits building up claims by use of custom. Therefore, even if it was agreed that the Antarctic claims had sovereignty (the Treaty would be defunct in this case), the declaration of EEZ cannot build support for existing claims for the Treaty duration.

Will the recognition of an Antarctic EEZ destabilise the ATS?

Both the Antarctic Treaty and UNCLOS were formed through extensive consultation and negotiations. These processes gave legitimacy to these agreements. In theory, it is therefore unlikely that a state would breach their international obligations under these two treaties. The stability of the ATS would be preserved.

The issue of control of marine resources could destabilise the ATS. But, the ATS would need to destabilise before an EEZ could be recognised, as sovereignty has to be established for this to occur. There are many “checks and balances” in international relations which would enable the ATS equilibrium to continue. These include diplomatic pressure, logistics, economics, education and other international legal instruments. Use of force is a distant possibility as a means of controlling governance of Antarctica.
6 EEZs AND ANTARCTICA

6.1 IS THE DECLARATION OF AN EEZ A DECLARATION OF SOVEREIGNTY?

The Antarctic Treaty sets aside all territorial claims of the Antarctic continent for the duration of the treaty. The Treaty appears to be robust, and has withstood the rigours of the Cold War and mining issue, which was debated in the 1980s. It remains to be seen whether the Treaty will be strong enough to withstand the claims for EEZs.

Those countries who do not have a claim to Antarctic territory would not favour the declaration of an EEZ by the claimant states, because:

- an EEZ would substantially increase the size of those territories already claimed;
- an EEZ could make that section of the Southern Ocean off limits to other countries, with the country claiming the EEZ possibly gaining economic benefits;
- an EEZ claim may potentially disrupt the ecosystem monitoring approach used by CCAMLR to manage the Antarctic and Southern Ocean ecosystem, which could adversely effect fisheries management.\textsuperscript{96} Some may even consider this as a regressive step in CCAMLR's progression as an all-encompassing authoritarian body for the governing of this area.\textsuperscript{97}

An important point in this argument is the fact that an EEZ would go against Article IV of the Treaty, in which everyone agrees to set aside all Antarctic territorial claims for the duration of the treaty. A crucial factor in this argument is whether the declaration of an


\textsuperscript{97} Fracioni, F. 1996 A Decade of development in Antarctic International Law in \textit{International Law in Antarctica} Fracion, F. & Scovazzi, T. (Eds) p 1-17.
EEZ is a declaration of sovereignty, either in its own entity or by enacting the sovereignty of the adjacent territorial claim, with both scenarios directly going against Article IV of the Treaty.

To claim an EEZ under UNCLOS, a country must be a coastal state, because an EEZ is defined by the extension of the continental shelf, which is a natural extension of the adjacent landmass. Thus, in order to declare an EEZ in Antarctic waters, a country must be a coastal state of Antarctica, which would require this country to have (recognised) territorial sovereignty of that part of the continent which they claim. Therefore, the declaration of an EEZ is a declaration of sovereignty. However, to have recognised territorial sovereignty, a country’s claim must be legitimately acknowledged by other countries to exist, and this cannot happen while the Treaty is in force. Even if the Treaty were to lapse, territorial claims may not be legitimately recognised by some countries, which would still prevent territorial sovereignty of some countries being established. As stated in Article IV, “No new claim or enlargement of any existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.” This is succinctly expressed by Pallone (1978):

“...sovereignty over the continental shelf depends upon sovereignty over the adjacent land mass. In the absence of sovereignty over the Antarctic land mass under the treaty regime, there can be no sovereignty over the continental shelf.”

This means that currently, and for the duration of the Treaty, because no territorial claims are recognised, no state can exist as a coastal state in the Antarctic context. Therefore, no EEZ can be claimed without it being a declaration of sovereignty.

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98 The UK, Australia, New Zealand, France and Norway mutually recognise each other’s claims. Argentina, Chile and the UK have overlapping claims – Argentina and Chile disagree on their respective territorial boundaries but agree that the Antarctic Peninsula should be South American. The UK disputes this claim. The USA and USSR view all seven claims as illegitimate, due to several points of international law, including a lack of “effective occupation”. Elliot, L.M., *International Environmental Politics: Protecting the Environment* (1994).

Consequently, it may transpire that no EEZ claims will be substantiated as long as the Antarctic Treaty is in place.

On the other hand, *in certain circumstances* the declaration of an EEZ under UNCLOS may not be considered a declaration of sovereignty, and therefore will not breach Article IV of the Antarctic Treaty. Australia’s EEZ submission, which is detailed in chapter seven, relies upon two main points:

1. that the expression of “territorial sovereignty” is commonly used to only apply to land, and not marine spaces, therefore suggesting that the right to an EEZ is not an extension of sovereignty but a direct operation of law.\(^\text{100}\)
2. that their claim does not breach Article IV of the treaty, because their EEZ claim predates the Treaty i.e. it is a point of history.

6.2 WHERE WOULD THE DECLARATION OF AN EEZ LEAVE OTHER ATS CONSULTATIVE MEMBERS?

Australia will be the first to make an EEZ claim off its claimed continental Antarctic Territory, because it was the first country that has a claim to Antarctic territory to ratify the United Nations Convention on the Law of the Sea, in October 1994. Once ratifying, countries initially had ten years to submit proposals for extending their Exclusive Economic Zones off any of their territories, to the United Nations. This has now been extended to twelve and a half years, giving Australia until May 2007 to submit its claim.\(^\text{101}\)

For the first sixty states who signed UNCLOS, the convention entered into force twelve months after the sixtieth state had ratified, which was December 1994. For those states who ratified UNCLOS after this time, which includes all seven claimant states, UNCLOS entered into force thirty days after each country had ratified. The following table shows when each of the claimant states ratified UNCLOS, and their deadline to make a claim

\(^{100}\) Ibid, 14
for extending their continental shelf limit, which is twelve and a half years after the date of entry into force.

