INTRODUCTION

Marine mammals in Antarctica primarily fall into two groups: seals\(^1\) and whales.\(^2\) These two groups have been dealt with quite differently within the Antarctic Treaty System (ATS): seals are the subject of a treaty which is a part of the ATS, while whales are governed by the ICRW\(^3\) and only partially by the Antarctic Treaty. Consultative Parties (ATCPs) have deliberately stepped back from dealing with any aspect of the whaling issue. Both types of mammal have historically been subjected to harvesting and both have received protection under international law. However, the ongoing harvesting of (mostly minke) whales by Japan under a ‘scientific permit’ has highlighted particular tensions in the legal and political connections between the ATS and the ICRW.

It is difficult to compare the success of the relative legal regimes directly. Although harvesting of seals and whales was one of the main reasons for early exploration of the Southern Ocean, the commercial industries have followed different paths. Sealing experienced a short and sharp boom and bust cycle in the nineteenth century. Whaling in the Southern Ocean has been more prolonged. At the time the Antarctic Treaty was signed,\(^4\) the whaling industry was already regulated by the ICRW and parties saw little need to enter into whaling issues. It was the prospect of unregulated sealing that prompted negotiations for CCAS.\(^5\)

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\(^2\) Whales found in the Southern Ocean include Minke, Humpback, Fin, Blue, Sperm and Killer (or Orca) whales. See, e.g. Llano, ibid., 363–365; Joyner, ibid., 26–28.

\(^3\) International Convention for the Regulation of Whaling (ICRW) of 2 December 1946 (161 UNTS 72).

\(^4\) Antarctic Treaty of 1 December 1959 (402 UNTS 71).

\(^5\) Convention for the Conservation of Antarctic Seals (CCAS) of 1 June 1972 (11 ILM 251).
Therefore, the international regulation of marine mammals in the Southern Ocean has followed very divergent paths.

**Law of the Sea Convention, Antarctica, and Marine Mammals**

*Law of the Sea Convention and the Antarctic Treaty*

Many commentators have explored the interaction between the LOS Convention and the ATS. Some of the key concerns about the application of the LOS Convention in Antarctica revolve around the role of coastal state jurisdiction. The claims to sovereignty over Antarctica are held in abeyance by article IV of the Antarctic Treaty. In addition, article VI of the Antarctic Treaty stipulates that nothing in the treaty “shall prejudice or in any way affect the rights . . . of any State under international law with regard to the high seas” south of 60° S.

Because the majority of ATCPs do not recognise the sovereignty claims, they consider that there is no coastal state in Antarctica, and therefore view the sea around Antarctica as high seas. On the other hand, one claimant state—Australia—has passed domestic legislation asserting an Exclusive Economic Zone (EEZ) off the Australian Antarctic Territory (AAT). There is some question about whether Australia’s claim to an EEZ is a breach of article IV, which prohibits new or the extension of existing claims. However, as Australian policy is to not seek to enforce Australian law against foreign nationals in the AAT or the EEZ off the AAT, this question has remained somewhat academic.

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10 Crawford and Rothwell, ibid., 82.