

CHAPTER SEVENTEEN

INTERACTIONS BETWEEN GLOBAL AND REGIONAL REGIMES: TRENDS AND PROSPECTS

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INTRODUCTION

The law of the sea and the polar regions remain in a dynamic state of interaction and the polar regions are perhaps one of the most significant global examples of interaction between global and regional law of the sea regimes. In the case of Antarctica, this interaction has been present since the adoption of the Antarctic Treaty,¹ 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 the LOS Convention,² 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 (ATCPs), and other members of the international community. In particular, reactions to Commission on the Limits of the Continental Shelf (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.

In the case of the Arctic, the interaction between global and regional regimes is much more recent. Even though the first Arctic-wide treaty—the ACPB³—dates from 1973 and polar bears are regarded as marine mammals in the scientific domain,⁴ the ACPB was not conceived of as a regional law of the sea instrument. However, while not a regional regime, an earlier interaction with the global level consisted of the legislation and other state practice triggered by the controversial crossings of the Northwest Passage and Northern Sea Route in the 1960s and

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

² United Nations Convention on the Law of the Sea of 10 December 1982 (1833 UNTS 397).

³ Agreement on the Conservation of Polar Bears of 15 November 1973 (13 ILM 13).

⁴ See chapter 13, s. Introduction.

1970s, some of which was later sanctioned by article 234 of the LOS Convention. Global-regional interaction in the law of the sea truly commenced with the creation of the AEPS⁵ and its associated institutional process in 1991. But as the section on the Arctic below will show, especially during the last five years or so, the Arctic Council—which was created in 1996 by means of the Ottawa Declaration⁶ and incorporated the AEPS process—has evolved into the principal intergovernmental body for Arctic cooperation as well as the principal player in the interaction between global and regional regimes in the Arctic. However, further institutional change to adapt the Arctic Council to the rapidly changing circumstances in the Arctic seems inevitable.

In the assessment that follows, some of these critical and ongoing issues facing the polar regions and the law of the sea in the short, medium and long term will be assessed in light of the earlier chapters in this volume. Given the centrality of maritime affairs and accordingly the law of the sea to both polar regions, particular consideration will be given to potential 'game changers' (i.e. unanticipated events that impact upon the status quo of a regime which result in significant changes to that regime) that would have the capacity to significantly impact upon future interactions between the law of the sea and the polar regions.

ANTARCTIC REGION

Introduction

The Antarctic region remains one of the more distinctive regions for the purposes of contemporary international law of the sea as a result of the compact created under the Antarctic Treaty, which in turn paved the way for the development over the subsequent decades of the Antarctic Treaty System (ATS). In this respect it should not be forgotten that the treaty was concluded at the height of the Cold War and that it was in place prior to many of the global legal frameworks that have been subsequently negotiated and which apply in the Antarctic region. This has created interesting regime dynamics from a legal perspective. The ATS has predominantly deferred to the ICRW⁷ with respect to whaling—which predated the Antarctic Treaty⁸—thereby creating some tensions as the ATS has evolved and given ever greater prominence to environmental protection and management while also maintaining its emphasis, as reflected in terms

⁵ Arctic Environmental Protection Strategy of 14 June 1991 (30 ILM 1624).

⁶ Declaration on the Establishment of the Arctic Council of 19 September 1996 (available at <www.arctic-council.org>).

⁷ International Convention for the Regulation of Whaling of 10 November 1948 (161 UNTS 72).

⁸ See CAMLR Convention (Convention on the Conservation of Antarctic Marine Living Resources of 20 May 1980 (1329 UNTS 47)), art. VI.

of the Antarctic Treaty, on the freedom of scientific research.⁹ Notwithstanding that the Antarctic Treaty was negotiated very soon after the four Geneva conventions on the law of the sea of 1958, there was some ambiguity under both the Treaty¹⁰ and subsequent instruments such as CCAS¹¹ as to precisely how ATS regulation and management of the Southern Ocean intersected with the law of the sea. While the LOS Convention did not include specific provisions dealing with the Antarctic region, it clearly had significant implications notwithstanding that discussion of Antarctica was avoided during the Third United Nations Conference on the Law of the Sea.

Interestingly, as the ATS has continued to evolve, there has been acceptance of the value of increased interaction between the ATS and global legal regimes other than the LOS Convention, with a prominent example being how Annex IV of the Madrid Protocol¹² directly cross refers to MARPOL¹³ provisions dealing with the prevention of marine pollution. Accordingly, over its lifetime varied positions have been taken with respect to how the ATS formally interacts with other international legal frameworks which, while developed with a global agenda, have application to the Antarctic region. In this regard it should not be overlooked that the founding members of the ATS included pivotal states in the international community such as France, Japan, the United Kingdom, the United States, and the USSR/Russian Federation, while Brazil (1975), India and China (1983) are now also ATCPs.

How the ATS continues to evolve is uncertain, yet as noted below there is the potential for game changers to certainly have an impact upon the legal regime of the Antarctic region, especially if those events highlight weaknesses. It should not, however, be assumed that the ATS status quo will remain in place forever. There are emerging issues confronting the Antarctic region which the ATS will need to respond to in due course, not the least of which is the status of the current prohibition on mining.¹⁴ It also needs to be recalled that article XII of the Antarctic Treaty provides for a 'review' mechanism which can be called for by

⁹ This issue is discussed in chapter 14 in this volume.

¹⁰ See Antarctic Treaty, art. VI where reference is made to the Treaty not prejudicing or in any way affecting the rights "of any State under international law with regard to the high seas within that area" subject to the Treaty.

¹¹ Convention for the Conservation of Antarctic Seals of 1 June 1972 (1080 UNTS 176). See the discussion in chapter 12 in this volume.

¹² Protocol on Environmental Protection to the Antarctic Treaty of 4 October 1991 (30 ILM 1455).

¹³ International Convention for the Prevention of Pollution from Ships of 2 November 1973, as modified by the Protocol of 1 June 1978 and the Protocol of 26 September 1997; as regularly amended.

¹⁴ This and other 'Antarctic security' issues are considered in A.D. Hemmings, D.R. Rothwell and K.N. Scott (eds.) *Antarctic Security in the Twenty-First Century* (Routledge, Abingdon: 2012).

any ATCP and that this process has been available to ATCPs since 1991. While presently there is no indication that the article XII mechanism will be invoked in the immediate future, the existence of that process and its possible implications for the stability of the ATS need to be kept in mind.

Overlaps with Global and Regional Regimes

There can be no denying that one of the most significant levels of interaction between the LOS Convention and the Antarctic region's legal framework has been the process over the past decade of coastal state submissions to the CLCS. To date three Antarctic territorial claimants have made submissions, and in addition submissions have also been made by coastal states in relation to subantarctic islands.¹⁵ A variety of approaches has been taken by the territorial claimants as part of this process. Australia, in its 2004 submission to the CLCS, indicated that it had collected data for the Australian Antarctic Territory (AAT) which was included in its submission, but that it was not asking the CLCS to consider that aspect of the submission for the time being.¹⁶ New Zealand, on the other hand, indicated that it reserved its right to make a future CLCS submission concerning the Ross Dependency, while Argentina submitted data regarding its Antarctic territory to the Commission for its consideration.

A further dynamic that exists with respect to CLCS submissions for the Southern Ocean is that some states have the capacity to assert claims offshore the continent, and also their subantarctic possessions,¹⁷ thereby raising issues with respect to claimed territory and continental shelf that lies either side of the Antarctic Treaty's 60° S northern boundary.¹⁸ Australia is such a state, having collected and submitted data to the Commission with respect to both the AAT, and its subantarctic islands of Heard and McDonald Islands, and Macquarie Island. In the Commission's 2008 recommendations to Australia, it endorsed Australia's outer continental shelf beyond 200 nautical miles (nm) adjacent to its subantarctic islands. In reliance upon those recommendations and consistent with the process provided for under article 76 of the LOS Convention, in 2012 Australia formally proclaimed the outer limits of the continental shelf beyond 200 nm

¹⁵ Submissions have been made by Argentina, Australia, France (Kerguelen), Norway, South Africa (joint application with France concerning the Crozet Archipelago and Prince Edward Islands in the Southern Ocean), United Kingdom (with respect to South Georgia and South Sandwich Islands).

¹⁶ See chapter 4 in this volume; see also A. Serdy "Towards Certainty of Seabed Jurisdiction beyond 200 Nautical Miles from the Territorial Sea Baseline: Australia's Submission to the Commission on the Limits of the Continental Shelf" (2005) 36 *Ocean Development and International Law* 201–217.

