scientists from a claimant state, and none is demanded. The Scientific Committee on Antarctic Research (SCAR), the scientific appendage of the Antarctic Treaty system, takes a leading role in organising studies and assessments involving krill and fishery stocks, climate change, marine biodiversity, managing a census of Antarctic marine life, and conducting an ocean mapping programme to gain better knowledge of the sea floor topography in the Southern Ocean. The CCAMLR sponsored scientific research in the 1981 BIOMASS/FIBEX programmes and the 2000 synoptic survey concerning krill biomass and their distribution, and continues to do so today.

The provisions in Part III of UNCLOS pertain to the fifth issue in the law of the sea, namely the passage of vessels through international straits. In Antarctic circumstances, however, they hold little relevance in contrast to the Arctic and contested zones such as the Northwest Passage. It is true that straits do exist in the Antarctic, for example the Bransfield, Gerlache, and Lemaire Straits. Nevertheless, the ambiguous situation over whether there are actual ‘coastal states’ on the continent renders arguable at best the existence of strait states and the necessity for applying the new regime of ‘transit passage’ contained in the convention. While the regime of transit passage preserves the international status of the straits and provides for the rights of unimpeded navigation and overflight, vessels in transit passage must still observe international regulations on navigational safety, civilian air-traffic control and prohibition of vessel source pollution. In any event, these rules for safe navigation are certainly pertinent for logistical resupply vessels as well as the increasing number of tourist ships navigating around the continent’s peninsula region.

The final issue area in modern ocean law relates to the international regime for mineral resource development in the deep seabed area beyond national jurisdiction, which is contained in Part XI of the 1982 UNCLOS. This was arguably the most controversial aspect of UNCLOS and explains the reluctance of the United States to ratify its provisions. In the Antarctic these provisions would permit an International Seabed Authority to regulate seafloor development activities beyond the limits of continental shelf claims made by Australia, the United Kingdom, Norway and New Zealand, pending their approval by the UN Continental Shelf Commission. If that approval were not forthcoming, the area under the authority’s jurisdiction would probably begin at the edge of the continent. Regardless of these legal niceties, oceanographic and geophysical realities suggest that deep seabed mining arrangements applied to offshore Antarctica are never likely to occur. The circumpolar waters are ice-covered much of the year, and throughout the spring and summer months, these seas are among the windiest, coldest and harshest on the planet. There is no evidence that the objects of this mineral regime, rock concretions called polymetallic nodules or manganese nodules, actually exist in commercially recoverable quantifies on Southern Ocean’s seabed. In any event, conducting mining operation in such extreme conditions would be prohibitively expensive, never mind incredibly hazardous for operators at sea.

In conclusion, during the 50 year life of the Antarctic Treaty, the law of the sea emerged into a fully fledged legal regime for managing the world’s oceans. At the same time, parties to the Antarctic treaty had to adjust to changing political, economic, legal, scientific, environmental and geophysical circumstances affecting Antarctica and its surrounding seas. Significantly, as the law of the sea progressively changed during this period, so too did certain parties to the Antarctic parties seek to apply new concepts and principles of that law to bolster (at times controversially) their interests on and around the continent. The 1982 UNCLOS furnished the fundamental rules, principles and norms for doing so, especially in setting up agreements for conservation and preservation of living marine resources and protection of the marine environment. With respect to offshore zones of territorial jurisdiction, the lawfulness of those efforts remains polemical between the groups of claimant (including three counter-claimants) and non-claimant governments involved in the Antarctic Treaty. Finally, the geophysical conditions in the Antarctic make it unlikely that the UNCLOS regimes for strait passage and deep seabed mining will actually be applied to in the waters south of 60°S. For the foreseeable future, the modern law of the sea will most profoundly impact Antarctic waters by furnishing the ways and means for more effectively conserving the region’s living marine resources and protecting the integrity of the circumpolar marine ecosystem.

Sovereignty and the Antarctic Treaty

Donald R. Rothwell
College of Law, Australian National University, ACT 0200, Australia (RothwellD@law.anu.edu.au)

doi:10.1017/S003224740999026X

Sovereignty and Antarctic discovery

Sovereignty was and still remains one of the principal reasons for human endeavour in Antarctica. The ‘Heroic Era’ of Antarctic exploration was designed principally to seek out not only new lands including the South Pole, but also to assert territorial claims on behalf of the sovereign who sponsored these expeditions. The ‘planting of the flag’ was therefore just as much a crucial component of Antarctic discovery, as also was the conduct of science. Sovereignty and science remained twin pillars of Antarctic endeavour throughout the early part of the twentieth century, and whilst the region escaped the horrors of World War II, it did not take long after the war for Antarctic endeavours to resume on both fronts. In a decade

https://doi.org/10.1017/S003224740999026X Published online by Cambridge University Press

of frantic diplomatic activity during the 1950s, which was highlighted by the 1957–1958 International Geophysical Year and the 1959 Washington Conference, there was also the prospect in 1956 of a case before the International Court of Justice between Argentina, Chile and the United Kingdom over the contested status of territorial claims on the Antarctic Peninsula. Notwithstanding that by this time all of the current claims to the continent had by then been asserted, there had also been moves made by India in 1956 and then again in 1958 to reconsider the management of the continent with a view to its internationalisation under a framework created by the United Nations General Assembly.

