Legal Challenges for Maritime Operations in the Southern Ocean*

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Introduction

There has been a renewed focus on the polar oceans early in the 21st century. This has been partly driven by the attention generated by claims to an outer continental shelf made in both the Arctic Ocean and Southern Ocean by a number of countries. These claims have been the subject of review by the Commission on the Limits of the Continental Shelf (CLCS) and that process remains ongoing. It has also been driven by renewed interest in the polar regions as a result of the impact of climate change making both regions more accessible to a range of activities, including commercial shipping, fishing operations, and seabed exploration and development. The polar oceans have also been the scene of clashes over contentious environmental issues such as whaling, which in the Southern Ocean has resulted in Australia commencing a case before the International Court of Justice over the legitimacy of Japan’s scientific whaling program. While the polar oceans are governed by a legal regime founded upon the 1982 United Nations Convention on the Law of the Sea (UNCLOS), different regional approaches apply. In Antarctica large parts of

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the Southern Ocean are subject to the Antarctic Treaty and associated international legal instruments that regulate fisheries and marine environmental protection. In the Arctic there is no equivalent regional legal regime, although the Arctic Council is increasingly paying attention to the Arctic Ocean.

This article seeks to review these issues in the context of the Southern Ocean using the law of the sea under UNCLOS as the lens for the analysis. The law of the sea and the polar oceans remain in a dynamic state of interaction and is perhaps one of the most significant global examples of interaction between global and regional regimes. For Antarctica this interaction has been present since the 1959 Antarctic Treaty was adopted, which made direct reference in Article VI to the high seas. Since that time, with the evolution of the law of the sea and especially the expansion of maritime zones as reflected in UNCLOS, that dynamic has emerged as a tension between the rights and interests of the seven Antarctic territorial claimants, the non-claimant Antarctic Treaty Consultative Parties, and the other members of the international community. In particular, reactions to CLCS submissions have highlighted that notwithstanding the success of the Antarctic Treaty in suppressing simmering territorial tensions during the 1950s, those tensions remain and can be brought to the surface through law of the sea related actions.

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6 This has been reflected in the adoption by the states that comprise the Arctic Council (Canada, Denmark Finland, Iceland, Norway, Russian Federation, Sweden, the United States) of two recent international instruments, the 2011 Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic, and the 2013 Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic, available online: <http://www.arctic-council.org>; see generally E.J. Molenaar, D.R. Rothwell and A.G. Oude Elferink, “Interactions between Global and Regional Regimes: Trends and Prospects” in Molenaar et al., n. 2 above; N. Loukacheva, ed., Polar Law Textbook (Copenhagen: TemmaNord, 2010): 127–132.
7 Those being the territorial sea (12 nautical miles), contiguous zone (24 nautical miles), exclusive economic zone (200 nautical miles), and continental shelf (minimum of 200 nautical miles).
8 Those states are Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom.
9 There are currently 28 states with status as ATCPs, of which seven are claimant states, making 21 non-claimant ATCPs.
10 The United Nations currently has a total membership of 193, of which 50 UN member states are parties to the Antarctic Treaty, leaving 143 states in the international community who are not parties to the Antarctic Treaty.
11 This was particularly highlighted following the Australian submission in 2004 to the Commission on the Limits of the Continental Shelf, which resulted in Germany, India,