¹⁷ This is the position for Australia, France, New Zealand, Norway, and the United Kingdom.

¹⁸ Antarctic Treaty, art. VI.

off those islands.¹⁹ The proclaimed outer limits of the Australian continental shelf in the case of both the Heard and McDonald Islands, and Macquarie Island, all extend into the Antarctic Treaty area. Australia's actions have the potential to raise concerns from other Antarctic Treaty parties that it is acting contrary to article IV of the Antarctic Treaty and seeking to assert a new 'claim' within the Antarctic Treaty area.²⁰ If this were to occur, then Australia's reliance upon the LOS Convention to claim an outer continental shelf would be the first occasion since adoption of the Antarctic Treaty that active discussion would have taken place over the assertion of a new 'claim' over either Antarctica or the Southern Ocean.²¹ The United Kingdom submission before the CLCS also raises similar issues with respect to the continental shelf offshore South Georgia and the South Sandwich Islands.

Closely related to the status of the Southern Ocean seabed and claims to an outer continental shelf, is the potential dynamic that could arise between the International Seabed Authority (ISA) and the ATS over whether parts of the Southern Ocean that comprise the 'Area' under the LOS Convention could be subject to ISA oversight. The status of the Area within the Southern Ocean has long been contentious,²² especially because of the 'unclaimed sector' on the Antarctic continent from which no continental shelf can be asserted in the absence of a coastal state and due to the prohibition of mining in Antarctica and the Southern Ocean up to 60° S under the Madrid Protocol.²³ This raises direct issues of regime interaction and whether the LOS Convention's global legal framework and its institutions such as the ISA acknowledge the primacy of the ATS regional legal framework which for the time being does not permit any seabed mining activities to take place within the Antarctic Treaty area. To date, no clash has arisen between the two regimes. This is no doubt due in part to the focus of the ISA on exploration activities taking place in other parts of the deep seabed,²⁴ that

¹⁹ Seas and Submerged Lands (Limits of Continental Shelf) Proclamation 2012 (Australia), Federal Register of Legislative Instruments F2012L01081 (24 May 2012); see chapter 4 in this volume; see also N. Roxon, B. Carr, and M. Ferguson "Historic continental shelf proclamation" Joint Media Release (25 May 2012), available at <www.attorneygeneral.gov.au>.

²⁰ See discussion of these issues in chapter 4 in this volume and A.D. Hemmings and T. Stephens "The extended continental shelves of sub-Antarctic Islands: implications for Antarctic governance" (2010) 46 (239) *Polar Record* 312–327.

²¹ The status of claims and potential claims to the Antarctic continent was the subject of active discussion between key Antarctic states between 1930–1959; see D. Day *Antarctica: A Biography* (Knopf, North Sydney: 2012) 253–491.

²² For an earlier assessment see A.G. Oude Elferink and D.R. Rothwell "Challenges for Polar Maritime Delimitation and Jurisdiction: The Current Regime and its Prospects" in A.G. Oude Elferink and D.R. Rothwell (eds.) *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Martinus Nijhoff, The Hague: 2001) 337–354 at 351–352.

²³ Madrid Protocol, art. 7.

²⁴ As of 2013, exploration areas have been opened in the Clarion-Clipperton Zone in the Equatorial North Pacific Ocean, and in the Central Indian Basin in the Indian Ocean.

those exploration activities remain at a very preliminary phase with no immediate prospect of exploitation occurring in the near future, and that the inhospitable Southern Ocean marine environment creates significant challenges for deep seabed operations. Resolution of how the LOS Convention interacts with the ATS on this matter is currently not a pressing issue, but may arise in the future if there is interest amongst some members of the international community to engage in deep seabed mining in parts of the Southern Ocean. Another important dynamic which needs to be taken into account is that the Madrid Protocol's prohibition on mining is subject to review either under a traditional treaty amendment mechanism or after the Protocol has been in force for 50 years.²⁵ If the Madrid Protocol's prohibition on mining were to be overturned in the future, there would be a need for a "binding legal regime on Antarctic mineral resource activities"²⁶ which, if it duplicated the Protocol's application within the Antarctic Treaty area,²⁷ would apply within the Southern Ocean as far north as 60° S including the Southern Ocean seabed that would be considered part of the 'Area'. This would create a new interaction dynamic between a seabed mining regime developed under a regional framework and that under the LOS Convention administered by the ISA.²⁸

A further legal dynamic that exists is with respect to whaling. In this respect there are two separate but closely related dimensions. The first is the status of the Southern Ocean Sanctuary proclaimed under the ICRW, within which all commercial whaling is prohibited, and the ongoing controversy that has existed as to whether Japan's conduct of its JARPA II 'scientific whaling' program is consistent with the ICRW.²⁹ The second is the particular dispute that has arisen between Australia and Japan over the legality of Japan's conduct of JARPA II. Australia's application to the International Court of Justice (ICJ)³⁰ raised legal issues concerning Japan's conduct with respect to the ICRW, the CITES³¹ and the CBD.³²

²⁵ This will occur in 2048.

²⁶ Madrid Protocol, art. 25 (5)(a).

²⁷ *Ibid.*, arts. 1 and 3.

²⁸ It should however be noted that the CRAMRA (Convention on the Regulation of Antarctic Mineral Resource Activities of 2 June 1988 ((1988) 27 ILM 868)) defined its area of application in art. 5 as the offshore areas up to the deep seabed. The Final Act of the conference at which CRAMRA was adopted clarifies that this area of application of CRAMRA "would be determined by reference to all the criteria and the rules embodied in paragraphs 1 to 7 of Article 76 of the United Nations Convention on the Law of the Sea" (see (1988) 27 ILM 866). If this approach were to be followed the scope for conflict between a regional regime and the LOS Convention would be much more limited.

²⁹ See the discussion in chapter 12 in this volume.

³⁰ *Whaling in the Antarctic* (Australia v. Japan), Application instituting proceedings (31 May 2010) (available at <www.icj-cij.org/docket/>).

³¹ Convention on International Trade in Endangered Species of Wild Fauna and Flora of 3 March 1973 (993 UNTS 342).

³² Convention on Biological Diversity of 5 June 1992 (1760 UNTS 79).

In this regard Australia has sought to avoid legal argument on matters related to its domestic laws prohibiting whaling within its proclaimed 'Australian Whale Sanctuary' that extend to the maritime zones of the Australian Antarctic Territory,³³ thereby circumventing any issues regarding the interpretation of article IV of the Antarctic Treaty. Australia has therefore sought to keep the ATS at arm's length from these proceedings. However, New Zealand's November 2012 Application for Permission to intervene in the case,³⁴ which was authorized by the ICJ in February 2013³⁵ has only served to highlight the tensions that exist amongst the founding members of the Antarctic Treaty over this issue.

Potential Game Changers for the Antarctic Region

A feature of the ATS during its lifetime is that not only has it had a period of evolution,³⁶ but it has also had to respond to a number of game changers which confronted the regime. The most significant of these was the separate, albeit parallel, debates that arose in the 1970s and 1980s over the future of the ATS. One strand in that debate was the 'Antarctica World Park' movement that was strongly promoted by environmental organizations and which gained momentum in the 1980s during the CRAMRA negotiations. The other strand, advanced by developing states in the United Nations General Assembly, was that the ATS was a closed 'club' and that CRAMRA was designed to only permit mining activities by members of that 'club'.³⁷ The impact of these 'campaigns' resulted in a game changer for the ATS when in 1989 the decision was made to abandon CRAMRA and move towards a comprehensive environmental protection regime as embodied in the Madrid Protocol.³⁸ The impact of this debate and the decision to adopt the Madrid Protocol radically reshaped the short to medium term future of the ATS and has had a significant impact on how the ATS has continued to evolve since the 1990s, including some of the issues that have been considered in this volume with respect to the interaction of the ATS and global regimes.

³³ See the discussion in chapter 12 in this volume.

³⁴ *Whaling in the Antarctic* (Australia v. Japan), Declaration of Intervention Pursuant to Article 63 of the Statute of the Court by the Government of New Zealand (20 November 2012) (available at <www.icj-cij.org/docket/>).

³⁵ *Whaling in the Antarctic* (Australia v. Japan) Declaration of Intervention of New Zealand, Order (6 February 2013).

³⁶ See the discussion in chapter 2 in this volume.

