The Antarctic Treaty System and the Law of the Sea—Competing Regimes in the Southern Ocean?*

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Introduction

The Southern Ocean surrounding Antarctica has now become subject to two overlapping international legal regimes. There is on the one hand the system of agreements centered around the 1959 Antarctic Treaty. This regime, which has evolved piecemeal over the past three decades, applies to all ocean space south of 60° South Latitude and for purposes of conservation of marine living resources may extend as far north as the Antarctic Convergence. There is on the other hand the regime created by the 1982 LOS Convention. This legal instrument,

* This article has its origins in a seminar paper presented to the Australian Antarctic Division in Kingston, Tasmania, while the author was a visiting research fellow during 1994 with the Antarctic Cooperative Research Centre for the Antarctic and Southern Ocean Environment at the University of Tasmania. The author would like to express his appreciation to the Antarctic CRC and to the Institute for Antarctic and Southern Ocean Studies in the Centre for making this visit possible.

1 The Antarctic Treaty, done 1 December 1959, 12 UST 794, TIAS No. 4780, 402 UNTS 71.
2 Done at Montego Bay on 10 December 1982, entered into force 16 November 1994, UN Doc. A/CONF.62/WP.10/Rev. 3 (1982), reprinted in (1982) XXI ILM 1261 [hereinafter cited as 1982 LOS Convention]. This convention was recently able to attract a number of developed states as potential acceding powers by the promulgation of a separate instrument, The Agreement Relating to the Implementation of Part XI of the United Nations Law of the Sea Convention, on 29 July 1994. This agreement fundamentally changes the structure, powers and rights of the regime for mining the deep sea-bed contained in Part XI of the 1982 Convention. The changes are legally binding, and the Implementation Agreement is to be applied and interpreted together with the Convention as a single composite instrument. For analysis of both the Convention and Implementation Agreement provisions, see generally United States Senate, Commentary—The 1992 United Nations LOS Convention and the Agreement on Implementation of Part XI, in Message from the President of the United States transmitting United Nations LOS Convention, with Annexes, done at Montego Bay, December 10, 1992 . . . and the Agreement Relating to the...
negotiated by some 160 participant states over nearly a decade (1973–1982), was opened for signature on 10 December 1982 and has now entered in force. The 1982 LOS Convention has gained widespread international acceptance as the authoritative embodiment of contemporary ocean law.

This study concerns the extent to which the Antarctic Treaty System and the 1982 LOS Convention generate regimes that are mutually compatible, or mutually conflictive, or mutually reinforcing, or legally redundant. To ascertain whether jurisdictional overlap and conflict stems from these two legal regimes affecting Antarctic ocean space, the analysis considers certain Antarctic issue areas relevant for the contemporary law of the sea: the nature of the coastal baseline for Antarctica; the extent of offshore maritime zones; implications for fishing and conservation in the region; the duty of environmental protection; the freedom of marine scientific research; the prospects for deep sea-bed mining; and the legal status of ice formations. From this assessment it is suggested that the overlapping character of these lawful regimes contributes importantly to more comprehensive, comprehensible international management of the Southern Ocean, an area encompassing about one-tenth of the world’s ocean space.

The Nature of the Regimes

The Antarctic Treaty System (ATS) contains the ensemble of legal agreements stemming from the 1959 Antarctic Treaty process. These agreements have been formulated, adopted and implemented by those states active in scientific research in the region called the Antarctic Treaty Consultative Parties (ATCPs). Originally comprised of 12 states, 26 governments now make up the ATCP

3 Implementation of Part XI of the United Nations Convention on the of the Sea of 10 December 1982, with Annex . . . 103rd Congress, 2nd Session (1994). As of February 1995, at least 73 states had signed the Implementation Agreement, indicating provisional acceptance of the 1982 LOS Convention, as modified. Of those states, the following states also participate as members of the Antarctic Treaty System: Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, Finland, France, Germany, Greece, India, Italy, Japan, Netherlands, Norway, Poland, Romania, South Africa, Spain, Sweden, Switzerland, United Kingdom, United States and Uruguay. Of these, Australia, Brazil, Germany, and Uruguay have also acceded to the Convention. United Nations (Fax communication) To All Representatives of Member-States and Observers to the United Nations, 2 November 1994, pp. 1-2. See also the commentary on Antarctic Treaty states in note 5 below.

4 While the term “Consultative Party” is not used in the Antarctic Treaty text itself, the authority for this group of states to make policy for themselves in the Antarctic flows from Article IX(1) in that instrument. This provision calls for contracting parties to meet “at suitable intervals” to exchange information, consult together on matters of common interest pertaining to Antarctica, and formulate, consider, and recommend to their governments “measures in furtherance of the principles and objectives to the Treaty”. Antarctic Treaty, n. 1 above, Article IX(1).