The 1959 Antarctic Treaty

It was against this geopolitical and legal backdrop that the Antarctic Treaty was negotiated in 1959 in Washington. The outcome was a treaty that both promoted the ongoing freedom of scientific research on the continent, but also sought to suppress and contain sovereignty and sovereign practices such as flag planting and 'effective occupation'. In doing so, the treaty sought to pave the way for ongoing scientific cooperation and collaboration over Antarctica free of the disputes and tensions that would have inevitably arisen as a result of continuing jostling over territorial claims especially on the Antarctic Peninsula. The continent was effectively desensitised when it came to sovereignty through the wording of Article IV that states:

1 Nothing contained in the present Treaty shall be interpreted as:
   (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
   (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
   (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.

2 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 in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

An important tandem provision was Article VIII which placed limitations on the exercise of jurisdiction other than in the case of nationals.

The effect of Article IV was that it could be interpreted so as to accommodate the particular interests of all states which then had an active interest in Antarctica and which may have, or might have in the future, a sovereign interest in Antarctic territory. This meant that the then existing seven territorial claimants – Argentina, Australia, Chile, France, New Zealand, Norway, and United Kingdom – were all accommodated, whilst the interests of the two most significant non-claimants, the United States and the (then) USSR were also acknowledged, as their potential basis for a future claim was not diminished. Likewise, other original treaty parties such as Belgium and South Africa were also accounted for under Article IV, which did not revoke their capacity to assert a future claim based on their prior activities on the continent. There was, however, a significant constraint embedded within the terms of Article IV (2) which not only diminished the capacity of any treaty party to assert new claims whilst the treaty was in force, but which also made clear that no new claim or enlargement of an existing claim could be asserted whilst the treaty was operative. This limitation in particular has raised sensitivities over the life of the Antarctic Treaty due to its implications for subsequent maritime claims over the Southern Ocean under a different legal regime – the law of the sea.

The Antarctic Treaty System and sovereignty

One of the features of the Antarctic Treaty has been its capacity to evolve over 50 years into the so-called 'Antarctic Treaty System' (ATS) which extends well beyond the terms of the 1959 Treaty to encompass not only the additional recommendations, decisions, and measures adopted at Antarctic Treaty Consultative Meetings but also through the additional legal instruments which have been added over the years. The most significant of these in terms of how they impact upon sovereignty has been the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) and the 1991 Protocol on Environmental Protection to the Antarctic Treaty (PEPAT). CCAMLR raised particular sovereignty sensitivities as it sought to extend beyond the 60°S limits of the Antarctic Treaty area into parts of the Southern Ocean that were more properly characterised as sub-Antarctic, thereby encompassing several sub-Antarctic islands over which sovereignty was uncontested. The Antarctic Treaty's Article IV sovereignty formula was endorsed in Article IV of CCAMLR, however, in a recognition that sub-Antarctic sovereignty differed from that on the continent it was acknowledged that those states, which possessed sub-Antarctic islands were able to assert traditional sovereign rights. In the CCAMLR context this has proven to be significant given the need for increasingly rigorous fisheries laws and regulations, capable of being backed up by enforcement mechanisms. CCAMLR's zone of application in effect acknowledged both the Article IV formula while insisting upon a wider zone of application,

https://doi.org/10.1017/S003224740999026X Published online by Cambridge University Press

which was more in tune with the biogeographical realities of the Southern Ocean.

The PEPAT also raised sovereignty sensitivities but in a different fashion. During the 1980s there had been significant momentum within the ATS for the negotiation of an Antarctic minerals regime and this resulted in the conclusion of the 1988 Convention for the Regulation of Antarctic Mineral Resource Activities (CRAMRA). However, in an astonishing about-face the Convention was effectively abandoned within two years due to concerns over the environmental impact of Antarctic mining activities and the need instead for a more comprehensive Antarctic environmental protection regime. This proved to be the catalyst for PEPAT. However, there can be no denying that sovereignty concerns were a factor which motivated some countries such as Australia and France to quickly reject CRAMRA and move to a regime, which prohibited all mining activities for a minimum of 50 years (post entry into force of PEPAT).

Maritime sovereignty and the Southern Ocean

One of the particular dynamics which has emerged during the lifetime of the Antarctic Treaty has been developments in the law of the sea permitting countries to claim an ever expanding range of maritime zones. In 1959 the law of the sea was at a rudimentary stage of its development and the only reference the Treaty makes to the oceans is to the maintenance of high seas rights. Since that time, Coastal States have become entitled to not only claim a territorial sea, but also a 200 nautical mile exclusive economic zone, and also a continental shelf which at a minimum extends 200 nautical miles from the coast but in some instances as far as 350 nautical miles. For the Antarctic claimant states these developments have created both an opportunity and a dilemma. The opportunity is that they have been able to claim various maritime zones consistent with their rights under the law of the sea, in particular the 1982 United Nations Convention on the Law of the Sea, whilst the dilemma is that such claims could be interpreted as being contrary to Article IV (2) of the Treaty because they constitute ‘new claims’.