³⁷ For a diplomat's perspective on those debates at the United Nations, see R. Woolcott *The Hot Sea: Reflections on Diplomacy from Stalin's Death to the Bali Bombings* (Harper-Collins, Sydney: 2003) 209–218.

³⁸ For an analysis of some of the political and policy factors that existed at that time in Australia, which along with France were key Antarctic Treaty states in promoting the Madrid Protocol, see A. Jackson and P. Boyce "Mining and 'World Park Antarctica', 1982–1991" in M. Haward and T. Griffiths (eds.) *Australia and the Antarctic Treaty System: 50 Years of Influence* (UNSW Press, Sydney: 2011) 243–273.

A current game changer that confronts the Antarctic region is climate change. The impact of climate change on the Southern Ocean and its ecosystems remains difficult to quantify, which in turns creates challenges in assessing any of the legal consequences that may follow. Two impacts may, however, be identified where it is currently possible to discuss the implications. The first is that climate change may result in a general warming trend across Antarctica impacting upon both the continent and the Southern Ocean. Parts of Antarctica may therefore become more ice free, and parts of the Southern Ocean may become more navigable on a year round or seasonable basis as the sea ice cover retreats, while at the same time there may be greater navigational hazards from icebergs due to increased carving of the Antarctic ice shelf. The impacts of these developments upon shipping are difficult to quantify, other than that the Southern Ocean may become more accessible to shipping which may result in more commercial merchant shipping using the Southern Ocean while at the same time becoming more navigationally challenging.³⁹ However, there will be inevitable limits to any upsurge in Southern Ocean navigation due to its relative remoteness from major economies and trade routes. This is not to suggest that the Southern Ocean will not continue to experience an increase in shipping, rather any surge will more than likely be modest, and may principally arise through increased visitations by tourist cruise ships. This suggests that the regulation and management of Southern Ocean shipping will remain an issue for the foreseeable future.

While the LOS Convention provides the foundation for the regulation and management of shipping, especially regarding the rights and freedoms of navigation,⁴⁰ the opening up of the Southern Ocean to greater shipping will principally raise issues with respect to environmental management and the safety of shipping. In this regard, article 234 of the LOS Convention has traditionally not been considered to have a role to play in the environmental management of shipping within the Southern Ocean due to the absence of recognized coastal states in Antarctica thereby precluding the assertion of exclusive economic zones (EEZs). Antarctic region shipping will, on the other hand, most certainly be the subject of both global and regional legal regulation with respect to marine pollution. While already there is interaction between the Madrid Protocol's provisions dealing with marine pollution and International Maritime Organization (IMO) standards found in instruments such as MARPOL, there is the possibility that a distinctive Southern Ocean marine pollution instrument could be adopted in the future if the view is taken that IMO mechanisms have proven inadequate.

In this respect one game changer would be a major maritime incident in the Southern Ocean which exposed weaknesses in the existing legal framework such

³⁹ See generally J. Jabour "Maritime Security: Investing in Safe Shipping Operations to help prevent Marine Pollution" in Hemmings, Rothwell and Scott, note 14, 238–256.

⁴⁰ See the discussion in chapter 9 in this volume.

as those relating to shipping standards for vessels operating in the Southern Ocean, liability regimes for marine environmental damage in the absence of recognized coastal states, and limitations in the search and rescue (SAR) regime. In the past decade a number of high profile maritime incidents have occurred involving cruise ships,⁴¹ protest vessels,⁴² and fishing vessels,⁴³ which have highlighted the limited response capability of states with responsibility for Southern Ocean maritime SAR under SOLAS.⁴⁴ With the ongoing popularity of Antarctic tourism especially, much of it ship-based, it must be anticipated that there shall be greater numbers of cruise ships in the Southern Ocean with significant passenger numbers which further highlight the issues associated with the logistics of a SAR operation involving a ship with a full passenger load.

The dimensions of Antarctic region SAR operations are immense. Australia, for example, has a SOLAS designated 'Search and Rescue Region' (SRR) of 52.8 million km²,⁴⁵ which is one tenth of the earth's surface and sees Australia assume responsibility for all of the maritime domain in the Southern Ocean between 75° E and 163° E.⁴⁶ This encompasses much of the waters offshore the AAT, Adélie Land (France), waters adjacent to Heard and McDonald Islands, and Macquarie Island. Despite this responsibility, Australia has no permanent SAR assets in the Antarctic region and has indicated in the past a limited capacity to respond when major maritime incidents occur.⁴⁷ While there has been some

⁴¹ The *MS Explorer* sank in the Southern Ocean in 2007 after striking submerged ice. All passengers and crew were safely evacuated ("MS Explorer sinks" *The Guardian* (23 November 2007; available at <www.guardian.co.uk/world/gallery/2007/nov/23/antarctica>).

⁴² The Sea Shepherd Conservation Society vessel *Ady Gil* collided with the Japanese whaler *Shonan Maru No 2* on 6 January 2012 in the Southern Ocean offshore Adélie Land (France) but within the Australian SRR; the *Ady Gil* was scuttled within 48 hours without loss of life (Australian Maritime Safety Authority "Fact finding report into the reported collision involving the New Zealand registered craft *Ady Gil* and the Japan registered *Shonan Maru No. 2* in the Southern Ocean on 6 January 2010" (Australian Maritime Safety Authority, Canberra: 2010)).

⁴³ In December 2010 a South Korean trawler sank in the Southern Ocean half way between New Zealand and Antarctica ("South Korean trawler sinks in Antarctic" *The Guardian* (13 December 2010; available at <www.guardian.co.uk/world/2010/dec/13/south-korea-fishing-ship-sink>).

⁴⁴ International Convention for the Safety of Life at Sea of 1 November 1974 (1184 UNTS 278), as regularly amended.

⁴⁵ Australian Maritime Safety Authority "Search and Rescue Arrangements in Australia" available at <www.amsa.gov.au/Search_and_Rescue/Search_and_Rescue_in_Australia/Arrangements_in_Australia.asp>.

⁴⁶ Australian Maritime Safety Authority "AUSREP: Ship reporting instructions for the Australian area 2012 edition" 5.2 AUSREP Coverage Area; available at <www.amsa.gov.au/publications/AUSREP_Book.pdf>.

⁴⁷ This was particularly highlighted following the 2010 collision in the Australian SRR in the Southern Ocean between the Sea Shepherd Conservation Society *Ady Gil* and

attempt to address this gap in the global SAR regime,⁴⁸ there is clearly more that could be done in the Southern Ocean to better align the global regime with the general rights and responsibilities assumed by ATS states, including the territorial claimants, which under the global international legal framework bear particular responsibility as recognized coastal states. In an effort to circumvent the absence of recognized coastal states offshore Antarctica, the Southern Ocean SRRs are all generated from coastal states situated to the north of 60° S. While this device has proven effective for the purposes of SOLAS, there would be merit in greater consideration being given by the ATS to developing more comprehensive mechanisms and procedures to deal with Southern Ocean SAR issues. While recent events have highlighted the increasing capacity to mobilize SAR capacity following incidents on the Antarctic continent,⁴⁹ this is not always the case for the Southern Ocean more generally where the use of aircraft in SAR response has limitations. To that end there is the potential for greater consideration being given to SOLAS SAR commitments within the ATS. While the ongoing efforts to develop and finalize the Polar Code are significant for the region, and are currently anticipated to include mandatory requirements with respect to safety of life at sea,⁵⁰ ongoing delays in the finalization of the Code are suggestive of the need for an Antarctic regional solution to also be found.

The other implication arising from climate change for the law of the sea in the Southern Ocean is upon fisheries management. A warming of the oceans will impact upon the Antarctic convergence,⁵¹ which is that part of the Southern Ocean where there is a natural boundary between the colder southern polar waters and more temperate waters to the north. The convergence is also the approximate northern boundary of the CAMLR Convention,⁵² and, consistent

the Japanese whaler, *Shonan Maru No 2* (see Australian Maritime Safety Authority, 'Fact finding report into the reported collision involving the New Zealand registered craft *Ady Gil* and the Japan registered whaling ship *Shonan Maru No 2* in the Southern Ocean on 6 January 2010', undated; available at <www.amsa.gov.au>).

⁴⁸ See International Maritime Organization "Enhanced Contingency Planning Guidance for Passenger Ships Operating in Areas Remote from SAR Facilities" 2006, MSC.1/Circ.1184 of 31 May 2006.