Table 1: Key UNCLOS dates for claimant states

<table>
<thead>
<tr>
<th>Claimant state</th>
<th>Entry into force</th>
<th>Deadline</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>October 1994</td>
<td>May 2007</td>
</tr>
<tr>
<td>Argentina</td>
<td>December 1995</td>
<td>July 2008</td>
</tr>
<tr>
<td>France</td>
<td>April 1996</td>
<td>November 2008</td>
</tr>
<tr>
<td>Norway</td>
<td>June 1996</td>
<td>January 2009</td>
</tr>
<tr>
<td>New Zealand</td>
<td>July 1996</td>
<td>February 2009</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>July 1997</td>
<td>February 2010</td>
</tr>
<tr>
<td>Chile</td>
<td>August 1997</td>
<td>March 2010</td>
</tr>
</tbody>
</table>

The resulting decision of Australia’s EEZ claim to the UN will be watched very closely by both the UN community and the ATS community, as it may prove to be a turning point in the history of the Antarctic Treaty System.

Whatever the outcome of the claim, a proverbial can of worms will undoubtedly be opened. This will lead to many more questions being asked and further discussions. The ATS Consultative Members will be particularly interested in the outcome, especially the six other claimant states. For these six countries the UN decision will probably factor highly in their own EEZ claim, or whether they submit EEZ claims at all.

There are six foreseeable outcomes to the UN recommendation of Australia’s continental shelf limit claim:

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1. That the UN will extend Australia’s EEZ claim off their Antarctic territory, possibly as a way of implementing patrolling mechanisms to ensure that regulations are followed and to prevent illegal fishing. For the claimant states, this outcome may be the most desirable, because it will probably be interpreted as a strong indication that their own future EEZ claims will be favoured. However, for those ATCPs who do not have historical claims, the UN declaration will probably be received poorly for three main reasons. Firstly, this situation could be viewed as UN involvement being brought into the ATS by a claimant state, and not necessarily with the agreement of the other ATCPs. Since its inception, the ATS has opposed the inclusion of the UN to deal with Antarctic-related matters. For this reason, even the claimant states may not desire this outcome. The second reason is that the non-claimant states will probably view this as a declaration of sovereignty, which directly goes against Article IV of the Treaty. Another reason, although not political in nature, is that the ATCPs may view the declaration of EEZs as a disruption to the ecosystem approach used by CCAMLR to manage the area south of 60°S, which could have ecological ramifications, such as the area becoming unsustainable.

2. That the UN will reject the Australian claim, with their main reluctance probably being the fact that declaring an EEZ off the Australian Antarctic Territory would be equivalent to declaring sovereignty. This would go directly against Article IV of the Treaty (as indicated in the previous section). It would not be desirable, as the states party to the Antarctic Treaty do not want to destabilise the treaty system. As well as prohibiting the possibility of asserting a sovereign claim, Article IV also rules out the possibility of denying a sovereign claim - “No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty...” – implying that the UN not only has no basis for endorsing Australia’s sovereign claim, via the vector of extending their EEZ, but also has no basis for denying their sovereign claim – i.e. that the UN will not be able to deny Australia’s claim.
3. That the UN will declare the waters off the Antarctic continent not available to be claimed as part of a country’s EEZ, until such time as territorial claims are legitimately recognised in Antarctica. This scenario could possibly happen even before Australia’s deadline of 2007, in which case it is likely that Australia would not even make a claim.

4. That when Australia submits its EEZ claim to the UN, other countries who are party to UNCLOS will not recognise it, and may bring the dispute to the International Tribunal on the Law of the Sea (ITLOS). This dispute may be brought either by a state that is party to the ATS, which may cause friction between the party states, or by a non-party state, in which case the boat would probably still be rocked, but not from within the realms of the ATS. The ITLOS has the power to prescribe provisional measures and give advice on such matters.

5. That the UN will not make its own recommendation about the issue, but instead will pass the responsibility onto CCAMLR, as technically any area south of 60°S is in their jurisdiction, and hence the marine living resources of any proposed EEZ is their responsibility.

6. The status quo will be maintained. That is, Australia will maintain that they have a 200 nautical mile EEZ, which will continue to not be recognised by other states. Their submission to have it extended to the edge of the continental shelf will not be granted.

We consider it most likely that the first outcome will not eventuate, as this would probably be the most controversial and problematic. We think that either outcome two or three will be the most likely scenario, i.e. that the UN will either declare that no EEZs can be claimed off the Antarctic continent, or that they will reject Australia’s claim to extend their EEZ, probably due to the fact that it would be seen as enacting their sovereignty claim. In any case, we consider it likely that other countries will dispute Australia’s claim, and that CCAMLR may intervene in some capacity.
6.3 SUMMARY

It is difficult to say whether the declaration of an EEZ would be a declaration of sovereignty, as there are legal reasons to support both sides of the argument. However, the argument that the declaration of an EEZ would be considered a declaration of sovereignty is substantially stronger, which will probably mean that Australia’s EEZ claim will not be viewed favourably, both by Antarctic Treaty members and non-members.