The sensitivity over Southern Ocean maritime claims has been particularly highlighted over the past five years as a number of Antarctic claimants have sought to present submissions before the UN Commission on the Limits of the Continental Shelf (CLCS) asserting their rights to claim an outer continental shelf beyond 200 nautical miles. In Australia’s case, whilst it chose to present data to the CLCS justifying a claim offshore the Australian Antarctic Territory, it asked that the claim not be considered for the time being as a direct acknowledgement to Article IV’s limitations on ‘new claims’. Nevertheless, Australia’s submission provoked an interesting response from six other Antarctic Treaty parties who in communications with the United Nations made it clear that they did not recognise that a State’s claim to territory in Antarctica was capable of creating any rights over the adjacent seabed. In New Zealand’s claim to the CLCS, on the other hand, it made clear that it reserved its position to make a future claim to the continental shelf adjacent to the Ross Dependency, while making other submissions to seabed north of the Antarctic Treaty zone of application

The unclaimed sector

One legacy of the Antarctic Treaty in terms of its impact has been its consequence for the unclaimed sector of the continent which lies between 90°W and 150°W. From time to time considered to be an area of possible US interest, the effect of Article IV was to ensure that no claim could be asserted to this part of the continent whilst the treaty was in force. This remains the position to this day, and accordingly this slice of Antarctica remains the last unclaimed piece of land on earth. Dissolution of the Treaty would inevitably result in a scramble to assert a territorial claim to this sector, which inevitably would be the subject of claim and counterclaim and only really capable of resolution before an international court.

That Antarctica contains territory which is unclaimed highlights one of the ongoing issues which has arisen with respect to Antarctic sovereignty over the past 50 years and that goes to its legitimacy. The current seven claims are not subject to extensive formal recognition, and that which does occur is often on a reciprocal basis between the claimants themselves. Efforts to actively assert sovereignty are either ignored or politically contested. In recent years Australia has found itself in the position of having a ruling by one of its highest courts, as to the application of Australian law in Antarctic, ignored by Japan because of a refusal to recognise Australian sovereignty over the Australian Antarctic Territory and adjacent offshore areas.

The lack of legitimacy regarding Antarctic sovereignty has meant that the ATS can from time to time be also challenged as to its legitimacy and this was highlighted during the debates, which took place in the United Nations General Assembly during the 1980s on the ‘Question of Antarctica’. Whilst ultimately those debates have fizzled in part because of an expanding membership of the ATS by the Global South, they did highlight a view amongst many members of the international community that not only was the ATS illegitimate but so too were the territorial claims to the continent. In the view of many states at that time, especially developing states, Antarctica should have been subject to some form of global management under the auspices of a body such as the United Nations, as suggested by India in the 1950s. On that view, no form of traditional sovereignty could have been exercised in Antarctica, especially during an era when European empires were beginning to dissolve in Africa and Asia. By the time the Antarctic Treaty was negotiated in 1959, Malaysia a chief critic of the ATSin the UN was still a British colony.

https://doi.org/10.1017/S003224740999026X Published online by Cambridge University Press

Concluding remark

Whilst the Antarctic Treaty has been remarkably successfully in suppressing sovereignty as an issue throughout its duration, from time to time the question of sovereignty trickles to the surface of Antarctic law, management, policy, and politics. In reality it is never far from the considerations of many of the delegates attending Antarctic Treaty Consultative Meetings, or from the decisions that are made within that forum and more broadly within the ATS. Whilst the effect of the treaty has therefore been to make sovereignty a dormant issue within the ATS, it has the potential to reawaken and become a matter of major significance, which could rock the very foundation of the treaty and the Antarctic regime more generally

To date, there has been a highly pragmatic approach adopted within the ATS to the matter. Even in the face of the 1982 Falklands conflict, which had at its foundation a dispute with respect to territorial sovereignty, albeit over an area to the north of the Treaty's limits, the Treaty regime remained solid. Britain and Argentina continued to co-operate with one another in the Antarctic region. Likewise, the ATS was able to withstand criticism concerning the legitimacy of Antarctic sovereignty and regime development during United Nations debates and the negotiations over a minerals regime in the 1980s. However, what these different events suggest is that Antarctica's resource potential (and possible disputes over resources) are capable of exciting considerable interest in sovereignty. Recent events in the Arctic reinforce this observation especially following the high profile flag planting exercise of the Russians in August 2007. Whilst PEPAT maintains limitations on oil and gas exploitation on the continent and within the Southern Ocean these tensions will be kept in check, but it is self evident from the actions of some Antarctic claimants including Australia and Britain that they are prepositioning themselves for future claims over the outer continental shelf. For the time being then sovereignty remains in check in Antarctica, but it cannot be ignored

https://doi.org/10.1017/S003224740999026X Published online by Cambridge University Press