⁴⁹ In January 2013 an aerial SAR effort was mobilized in Antarctica by the New Zealand Rescue Coordination Centre following the disappearance of a Twin Otter aircraft while on a resupply flight, highlighting the capacity to conduct aerial SAR in Antarctica, albeit during the height of the summer season (J. Wingrove "Crews find Antarctic crash site, call off recovery" *The Globe and Mail* (January 26, 2013), available at <www.theglobeandmail.com/news/national/crews-find-antarctic-crash-site-call-off-recovery>).

⁵⁰ IMO "Sub-Committee on Radiocommunications and Search and Rescue (COMSAR)—17th session, 21 to 25 January 2013" (January 25, 2013; available at <www.imo.org/MediaCentre/MeetingSummaries/COMSAR/Pages/COMSAR>).

⁵¹ J.K. Moore et al. "Location and dynamics of the Antarctic Polar Front from satellite sea surface temperature data" (1999) 104 *Journal of Geophysical Research* C2 3059–3073.

⁵² Note 8.

with that framework, mechanisms for the management of marine living resources within that area have been developed. The dynamic that has the potential to arise as a result of climate change is that fish stocks traditionally found in more temperate waters may begin to be found further south in the Southern Ocean, which may create issues with respect to the interaction of various fisheries management regimes. Already there have been interactions between the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the commission responsible for the management of southern bluefin tuna, under the CSBT Convention.⁵³ While these are issues that will more than likely be resolved through management of relevant fisheries at a regional or sub-regional level, the global component of international fisheries law also needs to be taken into account. This may create difficulties for some aspects of CCAMLR's operations given ongoing doubts as to whether it is a regional fisheries management organization (RFMO) under the Fish Stocks Agreement,⁵⁴ and while its management of Southern Ocean fisheries is very closely aligned with the global component of international fisheries law,⁵⁵ the CAMLR Convention does have a broader marine environmental focus such that CCAMLR may need to give these issues greater weight if confronted by the effects of climate change upon the Southern Ocean.

A final game changer for the Antarctic region which has been on the horizon for much of the past decade has been bioprospecting.⁵⁶ This activity, which highlights the science-law-resources interface that has been a theme throughout the life of the ATS,⁵⁷ raises a number of important legal issues for both the ATS and global legal regimes, in addition to the adequacy of national legal systems regulating bioprospecting. So far the ATS has discussed but not conclusively responded to this developing phenomenon,⁵⁸ which opens the door for a significant bioprospecting 'incident' to shine the spotlight on whether the ATS has adequately developed legal mechanisms to respond to the issues that will arise, or whether that legal vacuum will be filled by other regimes such as the CBD and

⁵³ Convention for the Conservation of Southern Bluefin Tuna of 10 May 1993 (1819 UNTS 360).

⁵⁴ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 December 1995 (2167 UNTS 3).

⁵⁵ See the discussion in chapter 10 in this volume.

⁵⁶ See generally, A.D. Hemmings and M. Rogan-Finnemore (eds.) *Antarctic Bioprospecting* (University of Canterbury, Christchurch: 2005).

⁵⁷ As considered in S. Chaturvedi "Biological Prospecting and in the Southern Polar Region: Science-Geopolitics Interface" in J.M. Shadian and M. Tennberg (eds.) *Legacies and Change in Polar Sciences* (Ashgate, Farnham: 2009) 171-188.

⁵⁸ See the discussion in chapter 14 in this volume.

the ABS Protocol.⁵⁹ In this respect, the regulation of bioprospecting in the Southern Ocean within the area up to 60° S raises a number of challenges for both the ATS and the LOS Convention which place value on the ‘freedom’ of scientific investigation and research,⁶⁰ while at the same time not wishing to under-regulate an activity whose impact upon the marine environment and genetic resources may be uncertain.

ARCTIC REGION

Introduction

Compared to its Antarctic counterpart, the international regime for the Arctic is much more fragmented and contains not only more overlaps but also more gaps. To be fair, however, this is also true for a comparison between the Arctic and any other region of a comparable size. Fragmentation, overlaps and gaps in international regimes result from the tendency for international regimes to develop incrementally in response to new and emerging problems, technological developments, advances in science as well as changing needs and views of individual states or the international community as a whole, rather than by means of pro-active and all-encompassing frameworks. This tendency is in its turn caused by the resistance of states to accept restrictions on their sovereignty through international instruments and bodies established by them. Such resistance explains to some extent why the Arctic Council became a high-level forum rather than an intergovernmental organization and why the Arctic Ocean coastal states dismissed—by means of their Ilulissat Declaration⁶¹—the need for a new overarching treaty for the Arctic Ocean.

Overlaps Between Regional Regimes

The Arctic Council is now unmistakably the principal intergovernmental body for Arctic cooperation as well as the principal institution in the interaction between global and regional regimes in the Arctic. The Council’s competence is very broad—both spatially and substantively,⁶² as reflected among other things in the common practice for members to nominate officials from their ministries

⁵⁹ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity of 29 October 2010 (available at <www.cbd.int/abs/text/>).

⁶⁰ Antarctic Treaty, art. II; LOS Convention, art. 87 (1)(f); see also chapter 14 in this volume.

⁶¹ Ilulissat Declaration, Arctic Ocean Conference of 28 May 2008 (48 ILM 362).

⁶² Its competence is not spatially defined and is very broad in substantive terms, as it relates to “common Arctic issues” with special reference to “issues of sustainable development and environmental protection in the Arctic” (Ottawa Declaration, art. 1).

of foreign affairs as Senior Arctic Officials (SAOs)—but has been significantly under-utilized. In part this is a result of its status as a high-level intergovernmental forum rather than an intergovernmental organization. But at least as important is the circumstance that when the Council and the AEPS process were established, many regional bodies and instruments—in particular relating to the North Atlantic—had already been in operation for quite some time.

Numerous overlaps relevant to the law of the sea between the Arctic Council's competence and output and those of other regional bodies and instruments have been identified in this book. Overlaps exist in relation to specific issues, species and sectors, and also in relation to cross-sectoral issues. The former include environmental assessments (e.g. the United Nations Economic Commission for Europe (UNECE)), marine scientific research (e.g. the International Council for the Exploration of the Sea (ICES)), management of Arctic fisheries (e.g. the North-East Atlantic Fisheries Commission (NEAFC)), conservation and management of marine mammals (e.g. the ACPB and the North Atlantic Marine Mammal Commission (NAMMCO)), and conservation of migratory seabirds and their habitats (e.g. the AEWA).⁶³ As regards marine pollution, overlaps exist, *inter alia*, with the OSPAR Convention⁶⁴ and the acts by the OSPAR Commission in relation to land-based pollution and pollution from offshore activities, and UNECE and the United Nations Environment Programme (UNEP) on account of the efforts undertaken under their auspices on atmospheric pollution by persistent organic pollutants (POPs) and heavy metals. Finally, as regards overlaps on cross-sectoral issues, reference can in particular be made to the OSPAR Commission's efforts on marine protected areas (MPAs) and the ecosystem approach to oceans management.

Even though these overlaps are real and result from the Council's broad substantive and spatial competence, they have not led to actual incompatibility or conflict with the output of other bodies with an Arctic mandate. In many instances, this was avoided because the Council simply did not exercise its competence. For example, while the Council has exercised its traditional monitoring and assessment role in relation to marine mammals and fish species, it has so far avoided becoming involved in Arctic fisheries management and conservation and management of marine mammals; among other things to avoid incompatibility or conflict with other instruments and fora as well as the non-participation

A footnote in the Ottawa Declaration nevertheless specifies that the Council "should not deal with matters related to military security".

⁶³ Agreement on the Conservation of African-Eurasian Migratory Waterbirds of 16 June 1995 ((1995) 6 *Yearbook of International Environmental Law* 907).

⁶⁴ Convention for the Protection of the Marine Environment of the North-East Atlantic of 22 September 1992 (consolidated version at <www.ospar.org>).

of key distant water fishing states and entities in the Arctic Council.⁶⁵ Actual incompatibility or conflict with the Council's output is often also avoided because—apart from the Arctic SAR Agreement⁶⁶ and the Arctic MOPPR Agreement⁶⁷—all the (quasi-)regulatory output of the Council is non-legally binding and therefore commonly leaves states a broad margin of appreciation.