The result of Australia’s proposed extended EEZ claim will be an important point in the evolution of the Antarctic Treaty, and possibly the UN, as it is a UN body which must determine the validity of a continental shelf submission.
7 CASE STUDIES

7.1 AUSTRALIA

Australia was one of the first countries to ratify UNCLOS after it entered into force in 1994.\textsuperscript{103} It had until 2004 to have its claim submitted to CLCS. This has subsequently been extended to 2007.\textsuperscript{104} Australia first declared sovereignty of the continental shelf off the Australian Antarctic Territory (AAT) in 1953, before the Antarctic Treaty was signed and negotiated. The basis of Australia’s current UNCLOS claim is that the claim to the continental shelf was already in place before claims were frozen by the Antarctic Treaty.\textsuperscript{105} In 1979 a 200nM Australian Fishing Zone was declared. In July 1994 Australia proclaimed an EEZ. Australia argued that, in accordance with Article 56 of UNCLOS, coastal states are entitled to an EEZ of 200nM adjacent to their terrestrial territory, and that due to Australia’s long-standing historical claims to the region a “proclamation of an EEZ adjacent to the Australian Antarctic Territory is merely a reflection of Australia’s territorial sovereignty in Antarctica and the progressive development of international law through the law of the sea.”\textsuperscript{106} The Australian proclaimed that the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) “will not be impeded by Australia’s EEZ adjacent to the Australian Antarctic Territory”.\textsuperscript{107}

On 2 December 1999, Australia delivered a joint press release from the Ministers for the

\textsuperscript{103} United Nations Law of the Sea website: site:

\textsuperscript{104} LINZ New Zealand Continental Shelf Report Newsletter 3 October 2001 website:


\textsuperscript{106} Scovazzi The Antarctic Treaty System and the New Law of the Sea: Selected Questions, In:

\textsuperscript{107} Ibid
Environment and Heritage and for Foreign Affairs announcing that Australia was going to define a Continental Shelf limit off the Australian Antarctica Territory (see Appendix 2 and Figure 5).\(^{108}\) The main reason for claiming this area was that “it is a once only opportunity which under current arrangements, is lost if the 2004 deadline is not met. The Howard government is not prepared to forgo the opportunity to add this area to Australia’s maritime territory.”\(^{109}\)

![Map showing the main UNCLOS marine jurisdictional zones in the Southern Ocean region. ECS – extended Continental Shelf.\(^{110}\)](image)

**Figure 5:** Map showing the main UNCLOS marine jurisdictional zones in the Southern Ocean region. ECS – extended Continental Shelf.\(^{110}\)

Australia has much to gain should their Antarctic EEZ claim be successful. It has been calculated that the claim off the AAT would be in the order of 1.2 times the size of the Australian continent itself. The combined area of Australia’s Antarctic EEZ and Antarctic extended continental shelf is estimated to be 8.84 km\(^2\).


\(^{109}\) See Supra Note 29

\(^{110}\) See Supra Note 113
The press statement went further in affirming that the Australian Government is committed to the Madrid Protocol and will not mine further south than 60 degrees. However, it was also inferred that the potential for bio-prospecting was a key driver for delimiting the continental shelf: “There are, however, other resources, such as genetic resources, which may be of value and would not involve mining. Australia's sovereign rights could be used to prevent others from exploiting the area so that the sea-bottom marine life is protected.”\textsuperscript{111}

The claim can be seen as a way of Australia trying to protect its right to bio-prospecting within its “territory”. Under UNCLOS a country has the ability to restrict scientific research within its EEZ.\textsuperscript{112} This could be the case with Australia restricting access to others carrying out bio-prospecting within it’s EEZ of the AAT. In fact, bio-prospecting has been regularly mentioned by Australia with respect to the AAT and their UNCLOS claim.\textsuperscript{113} Bio-prospecting is almost certainly one of the main driving forces for Australia’s UNCLOS claim off the AAT.

An article was posted on the Australian Antarctic Division website which defends Australia’s decision to claim off its territory with respect to the Antarctic Treaty (see Appendix 3). The article mentions various rights associated with making a claim: “These rights include the right to withhold consent from other States wishing to exploit those resources.”\textsuperscript{114} The article goes on to state that:

“The Government has not, however, decided how its rights under UNCLOS will be exercised. It has decided at this time only to define the area where the rights could be exercised, including the right to deny access to seabed resources, should it at some future date choose to do so. These are matters for future generations of Australians to determine and the Government's decision is designed to keep open Australia’s rights and options. These rights and options would be lost if the opportunity to determine the limits of the continental shelf is not taken now.”\textsuperscript{115}

\textsuperscript{111} Ibid, Senator Hill.
\textsuperscript{112} UNCLOS Article 56
\textsuperscript{113} The Australian Going Deeper down under. 29\textsuperscript{th} – 30\textsuperscript{th} June 2002.
\textsuperscript{114} Australian Antarctic Division website site: http://www.aad.gov.au/information/treaty/continentalshelf.asp viewed: 10\textsuperscript{th} August 2002.
\textsuperscript{115} Ibid
This statement seems to try and pacify those who might object to Australia’s claim by putting it bluntly - even if Australia does claim then Australia may not exercise its rights within the area. Whether other Consultative Parties to the Antarctic Treaty find this argument convincing is another matter. It seems unlikely that Australia would do this though. In fact, the British are very concerned about these political moves made by Australia.\textsuperscript{116} They are no doubt not the only concerned party. In the past when countries have even touched on the matter it has gone down like a lead balloon.