Apart from regional bodies and instruments, the Arctic Council also interacts with global bodies and instruments. For instance, the Arctic Marine Shipping Assessment (AMSA) recommendations and follow-up action as well as the recommendations on Arctic marine shipping put forward in the Arctic Ocean Review (AOR) project,⁶⁸ are conscious of the respective competences, roles and practices of the IMO and the Arctic Council. Its decision-shaping role as well as its role in regional implementation of global instruments require the Council to devote increasing attention to its coordinating role.⁶⁹

While the discussion has so far focused on the Arctic Council, there are also many overlaps between, on the one hand, other regional bodies whose competence extends into the marine Arctic and, on the other hand, global bodies. For instance, as part of its efforts on MPAs, the OSPAR Commission has coordinated extensively not only with regional bodies such as ICES and NEAFC but also with global bodies such as IMO and ISA.⁷⁰ NAMMCO coordinates with bilateral bodies such as the Joint Commission on Conservation and Management of Narwhal and Beluga (JCNB) and the Joint Norwegian-Russian Federation Fisheries Commission (Joint Commission), and is careful to position NAMMCO not as challenging but rather as being complementary to the International Whaling Commission (IWC).⁷¹ As a final example, reference can be made to the complementarity that exists between NEAFC and the Joint Commission despite their competence-overlap—both spatially and on species.⁷²

⁶⁵ Recommendations to enhance such involvement have nevertheless been proposed recently within the Arctic Ocean Review (AOR) project under the Council's Protection of the Arctic Marine Environment (PAME) working group (see *The Arctic Ocean Review Project. PHASE II REPORT. 2011–2013* (consolidated version of 9 February 2013, on file with the authors), 95–98). However, these are currently under consideration by SAOs and will not necessarily attract sufficient support for endorsement or adoption by the 2013 Kiruna Ministerial Meeting.

⁶⁶ Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic of 12 May 2011 (available at <www.arctic-council.org>).

⁶⁷ Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic of 15 May 2013 (available at <www.state.gov/r/pa/prs/ps/2013/05/209406.htm>).

⁶⁸ Draft AOR project Phase II Report, note 65 at 91–95.

⁶⁹ See chapter 3 in this volume.

⁷⁰ See chapter 5 in this volume.

⁷¹ See chapter 13 in this volume.

⁷² See chapter 11 in this volume.

Gaps in the Arctic Regime and Opportunities to Address Them

As international regimes tend to develop incrementally in a highly dynamic and often also highly unpredictable context, it does not come as a surprise that many chapters in this volume identify gaps or shortcomings in the regime for the marine Arctic and opportunities to address them. Among these is the potential role of the Arctic Council to develop harmonized procedures and optimize reciprocal access for marine science research activities in the maritime zones of Arctic states.⁷³ As regards MPAs, the Arctic Council's earlier efforts on the Circumpolar Protected Areas Network (CPAN) could be revived and take account of the various area-based management tools related to marine shipping.⁷⁴ More Council efforts on environmental assessments are also desirable; for instance updating and expanding existing Council output and establishing mechanisms or bodies to enhance compliance.⁷⁵ It should be noted that Phase II of the AOR project has not devoted any attention to environmental assessments, even though these were covered in Phase I.⁷⁶

As regards seabirds, there is potential for initiatives by the Arctic Council to complement the protection afforded by the global CMS⁷⁷ regime and the regional seabird instruments adopted under its scope.⁷⁸ In relation to marine shipping, opportunities for addressing gaps in the current regime exist within IMO, the Arctic Council and among ad hoc groupings of states acting in different capacities, for instance as coastal, port or flag states. Examples of the latter are multi-lateral consultations on the Northwest Passage and the Northern Sea Route in light of the fact that the future Polar Code neither intends to resolve the disagreements between states on applicable navigation regimes nor prejudice the exercise of coastal state jurisdiction in ice-covered areas pursuant to article 234 of the LOS Convention.⁷⁹

⁷³ See chapter 15 in this volume and the draft AOR project Phase II Report, note 65 at 101–102.

⁷⁴ See chapter 5 in this volume. During the PAME I-2013 Meeting, Canada proposed a project on a 'Pan-Arctic Framework for Networks of Marine Protected Areas' (doc. PAME(I) 13/9/a; on file with the authors).

⁷⁵ See chapter 7 in this volume.

⁷⁶ *The Arctic Ocean Review. PHASE I REPORT (2009–2011)* (available at <www.pame.is>), s. 5.5.

⁷⁷ Convention on the Conservation of Migratory Species of Wild Animals of 23 June 1979 (1651 UNTS 333).

⁷⁸ See chapter 8 in this volume and the draft AOR project Phase II Report, note 65 at 96–98.

⁷⁹ See chapter 9 in this volume and the draft AOR project Phase II Report, note 65 at 91–95.

Finally, as regards fisheries, the most notable gaps relate to research⁸⁰ and the coverage of the Central Arctic Ocean⁸¹ by RFMOs or Arrangements. While perhaps unlikely, the latter gap could in principle also be addressed by the Arctic Council by means of a treaty; pursuant to the same approach that has led to the Arctic SAR Agreement and the Arctic MOPPR Agreement. However, a stand-alone instrument on the (Central) Arctic Ocean is a more likely option and preparatory consultations for its negotiation appeared already ongoing at the time of writing.⁸² If correct, this pathway may have been chosen largely to eventually ensure easier involvement of key non-Arctic fishing states (e.g. China and Japan) and entities (i.e. the European Union (EU) and Taiwan).

Past and Future Game Changers for the Arctic Regime

The ending Cold War era and widespread concerns on pollution—in particular caused by or originating from the Soviet Union/Russian Federation—were the main drivers for the adoption of the AEPS in 1991. Global climate change has been the ‘root’ game changer since at least 2004, when the Arctic Climate Impact Assessment (ACIA) and its policy recommendations were finalized.⁸³ This milestone assessment documented impacts of global climate change on Arctic ecosystems, biodiversity and human populations and predicted further dramatic change for the Arctic as well as for the world as a whole.⁸⁴ A wide range of record lows and highs since then—for instance on sea-ice extent and thickness, the volume of Greenland’s ice-cap, the northward expansion of fish species and the duration of the summer shipping-season in the Northwest Passage and Northern Sea Route—underscore many of ACIA’s predictions and often even highlight their underestimation.

Another game changer is the Russian Federation’s planting of its flag on the geographical North Pole’s deep sea-bed in 2007, during the gathering of data for the Russian Federation’s revised CLCS submission. The Russian Federation’s flag planting triggered a number of reactions and counter-reactions. The first of these was the incorrect perception by many—e.g. media, academics, environmental non-governmental organizations (NGOs) and the European Parliament (EP)—

⁸⁰ *Ibid.*, 96.

⁸¹ ‘Arctic Ocean’ is defined here as the waters north of the Bering Strait, Greenland, Svalbard, and Franz Josef Land, excluding the Barents Sea and ‘Central Arctic Ocean’ as the high seas pocket in the Arctic Ocean.

⁸² See chapter II in this volume.

⁸³ See T. Fenge, “Toward a Future History of the Arctic: Canada and the Arctic Council”, in S. Bocking and B. Martin (eds.) *Perspectives on Environmental History of Northern Canada* (University of Calgary Press, Calgary: forthcoming in 2013; on file with the authors) at unnumbered pp. 15–18 on the importance of ACIA’s policy recommendations for the Arctic Council’s reform.

⁸⁴ The ACIA Overview Report and the Scientific Report are available at <www.amap.no/acia>.

that the flag planting was the green light for the last land-grab on earth and a resource bonanza, unchecked due to a legal vacuum. This incorrect perception was then followed by the incorrect assumption that this vacuum logically had to be filled by a treaty modeled on the Antarctic Treaty and calls to that effect.⁸⁵ The Arctic Ocean coastal states responded in 2008 with the Ilulissat Declaration, which rejected these incorrect perceptions by pointing out, among other things, that

the law of the sea provides for important rights and obligations concerning the delimitation of the outer limits of the continental shelf [...]. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims. [...] We [...] see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean.

This notwithstanding, the Declaration reflects a clear commitment for the development of bilateral and multilateral instruments on maritime safety, vessel-source pollution and SAR, both within and outside international bodies such as the IMO and the Arctic Council. The need for adaption was thus not questioned, but only certain outcomes and thereby the pathways connected to such outcomes.