For example, New Zealand’s bid to declare the Balleny Islands as a marine reserve created a whiff of discontent amongst Antarctic Treaty members, as it was believed that New Zealand was trying to exert further Antarctic territorial claims.\textsuperscript{117} It is not hard to imagine how sensitive a potential UNCLOS claim is within the Antarctic.

In many respects the Australian government is very sensitive to this for good reason. It can be seen in many reports about Australian Antarctic and Southern Ocean Profiling Project (AASOPP) that the Australian UNCLOS claim of the AAT is only a “possible” claim.\textsuperscript{118} Other times information from the Australian government is worded in such a way as to indicate that Australia might not make a claim. For example: “This will place Australia in a position to make a submission to the UN Commission on the Limits of the Continental Shelf; should it decide to do so.”\textsuperscript{119} Whether or not Australia makes a submission remains to be seen.

Thirty million Australian dollars has been set aside over five years for the project.\textsuperscript{120} This is separate from Australian Antarctic Programme funding.\textsuperscript{121} This is a considerable sum

\textsuperscript{116} Personal communication, Chris Rapley British Antarctic Survey, 16\textsuperscript{th} of January 2003.
\textsuperscript{117} Personal communication, Trevor Hughes, New Zealand Ministry of Trade and Foreign Affairs, 15\textsuperscript{th} of January 2003.
\textsuperscript{118} AusGEO News Marine geophysical surveys completed off Antarctica, AusGEO News June/July 2002.
\textsuperscript{119} Australian Antarctic Division website site: http://www.aad.gov.au/information/treaty/continentalshelf.asp viewed: 10\textsuperscript{th} August 2002
\textsuperscript{120} Ibid
\textsuperscript{121} Australian Antarctic Division website site: http://www.aad.gov.au/information/treaty/continentalshelf.asp viewed: 10\textsuperscript{th} August 2002.
of money when you consider that New Zealand’s UNCLOS claim for the New Zealand area is forty-four million NZ dollars over a similar time period.\textsuperscript{122}

The Australian work is being carried out by the government department, Geoscience Australia, under the title of “Australian Antarctic and Southern Ocean Profiling Project (AASOPP)”. Two ships have been sent to the Southern Ocean to carry out benthic and seismic studies for the claim. The two ships are “Geo Arctic” and “Polar Duke”. These ships are operating south of Tasmania and South Africa and some of the studies have already been completed.\textsuperscript{123}

7.2 CHILE AND ARGENTINA

Chile and Argentina have often claimed that the Antarctic Peninsula is a natural extension and continuation of the Andes Mountain chain. The defining of the continental shelf will provide direct geophysical evidence as to whether this is the case or not. If continental crust is found to be continuous between the Antarctic Peninsula and South America, it could strengthen the Chilean and Argentinean case. It leaves both these countries in a bit of a “catch twenty-two” situation, as they will be looking to strengthen their claim on the Antarctic Peninsula and there is some risk that the submission will weaken their argument.

7.3 NEW ZEALAND

New Zealand ratified UNCLOS in 1996 and has until 2009 to delimit continental shelves and put a proposal to CLCS.\textsuperscript{124} New Zealand has not yet made any public statement about an UNCLOS claim off Antarctica. However, in a letter to Gateway Antarctica, the New Zealand Ministry of Foreign Affairs and Trade (MFAT) suggested that there was already


a perfectly reasonable treaty in place with regards to management of the Southern Oceans and strongly suggested that New Zealand was not going to pursue an EEZ within the Ross Dependency.\textsuperscript{125} "[New Zealand] has not so far seen the need to establish an EEZ off the Ross Dependency while there is in place an effective international Treaty management regime for living resources (CCAMLR)."\textsuperscript{126}

This statement seems to be misleading, as evidence has been found to suggest that New Zealand is pursuing an EEZ. In a newsletter about New Zealand's continental shelf programme a document is mentioned entitled "Extra Desktop study of the Ross Dependency and areas aligned with Australia."\textsuperscript{127} What is in this document is unknown but it is assumed that it is some sort of document used in preparation for a submission, going on information given about desktop studies in the same newsletter: "The methodology of the New Zealand Desktop Study has been included in the UN training manual we produced to help developing countries prepare their submissions."\textsuperscript{128} Another perspective is that NZ is carrying out the continental shelf preparatory work so a future claim could be made should the circumstances be favourable.

Further evidence concerning New Zealand's plans with regard to UNCLOS was found in briefing notes to the incoming Foreign Affairs minister:

"MFAT is to report to Cabinet by 2004 on the delimitation of the continental shelf of the Ross Dependency. If International negotiations fail to exempt the determination of the limit of Antarctica's continental shelf from the existing UNCLOS deadlines, then LINZ may be required to undertake additional work acquiring data in the Ross Sea region of Antarctica. If this eventuates, there will be costs outside the original continental shelf budget and more funding will need to be sort."\textsuperscript{129}

\textsuperscript{125} Trevor Hughes personal communication with Brian Storey of Gateway Antarctica, 16th October 2002.
\textsuperscript{126} Ibid
\textsuperscript{128} Ibid
\textsuperscript{129} LINZ Website: http://www.linz.govt.nz/ras/linz/25955/briefing_incoming_minister_policy_issues_20020826_final.pdf viewed 17th December 2002
When considering whom the document is addressed to, it suggests that if negotiations fail then Land Information New Zealand (LINZ) will be seeking further funding from the government to carry out work for a claim. It is obvious that there is some sort of contingency plan for work to go ahead if negotiations fail or depending on what decision is made on Australia's UNCLOS claim off the Australian Antarctic Territory.

After talking to an MFAT representative, it was disclosed that New Zealand does claim territorial waters of twelve nM off the Ross Dependency, and that there is some work underway with regard to defining New Zealand's continental shelf. However, it was never specified what this work actually was. It seems New Zealand wants to leave its options open with respect to an UNCLOS claim, and it largely depends on what happens with negotiations and what success Australia's claim has.

If a country does not present evidence to the CLCS by their deadline, then that country looses the rights to the relevant continental shelf. Once a claim has been accepted it is then closed.

The actual cost of implementing UNCLOS is not cheap, for instance New Zealand is spending forty four million dollars on carrying out this task, Australia are also investing large amounts of money into defining it's continental shelf. Most of this money is going into charting research vessels to collect bathymetric and geological data. The cost and expertise of defining the continental shelf puts many developing countries at a great disadvantage, as they lack many of the resources required. It also disadvantages them when negotiating with industrialised states. There are provisions though within UNCLOS for the transfer of technology to developing countries.

130 Personal communication, Trevor Hughes, New Zealand Ministry of and Foreign Affairs and Trade, 15th January 2003.
7.4 SUMMARY
Four claimant states have been looked at, Australia, New Zealand, Chile and Argentina. Australia will be the first claimant state to make a submission to CLCS, with its claim being based on the fact that it made a claim to the continental shelf prior to the development of the Antarctic Treaty System. Australia’s claim is a sensitive issue and this is recognised by Australia – the subject is referred to in the Australian media, as “a possible claim” or as “Australia may claim”. The motivation of Australia’s claim is suspected to be for bio-prospecting reasons. How Australia’s submission will be received by the CLCS is unknown. One of the main concerns with Australia’s claim is that it could restrict scientific research within an EEZ off the AAT. This could occur especially if Australia suspected that the research was linked to bio-prospecting. New Zealand has yet to indicate whether it will make a formal submission off the Ross Dependency. It is currently in negotiations, attempting to exempt the Ross Dependency from an UNCLOS submission. New Zealand is no doubt watching how Australia’s claim will be greeted. Argentina and Chile are in a “catch twenty two” situation as their UNCLOS claim could potentially strengthen or weaken their Antarctic claim.

It is obvious that UNCLOS claims off Antarctic territories concern other ATCPs and are divisive within the ATS.
8 CONCLUSION

The Antarctic environment is fragile. It is a vital indicator of the earth’s health and provides important information about the present day global environment and the earth’s history. It is critical to preserve and protect the region for science and therefore the benefit of humankind.

The need or desire for marine resources, either presently or in the future, could propel the claimant states into active pursuit of Antarctic exclusive economic zones under the United Nations Convention on the Law of the Sea provisions.

The Antarctic Treaty System
The Antarctic is governed by several agreements which comprise the Antarctica Treaty System. The Antarctic Treaty is the cornerstone of this system. The Treaty freezes territorial claims and focuses on scientific gain from and peaceful use of the continent by those states that have an interest in the region. The four agreements, which together with the Treaty make up the Antarctica Treaty System, ensure the effective and sustainable management of the Antarctica Treaty Area. Articles IV and VI of the Antarctic Treaty are the provisions which create tension with the United Nations Convention on the Law of the Sea with respect to establishing exclusive economic zones in Antarctic waters.

The United Nations Convention on the Law of the Sea is an important international agreement. Its main purpose is the allocation of marine resources and the resolution of marine disputes. It brought together the international conflicting laws of individual states into one document, and established continuity. It was developed from 1957 – 1982 and
came into force in 1994. The United Nations Convention on the Law of the Sea also outlined five marine zones for states, territorial sea, continuous zone, exclusive economic zone, the continental shelf and the high seas. It also established a number of international committees and bodies to deal with the delimitation of the various marine zones, and the administration of marine resources on the continental shelf and the high seas.

**The Current Status of Exclusive Economic Zone Claims in Antarctic Waters**

Four claimant states have been looked at, Australia, New Zealand, Chile and Argentina. Australia is the first claimant state to make a submission to Commission on the Limits of the Continental Shelf. Its claim is based on the fact that it made a claim to the continental shelf prior to the development of the Antarctic Treaty System. Australia’s claim is a sensitive issue and this is recognised by Australia. The motivation of Australia’s claim is suspected to be for bio-prospecting reasons. How Australia’s submission will be received by the Commission on the Limits of the Continental Shelf is unknown. One of the main concerns with Australia’s claim is that it could restrict scientific research within an exclusive economic zone off the Australian Antarctic Territory. This could occur especially if Australia suspected that the research was linked to bio-prospecting. The result of Australia’s proposed extended exclusive economic zone claim will be an important point in the evolution of the Antarctic Treaty System, and possibly the United Nations, as it is a United Nations body which must determine the validity of a continental shelf submission.

New Zealand has yet to indicate whether it will make a formal submission off the Ross Dependency. It is however in negotiations which are attempting to exempt the Ross Dependency from a United Nations Convention on the Law of the Sea submission. New Zealand is no doubt watching how Australia’s claim is greeted.

Argentina and Chile are in a catch “twenty two” situation as their United Nations Convention on the Law of the Sea claim could potentially strengthen or weaken their Antarctic claim.
It is obvious however that United Nations Convention on the Law of the Sea claims off Antarctic territories concern other Antarctic Treaty Consultative Parties and are divisive within the Antarctica Treaty System.