The Ilulissat Declaration and the convening of the five Arctic Council members at ministerial level then triggered criticism by the other three members and the Permanent Participants for undermining the Arctic Council.⁸⁶ The Arctic Ocean coastal states nevertheless convened once again at ministerial level in 2010, in Chelsea, Canada. At that meeting, however, the United States Secretary of State Clinton expressed doubts and concerns on the appropriateness of ministerial meetings of the Arctic five,⁸⁷ and no further such meetings have taken place since then. The high-level participation at the 2011 Nuuk Ministerial Meeting—in particular by the United States, which was not only represented by Clinton but also by the Secretary of the Interior Salazar—is another clear sign of the Arctic five's renewed full support for the Council.

By late 2008/early 2009, the Russian Federation's flag planting and the reactions and counter-reactions triggered by it, had—together with concerns about the impacts of global climate change on the Arctic as well as interest in potential development—given rise to a wide range of different 'futures' for the Arctic and its governance.⁸⁸ This prompted several non-Arctic states and entities—namely

⁸⁵ See, *inter alia*, the EP's Resolution on 'Arctic governance' (*Official Journal* 2010, C 9/7; doc. P6_TA(2008)0474), para. 15.

⁸⁶ See e.g. the Report of the April 2010 SAOs Meeting (available at <www.arctic-council.org>), 20.

⁸⁷ T. Pedersen "Debates over the Role of the Arctic Council" (2012) 43 *Ocean Development and International Law* 146–156 at 152.

⁸⁸ K. Dodds "Anticipating the Arctic and the Arctic Council: Pre-emption, Precaution and Preparedness", in T. Axworthy, T. Koivurova and W. Hasanat (eds.) *The Arctic Council:*

China, Italy, South Korea and the EU—to apply for observer status with the Arctic Council prior to its 2009 Tromsø Ministerial Meeting. Since then, Japan (2009), Singapore (2011) and India (2012) have also applied. The 2009 Tromsø Ministerial Meeting could not reach consensus on the applications, among other things due to the then already ongoing debate on the strengthening or reform of the Council in general, as well as on the role therein for non-Arctic states and entities in particular.⁸⁹ The 2011 Nuuk Ministerial Meeting did not decide on the then pending applications either, but adopted the ‘Nuuk Observer Rules’⁹⁰ and seemed intent on having all applications evaluated in light of these new rules at the 2013 Kiruna Ministerial Meeting.⁹¹

2009 was not only a crucial year for the Arctic Council due to the applications for observer status. The 2009 Tromsø Ministerial Meeting approved the 2009 AMSA Report⁹² and its recommendations and immediately acted on two of these, namely calling for the development of a mandatory Polar Code within IMO and establishing a Council Task Force to negotiate what eventually became the Arctic SAR Agreement.⁹³ The first of these two actions is an example of the Council’s decision-shaping role⁹⁴ and the second of its role in the regional implementation of global treaties—as the Arctic SAR Agreement implements the SAR Convention⁹⁵ as well as the ICAO Convention.⁹⁶ This latter role was also used to initiate and further the conclusion of the Arctic MOPPR Agreement—which implements the OPRC.⁹⁷

At the start of the negotiations on the Arctic SAR Agreement, however, no decision had yet been made on the legal status of its outcome (i.e. legally binding or not) and, in part as a corollary thereto, whether it would be adopted by the

its Place in the Future of Arctic Governance (Gordon Foundation/Munk School of Global Affairs/Arctic Centre: 2012; available at <gordonfoundation.ca/node/530>), 1–28.

⁸⁹ E.J. Molenaar “Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea” (2012) 27 *International Journal of Marine and Coastal Law* 553–595 at 580–581. See also T. Fenge “Canada and the Arctic Council: Our Turn to Conduct the Arctic Orchestra” (2012; April) *Policy Options* (available at <www.irpp.org/po/archive/april2/fenge.pdf>), 65.

⁹⁰ Contained in Annex 1 to the Report of the May 2011 SAOs Meeting (available at <www.arctic-council.org>), 50–51.

⁹¹ Nuuk Declaration on the occasion of the Seventh Ministerial Meeting of the Arctic Council of 12 May 2011 (available at <www.arctic-council.org>), 2.

⁹² Available at <www.pame.is>.

⁹³ Tromsø Declaration [o]n the occasion of the Sixth Ministerial Meeting of [t]he Arctic Council of 29 April, 2009 (available at <www.arctic-council.org>), 4–5. It concerns AMSA Recommendations I(B) and I(E).

⁹⁴ See Fenge, note 89 at 64 for other examples of the Council’s decision-shaping role.

⁹⁵ International Convention on Maritime Search and Rescue of 27 April 1979 (1403 UNTS 118), as amended.

⁹⁶ Convention on International Civil Aviation of 7 December 1944 (15 UNTS 295).

⁹⁷ International Convention on Oil Pollution Preparedness, Response and Cooperation of 30 November 1990 (1891 UNTS 77).

Arctic Council or otherwise. The likelihood that the March 2010 Arctic Ocean coastal state ministerial meeting was to be the last of its kind and the Arctic five's renewed full support for the Council that this implied, as well as the environmental disaster with the *Deepwater Horizon* offshore installation in the Gulf of Mexico in April 2010, are likely to have been important drivers for the preference for a legally binding outcome. While the 2011 Nuuk Ministerial Meeting's decision to commence negotiations on the Arctic MOPPR Agreement⁹⁸ can be traced back to AMSA Recommendation III(C), it was certainly also strongly influenced by the *Deepwater Horizon* disaster. At this stage, however, it is not convincing to argue that this disaster can be categorized as a game changer, as support for the negotiations *per se* also implied unwillingness to freeze expansion of offshore hydrocarbon activities altogether. This position is likely to be maintained by most or all Arctic Ocean coastal states despite the accidents with Shell's prospecting activities in the Beaufort and Chukchi Seas in 2012 and Shell's decision to suspend drilling there at least for 2013.⁹⁹

The Arctic states eventually decided that the Arctic SAR Agreement would not be adopted by the Council, but to merely use the 2011 Nuuk Ministerial Meeting as the occasion for its signature. The Nuuk Declaration accordingly refers to the Arctic SAR Agreement as "the first legally binding agreement negotiated *under the auspices* of the Arctic Council" (emphasis added).¹⁰⁰ The main—if not only—reason for this decision seems to be that members of the Arctic Council have so far taken the position that as the Council is not an intergovernmental organization, it cannot adopt legally binding instruments.

The concept of the Arctic Council System (ACS) has been introduced to clarify that legally binding instruments such as the Arctic SAR Agreement and the Arctic MOPPR Agreement—and their institutional components—can be part of the Council's output even though they are not formally adopted by it.¹⁰¹ The ACS concept consists of two basic components. The first component is made up of the Council's constitutive instrument, other Ministerial Declarations, other instruments adopted by the Arctic Council (e.g. its Arctic Offshore Oil and Gas Guidelines)¹⁰² and the Council's institutional structure. The second component consists of instruments negotiated under the Council's auspices and their institutional components. The Arctic SAR Agreement and the Arctic MOPPR Agreement, as well as their Meetings of Parties under articles 10 and 14 respectively, all belong to this category.

The negotiation of treaties under its auspices, the establishment of the Arctic Council Secretariat in Tromsø, Norway—effectuated on 21 January 2013—and

⁹⁸ Nuuk Declaration, note 91 at 4.

⁹⁹ See Shell's Media Release of 27 February 2013 (available at <www.shell.us>).

¹⁰⁰ Nuuk Declaration, note 91 at 2.

¹⁰¹ Molenaar, note 89.

¹⁰² The most recent version dates from 2009 (available at <www.pame.is>).

the introduction of assessed contributions all address gaps and shortcomings of the Arctic Council identified earlier¹⁰³ and demonstrate that the Council has transformed at a remarkable pace in just a few years. New proposals for negotiating treaties under the Council's auspices have already been made within the AOR project (e.g. on marine shipping)¹⁰⁴ and outside it, possibly relating to black carbon or other short-lived climate forcers or the prevention of pollution from offshore hydrocarbon activities.¹⁰⁵

Further institutional change to adapt the Arctic Council to the rapidly changing circumstances in the Arctic will at some stage become inevitable and may also involve an overhaul of its constitutive instrument¹⁰⁶ or even further transforming the Arctic Council into an intergovernmental organization established by a regional treaty.¹⁰⁷ If the latter option would be pursued, it will be interesting to see if Permanent Participants would retain the same status and role that they currently have and whether or not non-Arctic states and the EU would be given the opportunity to become party to the treaty and members of the Council.

As regards non-Arctic states and the EU, it is worth noting that even though the Ottawa Declaration does not envisage new members, this is not inconsistent with current international law. Assumptions of inconsistency are sometimes caused by incorrect assumptions about the similarity between the Arctic Council and the ATS.¹⁰⁸ Article XIII of the Antarctic Treaty in principle allows any state to accede and the status of ATCP can, pursuant to article IX(2) of the Antarctic Treaty, in principle be granted to any state as well. However, in view of the Council's current mandate and main approaches, current international law does not provide non-Arctic states and entities with a clearly applicable and unquali-

¹⁰³ See e.g. T. Koivurova and E.J. Molenaar *International Governance and Regulation of the Marine Arctic* (WWF International Arctic Programme: 2010; available at <www.panda.org/arctic>), 8–9.

¹⁰⁴ E.g. to amend or complement the Arctic MOPPR Agreement to ensure coverage of other pollutants, in particular noxious liquid substances; and a new regional instrument “to collect and share Arctic marine traffic data” (draft AOR project Phase II Report, note 65 at 92–93).

¹⁰⁵ See Fenge, note 83 at unnumbered p. 23. Note also that, during the PAME I-2013 Meeting, the Oil and Gas Contact Group submitted a concept paper on ‘International Offshore Oil and Gas Standards in the Arctic’ (doc. PAME(I) 13/9/b; on file with the authors).

¹⁰⁶ As e.g. suggested by Fenge, note 89 at 56–58.

¹⁰⁷ As e.g. suggested by the Arctic Parliamentarians (cf. para. 1 of the Conference Statement adopted at the Arctic Parliamentarians’ 10th Conference in September 2012 (available at <www.arcticparl.org>), which is based on the Report entitled ‘Arctic Governance in an Evolving Arctic Region’ drawn up by the Standing Committee of Parliamentarians of the Arctic Region (SCPAR; on file with the authors)) and Koivurova and Molenaar, note 103 at 89.

¹⁰⁸ Another source of incorrect assumptions may relate to the Treaty concerning the Archipelago of Spitsbergen (of 9 February 1920 (2 LNTS 7)), to which all states can become parties and which grants a de facto freedom of scientific research.

fied entitlement to become a member.¹⁰⁹ The situation would be different, for instance, if the Council were to engage in regulation in a manner that would be inconsistent with the *pacta tertiis* principle.

Even though not even remotely similar to the Antarctic territorial disputes south of 60° S, several international disputes and disagreements relevant to the law of the sea currently exist in the Arctic. The most important are:

1. unresolved maritime boundary disputes, and (potential) disagreements or disputes relating to the establishment of final and binding outer limits of outer continental shelves;
2. disputes on the legality of straight baselines and entitlements to historic waters/title;
3. disputes on the applicable navigation regime in the Northwest Passage and the Northern Sea Route as well as on the conformity of national laws and regulations with article 234 of the LOS Convention;
4. disputes between Norway and other parties to the Spitsbergen Treaty¹¹⁰ on its interpretation, in particular its spatial scope; and
5. the dispute between Canada and Denmark on title to territory over Hans Island.

Apart from the dispute on Hans Island—which is very unlikely to develop into a game changer—useful predictions on the potential for the other disputes to develop into game changers are difficult to make and are not attempted here.

But as the discussion so far has already shown, game changers do not necessarily have to be related to international law disputes. Good examples are the ‘wildcards’ listed under several categories as part of the scenario narratives developed under the AMSA project, for instance accelerated ice melt, major pollution disasters and technology breakthroughs.¹¹¹ Significant changes in the relationships between Arctic states—for instance the United States and the Russian Federation—and between Arctic states and non-Arctic states and entities could trigger game changers as well. The 2013 Kiruna Ministerial Meeting has the challenging task of handling a significant number of important applications for observer status by non-Arctic states and entities.¹¹² Approval of all applications

¹⁰⁹ See the discussion by Molenaar, note 89 at 565–568, who highlights that participation in existing regional marine regimes with regulatory mandates is mostly limited to coastal (and port) states. The main example—apart from the *sui generis* ATS—of regional marine regimes that also allow for participation by non-coastal states are RFMOs with regulatory areas made up entirely or partly of high seas.

¹¹⁰ See note 108.

¹¹¹ *The Future of Arctic Marine Navigation in Mid-Century. Scenario Narratives* (May 2008; available at <www.pame.is>).

¹¹² Namely by China, the EU, India, Italy, Japan, Singapore and South Korea.

would mean that Arctic states would be outnumbered by non-Arctic states,¹¹³ while rejections—for instance the EU on account of its trade restrictions on seal products¹¹⁴—may harm bilateral relationships. Another dossier where non-Arctic states and entities are relevant is the ongoing process towards the adoption of a stand-alone instrument on (Central) Arctic Ocean fisheries. Non-involvement of key non-Arctic states and entities—even though unlikely—or involvement at a stage when they are essentially presented with a *fait accompli* and cannot participate in a meaningful way in the formal negotiations, could have a range of repercussions within the Arctic and beyond.

A COMPARATIVE PERSPECTIVE ON THE POLAR REGIONS

As chapter I set out, a number of considerations make a comparative perspective on the polar regions of interest for case studies for the regional implementation of the law of the sea:

1. The polar regions share climatologic, ecological and other characteristics that are not present in other marine regions. Consequently, regulatory responses could be similar in both cases, could be developed in tandem or, alternatively, experiences in one region might be relevant to the other region;
2. The polar regions are facing rapid change, in particular the Arctic. This has led to significant developments in regional cooperation; and
3. The polar regions offer two idiosyncratic examples of regional cooperation.

The current section reviews what kind of interactions there have been in relation to regulatory responses and to what extent the idiosyncrasies of the political and legal geography of the two polar regions has impacted on regional cooperation.

Interactions Between Regulatory Responses

The preceding chapters indicate that for most issues there is little interaction between the regulatory responses developed in the two polar regions, be it in the form of the development of regulation in tandem or experiences in one region that are relevant to the other region. Shipping provides the one example in which there has been a strong interaction between the development of the regulatory regimes in the polar regions. There are a couple of reasons that explain this strong interaction in this particular case. There is a wide recognition, including

¹¹³ Existing observers are: France, Germany, the Netherlands, Poland, Spain and the United Kingdom.

¹¹⁴ See, *inter alia*, disputes DS400 and DS401 at <www.wto.org>.

in the LOS Convention, that various purposes for which shipping is regulated (e.g. maritime safety and vessel-source pollution) as well as various categories of substantive standards (e.g. construction, design, equipment and manning standards), have to be addressed at the global level. The authority of the IMO to act in relation to these matters is undisputed and all major conventions in relation to these issues have been drawn up in its framework. Although international law leaves scope for unilateral and regional regulation—through article 234 of the LOS Convention and otherwise—it seems unlikely that future mandatory regulation outside the framework of the IMO—on one or both polar regions in their entirety—will pose a serious challenge to IMO's authority.

Notwithstanding the preeminence of the IMO, the development of a single instrument to address maritime safety and vessel-source pollution in the two polar regions, which is yet to be completed, has met with some difficulties along the road. Initially, a bi-polar approach met with concern among the ATCPs as it was considered that the proposed document did not give full consideration to the unique conditions of the Southern Ocean. As a consequence, the IMO initially adopted guidelines for ships operating in the Arctic in 2002, while the ATCM adopted a decision on 'Guidelines for Ships Operating in Arctic and Antarctic Ice-Covered waters' in 2004. These latter guidelines are very similar to those adopted two years earlier by the IMO. The IMO subsequently adopted the 2009 Polar Shipping Guidelines, updating its earlier guidelines and extending them to the Southern Ocean. The development of a mandatory Polar Code applicable to both polar regions is ongoing. One of the difficulties is the relationship between the Polar Code and national regulation in accordance with article 234 of the LOS Convention. This is an Arctic issue, pitching Canada and the Russian Federation against other states, in particular the United States, and does not have any relevance to Antarctica. Once adopted, the Polar Code will be the first legally binding bi-polar instrument.