**Exclusive Economic Zones in Antarctic Waters**

Claimant states attempt to use customary rules to validate their claim. Non-claimant states and counter-claimant states become “persistent objectors” to these attempts and also try establishing contradictory customary rules in order to protect their own interests. However the Antarctic Treaty sets out that a state’s Antarctic activities do not strengthen or weaken “any basis of claim to territorial sovereignty in Antarctica” i.e. it prohibits building up claims by use of custom. Therefore even if it was agreed that the Antarctic claims had sovereignty (the Treaty would be defunct in this case), the declaration of exclusive economic zone cannot build support for or lend credence to existing claims whilst the Antarctic Treaty is in force.

The issue of control of marine resources could destabilise Antarctica Treaty System. However the Antarctica Treaty System would need to destabilise before an exclusive economic zone could be recognised, as sovereignty has to be established for this to occur. In practise, there are many “checks and balances” in international relations which would enable the Antarctica Treaty System equilibrium to continue. These include diplomatic pressure, logistics, economics, education and other international legal instruments. Use of force is a distant possibility as a means of controlling governance of Antarctica.

Both the Antarctic Treaty and the United Nations Convention on the Law of the Sea were formed through extensive consultation and negotiations. These processes gave legitimacy to these agreements. In theory, it is therefore unlikely that a state would breach their international obligations under these two treaties and the stability of the Antarctica Treaty System would be preserved. With Antarctic Treaty System stability, exclusive economic zones in Antarctic waters are unlikely to be permitted.
It is difficult to say whether the declaration of an exclusive economic zone would be a declaration of sovereignty, as there are legal reasons to support both sides of the argument. However, the argument that the declaration of an exclusive economic zone would be considered a declaration of sovereignty is substantially stronger. This implies that claims for exclusive economic zones in Antarctic waters will not be viewed favourably, both by Antarctic Treaty System members and non-members alike as Antarctic exclusive economic zones will only benefit a handful of states.

Exclusive economic zone claims rely on the existence of sovereign territory for their demarcation. However agreement has not been reached over the legal acceptability of various Antarctic territorial claims under customary international law. Therefore the present-day application of exclusive economic zones in the Antarctic is inoperable until the Antarctic Treaty dissolves and territorial sovereignty on the continent is resolved. This scenario is undesirable and arguably unworkable as there is a strong case for Antarctica and the Southern Ocean being preserved as the common heritage of mankind.
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Press Releases
APPENDIX 1: List of Abbreviations

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<tr>
<td>AASOPP</td>
<td>Australian Antarctic Southern Oceans Profiling Program</td>
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<td>AAT</td>
<td>Australian Antarctic Territory</td>
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<td>AGSO</td>
<td>Geoscience Australia</td>
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<td>ASOC</td>
<td>Antarctic and Southern Ocean Coalition</td>
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<td>ATA</td>
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<td>Antarctic Treaty Consultative Meeting</td>
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<td>Antarctic Treaty Consultative Party</td>
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<td>Antarctic Treaty System</td>
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<td>CCAMLR</td>
<td>Convention for the Conservation of Antarctic Marine Living Resources</td>
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<td>CCAS</td>
<td>Convention for the Conservation of Antarctic Seals</td>
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<td>CEP</td>
<td>Committee for Environmental Protection</td>
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<td>CHM</td>
<td>Common Heritage of Mankind</td>
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<td>CLCS</td>
<td>Commission on the Limits of the Continental Shelf</td>
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<td>COMNAP</td>
<td>Council of Managers of National Antarctic Programs</td>
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<td>CRAMRA</td>
<td>Convention for the Regulation of Antarctic Mineral Resource Activities</td>
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<td>CS</td>
<td>Continental Shelf</td>
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<td>EIA</td>
<td>Environmental Impact Assessment</td>
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<td>EEZ</td>
<td>Exclusive Economic Zones</td>
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<td>IAATO</td>
<td>International Association of Antarctica Tour Operators</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>IMO</td>
<td>International Maritime Organization</td>
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<td>ISA</td>
<td>International Seabed Authority</td>
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<td>ITLOS</td>
<td>International Tribunal of the Law of the Sea</td>
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<td>Illegal Unregulated Unreported Fishing</td>
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<td>LINZ</td>
<td>Land Information New Zealand</td>
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<td>LOS</td>
<td>Law of the Sea</td>
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<td>MFAT</td>
<td>Ministry of Foreign Affairs and Trade</td>
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<td>NIWA</td>
<td>National Institute of Water and Atmospheric Research</td>
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<td>nM</td>
<td>Nautical Mile</td>
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<td>SCAR</td>
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<td>UNEP</td>
<td>United Nations Environment Programme</td>
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APPENDIX 2: Australian Press Release, 2nd December 1999

2nd December 1999
JOINT MEDIA RELEASE: Robert Hill, Minister for the Environment and Heritage and Alexander Downer, Minister for Foreign Affairs

Move to claim extended Antarctic continental shelf
Federal Environment and Heritage Minister, Robert Hill, and Foreign Affairs Minister, Alexander Downer, today announced that the Commonwealth government will take action to define the limits of the continental shelf off the Australian Antarctic Territory so that Australia's rights under the UN Convention on the Law of the Sea (UNCLOS) can be fully exercised.

Under UNCLOS countries are entitled to an Exclusive Economic Zone (EEZ) extending 200 nautical miles from the coastline. Nations may also exercise sovereign rights over the physical continental shelf in areas beyond the EEZ.

Mr Downer said that it was believed that the continental shelf off our Antarctic Territory extended up to a further 150 nm beyond our existing EEZ - an area the size of Queensland.

"Under the rules of UNCLOS, Australia has until 2004 to lodge data delineating this additional area," Mr Downer said.

"It is a once only opportunity which, under current arrangements, is lost if the 2004 deadline is not met. The Howard government is not prepared to forgo the opportunity to add this area to Australia's marine territory.

"Our claim for the extended continental shelf is consistent with our approach to the continental shelf around Australia for which data is already being collected."

Senator Hill said that, once accepted, a country has exclusive rights for the purpose of exploring sea-bed natural resources, which include minerals as well as sedentary living resources of the seabed.

"The lodging of a claim for this area does not, however, indicate a weakening in the government's support for the Madrid protocol which prohibits mining south of 60 degrees south for at least 50 years.

"There are, however, other resources, such as genetic resources, which may be of value and would not involve mining. Australia's sovereign rights could be used to prevent others from exploiting the area so that the sea-bottom marine life is protected," Senator Hill said.

The government will provide approximately $30 million over five years (depending on final chartering costs) for the necessary research and survey work in the region.
APPENDIX 3: Australia’s Defense of Making a UNCLOS Claim.

From the Australian Antarctic Division website.
Now posted at:

What has the Australian Government decided?
On 2 December 1999 the Minister for the Environment and Heritage, Senator Hill, and the Minister for Foreign Affairs, Mr Downer, announced that the Australian Government will take action to define the limits of the continental shelf off the Australian Antarctic Territory (AAT).

To implement this decision the Government will provide approximately $30 million over 5 years for the survey work required to establish the baselines, determine the foot of the continental slope, and delineate the outer limit of the shelf.

Undertaking the survey work will enable the Government to lodge the necessary data with the Commission on the Limits of the Continental Shelf (CLCS) before November 2004, the deadline established by Annex II, Article 4 of the United Nations Convention on the Law of the Sea (UNCLOS). Australia must submit data before this deadline if it wishes to exercise its rights under Article 77 of that Convention.

What continental shelf rights under UNCLOS does Australia wish to exercise?
Article 77 of UNCLOS provides coastal States with exclusive rights to the natural resources (i.e.: the mineral and sedentary living resources) on the continental shelf (but not the water column above). These rights include the right to withhold consent from other States wishing to exploit those resources. The purpose of the Government’s decision is to enable Australia, in accordance with UNCLOS, to define the outer limit of the area in which those rights may be exercised.

Australia will give effect to its obligations under the Protocol on Environmental Protection to the Antarctic Treaty (the Madrid Protocol) and not exercise mining rights in the Antarctic Treaty area.

The Government has not, however, decided how its rights under UNCLOS will be exercised. It has decided at this time only to define the area where the rights could be exercised, including the right to deny access to seabed resources, should it at some future date choose to do so. These are matters for future generations of Australians to determine and the Government’s decision is designed to keep open Australia’s rights and options. These rights and options would be lost if the opportunity to determine the limits of the continental shelf is not taken now.

Is Australia’s action consistent with Article IV of the Antarctic Treaty?
Yes. Australia is fully committed to the Antarctic Treaty and is among its strongest defenders. We will not take action contrary to our Treaty obligations. Australia is an original signatory to the Treaty and an important component of the Government's goals for the Australian Antarctic Program is maintaining the Antarctic Treaty System.

Article IV of the Antarctic Treaty provides that no new claim, or enlargement of an existing claim to territorial sovereignty in Antarctica shall be asserted while the Treaty is in force. This is not a new claim. Australia has had a long standing historical claim to territory in Antarctica since 1936. Australia first proclaimed a continental shelf off the AAT in 1953, well before the Antarctic Treaty was negotiated and entered into force. Accordingly, this decision is consistent with the position held at that time and subsequently. This is, however, the first time that Australia has taken action to define the outer limit of the continental shelf adjacent to the AAT and, with entry into force of UNCLOS, there is a prescribed procedure and a deadline for taking such action. Australia intends to define those limits strictly in accordance with the provisions of UNCLOS.

This is not an enlargement of an existing claim, but is the exercise of rights under international law, as reflected in UNCLOS, flowing to Australia as a consequence of Australia's existing sovereignty over the AAT.

Australia has consistently acted to support its position as a State which has territory in Antarctica. Australia's policy position to maintain its sovereignty has not changed, nor has Australia acted other than in accordance with prevailing international law. Australia has previously asserted maritime zones in the Antarctic (a territorial sea, exclusive economic zone and continental shelf) on the basis of the pre-existing terrestrial claim and progressively as allowed by the subsequent development of international law. This decision is a logical continuation of that practice and takes full account of Australia's obligations under the Antarctic Treaty.

Is Australia's action consistent with Article VI of the Antarctic Treaty?
Yes. Article VI of the Antarctic Treaty provides that the Treaty shall apply to the area south of 60° South but that nothing in the Treaty shall prejudice the rights of any State under international law with regard to the high seas in that area. Australia is not interfering with any high seas rights - it is exercising coastal States' rights, as reflected in UNCLOS, incidental to its existing sovereignty over the AAT.

Is Australia seeking to exploit sea bed minerals in Antarctica?
No. Australia was a leading promoter of the negotiations which led to the adoption of the Madrid Protocol. Australia remains a strong supporter of the Protocol, including the prohibition on mining. The Ministers' announcement makes it clear that Australia has no intention of retreating from that position.

Australia expects that a proportion of the continental shelf will extend north of the Antarctic Treaty area and thus will not be covered by the Protocol's prohibition on mining, but this does not mean that Australia will seek to mine in that area.
Australia was the first country to prohibit mining in Antarctica by enacting legislation in 1991, before the Madrid Protocol was adopted. Australian law prohibits mining anywhere south of 60° South.

Australia notes that under UNCLOS a coastal State has rights to sedentary living resources on the sea bed. There may also be genetic resources. It is not known if there are such resources in Antarctic waters, but Australia is prepared to hold open the opportunity for such resources to be discovered and for their sustainable use. This would not involve mining and would be consistent with the Madrid Protocol.

How does this decision sit with Australia’s position on protecting the Antarctic environment?

Australia regards the Antarctic Treaty system as fundamental to the protection of Antarctica and is active in supporting the objectives and principles of all of the instruments established under the Treaty system to protect the Antarctic environment. Under Article 77 of UNCLOS a coastal State has exclusive rights to sea bed resources on the continental shelf and other States wishing to use those resources must have the consent of the coastal State. Accordingly, Australia is able to use its rights under UNCLOS to protect the environment by denying access to those sea bed resources by other States. The Ministerial announcement makes it clear that this was one of the Government’s considerations in making this decision.

Why has Australia taken the decision now and not other claimants?

Article 4 of Annex II of UNCLOS provides that where a State intends to establish the outer limits of the continental shelf in accordance with Article 76 of the Convention, it must submit particulars of such limits to the Commission on the Limits of the Continental Shelf (CLCS) within 10 years of the entry into force of the Convention for that State. In Australia’s case, that deadline is in November 2004.

Australia is the first of the Antarctic claimant States to reach the 10 year deadline. The deadlines for other Antarctic claimants fall in 2005 (Argentina), 2006 (France, Norway and New Zealand), and 2007 (United Kingdom and Chile). Therefore, this has not become a pressing issue for any claimant other than Australia.

Australia has put off taking a decision for as long as possible. But if a submission of data that satisfies UNCLOS requirements is to be made to the CLCS by 2004 the collection of data must commence now. UNCLOS does not prescribe what happens should a State fail to meet its deadline, but we must assume that a possible consequence is that failure to meet the deadline means foregoing the rights which may be exercised over the continental shelf. Australia is not prepared to take that risk.

Australia had hoped that the CLCS would accept in 1998 the proposal that the deadline for the lodgment of submissions in respect of the continental shelf in Antarctica be deferred. That proposal, if accepted, would have allowed time for Antarctic Treaty Consultative Parties and States Parties to UNCLOS to come to an understanding on this sensitive issue. It would also have deferred the need to collect survey data. Accordingly,
Australia was disappointed that the CLCS and UNCLOS were unable to agree to that proposal when setting its procedural rules.

At the time of the Government’s decision on this matter there was little prospect of UNCLOS States reaching agreement on a way of handling the Antarctic continental shelf issue. In any event, because of the impending deadline, Australia will need to collect the required data before 2004 in case States are not able to agree to a means to defer the issue in a way that does not prejudice Australia’s interests. Thus, Australia is in the position of having to protect its interests as a coastal State in accordance with existing provisions of UNCLOS.

Is unilateral action appropriate?
Australia is not acting unilaterally. We have sought ways of working with Parties to UNCLOS and other Antarctic claimant States to find an acceptable solution to this problem, including by consulting on the prospects of achieving deferral of the obligation to submit data within 10 years. We are committed to working with other claimants, and all of our other Treaty partners, to ensure that Australia’s interests and the interests of the Treaty as a whole are respected. However, the fact that the deadline arrives first for Australia places us in a position where, for the reasons explained above, Australia cannot wait indefinitely for a satisfactory solution to be achieved by diplomatic means and must start collecting the data now.

Australia will continue to work in close cooperation with its Treaty partners to achieve a strategy which protects our options, and the interests of others, in the long term. Australia encourages frank discussion and creative solutions to the problem.

What would happen if Australia did not take this action?
Under the current provisions of UNCLOS, if Australia does not submit data to delineate the limits of the Antarctic continental shelf by 2004 it is possible that it would forego the rights made available by UNCLOS. For the same reason, Australia is intending to submit data for the maritime areas around the rest of Australia and its other external territories by 2004, and no-one has disputed that failure to lodge the data for those areas could prejudice Australia’s interests.

With respect to Antarctica, Australia has consistently acted in accordance with its position as a State claiming territorial sovereignty. Failure to take action on this occasion could be seen as a limitation on Australia’s commitment to the AAT, a commitment which should not be doubted.

Will other Antarctic claimant States follow Australia’s action?
The 10 year deadlines for other claimant States fall after 2004 providing further time for them to decide whether to submit data. At this time the other claimants have not indicated their intentions.

What are the prospects of agreement to a special procedure for handling the continental shelf off Antarctica?
Previous proposals for a mechanism by which Antarctic coastal States could be relieved of the obligation to submit details to the CLCS within 10 years have not been successful. Adoption of special provisions for the Antarctic requires agreement of the CLCS (which has already rejected suggestions that its rules of procedure be amended to accommodate the Antarctic issue); the agreement of the Conference of Parties to UNCLOS, which requires consensus; and the agreement of the International Seabed Authority not to consider applications for deep seabed mining in areas which form part of the Antarctic continental shelf. While agreement in each of these forums might ultimately be possible, the Government assesses that this is unlikely to be achieved before 2004 and, if agreement is not achieved, it will be too late for Australia to submit data.

What will be the impact on Australia's Antarctic science program? Funding for the survey work is independent of the Antarctic science program. The findings of the survey will enhance knowledge of sea floor morphology and may be useful for future areas of research, including research aimed at improving understanding and protection of the Antarctic environment.