The conservation and management of marine mammals provides a very different case of the interaction between a global regime, in this case the IWC, and the regional regimes in the polar regions. Unlike the IMO, the IWC is, as indicated by Mossop in chapter 12, essentially dysfunctional, with a serious division among its members about the purpose of the organization. As Mossop observes, the IWC has not been capable of assuming responsibility in relation to the management of whaling in the Southern Ocean. On the other hand, states have been reluctant to raise the subject in the framework of the ATS, even though there would be scope to do so. The main reason seems to be a fear that the divisions that have manifested themselves in the IWC will spill over into the ATS. As Bankes points out in chapter 13, in the Arctic, the dysfunction of the IWC has led to regulatory responses at the (sub-)regional, bilateral and national level in order to attain outcomes that are not achievable in the framework of the IWC. This provides just one of many instances in which the differences in the political and legal

geography of the polar regions impact on the development or absence thereof of specific regulatory regimes.¹¹⁵

The implementation of article 76 of the LOS Convention provides an illustration of how the jurisdictional framework of the law of the sea has generally shaped the law of the sea policies of states in both polar regions. In the Arctic this is in line with its 'law of the sea normalcy'. Like any other region it has coastal states that are making use of their right to define the extent of their maritime zones in accordance with the LOS Convention. As Scott observes in chapter 2, in Antarctica, upholding the agreement to disagree on the issue of sovereignty:

has included as a logical pre-requisite, claimant states behaving so as to demonstrate ongoing commitment to their claims. Thus, whereas the ATS has developed regimes in relation to specific activities [...], claimant states have followed developments in the law of the sea as they pertain to the establishment and definition of coastal state maritime zones.

The interest of article 76 of the LOS Convention for the present study lies in the fact that it imposes strict procedural and substantive requirements on coastal states that are required to establish the outer limit of their continental shelf beyond 200 nm. These requirements have been further elaborated by the CLCS, the body set up by the LOS Convention in connection with the process of defining the outer limits of the continental shelf beyond 200 nm. As is set out in chapter 4, claimant states in Antarctica and the coastal states in the Arctic region have in different ways employed the mechanisms created by the Convention and the CLCS in discharging their obligations under the LOS Convention. Interaction between the polar regions in this case has been totally absent. This is in line with the implementation of article 76 in other regions.

The implementation of article 76 provides an example in which there is a strong interaction between the general framework created at global level and implementation at the national level. At the same time, the implementation of article 76 may, depending on the circumstances of the case, also have some regional effects. In the Antarctic, there was in particular a need for coordination between claimant states to ensure consistency in their approach in the light of possible impacts of the article 76 process on the ATS. In the Arctic, the coastal states acted jointly through the Ilulissat Declaration, confirming that the LOS Convention also applies to the Arctic, in reaction to media coverage suggesting that the Arctic Ocean was subject to a 'land grab'. This basically concerned a misconception about the legal regime and the policies of the coastal states in the media, not an actual threat to the applicable global regime.

A number of chapters in this book point to a significant difference between the two polar regions as regards the regulation of specific activities. Regulation in the Antarctic is in many instances characterized by a regional component that

¹¹⁵ See further below.

is grounded in one or more instruments in the ATS, whereas regulation in the Arctic is much more fragmented, even though the Arctic Council provides a framework for looking at issues from a region-wide perspective. As Warner observes in chapter 7, implementation of international law obligations to conduct environmental impact assessment (EIA) in the Arctic occurs primarily at the national level with minimal oversight by regional and global bodies whereas in the Antarctic, the Madrid Protocol provides a more integrated regime for environmental assessment. Contrast also the central role of the CCAMLR in the regulation of fisheries in the Southern Ocean detailed in chapter 10 by Serdy to Molenaar's conclusion in chapter 11 that the large number of complementary regional, sub-regional and bilateral fisheries fora and instruments that apply to the marine Arctic is particularly noteworthy. Similar conclusions apply to the issue of marine protected areas discussed in chapters 5 and 6 and migratory species in chapter 8. The presence of numerous overlaps between the Arctic Council's competence and other regional regimes—which have so far not led to actual incompatibility or conflict—is a notable distinction with the ATS, where overlaps, potential incompatibility or conflict and the need for coordination have arisen largely in relation to global bodies such as IMO and ISA.¹¹⁶

A common characteristic of all the above activities in the Antarctic is that states have reached agreement on a regulatory regime within the framework of the ATS. In a case in which it is not possible to reach agreement within the ATS, it may well be impossible to achieve any kind of meaningful cooperation for any part of the Southern Ocean between a more limited number of parties because of the challenge this would pose to the ATS. This contrasts with the Arctic. Region-wide cooperation in the framework of the Arctic Council is much less developed and subregional cooperation is common and accepted and does not bear the same connotations of threatening the regional regime. This difference is also reflected in the area of application of instruments applicable to the two polar regions. In the case of Antarctica, the limit of 60° S of the Antarctic Treaty area and the Antarctic convergence as defined in the CAMLR Convention, provide the obvious focal points for the area of application of any additional regime.¹¹⁷ In the Arctic, other considerations apply. First of all, the general recognition of coastal state rights over maritime zones implies that any regional regime will have to take into account the limits of national jurisdiction in its definition and the consequences this has for regulation within and beyond that limit. In view of the presence of significant areas of continental shelf beyond 200 nm, the extent of national jurisdiction will moreover vary depending on the issue that is subject

¹¹⁶ A notable exception is the overlap between CCAMLR and the Commission for the Conservation of Southern Bluefin Tuna, discussed in chapter 10.

¹¹⁷ Note, however, that in the case of CRAMRA the area of application was defined with reference to the provisions of art. 76 of the LOS Convention.

to regulation. Secondly, existing instruments have different areas of application. Additional new instruments will have to take into account these limits in defining their area of application or will have to come to terms with the consequences of existing regimes by other means.

The particular interaction between the ATS and the law of the sea may also lead to uncertainties concerning the applicable legal regime. A case in point is made by Lefeber in chapter 14, who observes that the basic premise of the Antarctic Treaty and the LOS Convention concerning marine scientific research is the same: it is free. However, that freedom is subject to the varying conditions set out in these two instruments, which are bound to give rise to uncertainty about the applicable legal regime.¹¹⁸ Interestingly, the solution Lefeber proposes confirms the above point about the centrality of the ATS in successfully regulating activities in Antarctica:

It would facilitate marine scientific research in the Antarctic Treaty area if the ATCPs would explicitly assert collective jurisdiction over marine scientific research in marine areas adjacent to land areas in the Antarctic Treaty area, and apply the provisions of the Antarctic Treaty related to scientific research in these areas.

This situation in respect of marine scientific research contrasts with that in the Arctic, in which case the LOS Convention provides the undisputed regulatory framework for marine scientific research.¹¹⁹

The polar regions both have certain lessons to learn about the inclusiveness or exclusiveness of regional cooperation. As was explained in chapter 1, which states are entitled to participate in regional cooperation will first of all depend on the subject matter that is being regulated. In the case of Antarctica, a particularity of the ATS is that it effectively excludes parties from outside the ATS from decision-making. As was detailed by Scott in chapter 2, this led to a challenge to the ATS in the United Nations in the 1980s. This challenge was among others countered by coopting some of the most vociferous opponents as participants in the ATS. In the Arctic, the interest of extra-regional states and entities is of much more recent origin and Arctic states and Permanent Participants are still grappling with their involvement. This question will among others depend on the kind of regime(s) that will be developed in the Arctic. The law of the sea provides a logical focal point for defining the involvement of non-Arctic states and entities in specific regimes as it defines their participatory rights for specific subjects. Merchant shipping provides a case in point. The LOS Convention highlights the primacy of global regulation through the IMO and this avenue is presently being pursued in developing a specific mandatory regime through the negotiation of the Polar Code. In view of the commitment of the Arctic Ocean coastal states to the law of the sea, it stands to reason that they will also develop cooperation

¹¹⁸ A similar point is made by Scott in chapter 6 in relation to the issue of marine protected areas.

¹¹⁹ See chapter 11 in this volume.

on the basis of the rules provided by this framework in the development of other specific regimes. It may also be the case that the interest of non-Arctic states and entities at least in part will be temporary. A large part of this interest seems to be explained by the projections about the extent of change in the marine Arctic and the effects this will have on ocean uses. This requires a new regulatory framework. Once these new regulatory frameworks have been put in place, regional cooperation may well become more similar to that in other regions, which generally only have limited participation by extra-regional states in relation to many issues.

The preceding analysis makes clear that there is little likelihood of a convergence of the basic legal underpinnings of the cooperative regimes in the polar regions. There is no reason to assume that the Arctic coastal states would feel any need to apply solutions that are particular to the Antarctic and its absence of normal coastal state jurisdiction. That is not to say that the Arctic will not witness a deepening of cooperation, as is also suggested by the concept of the ACS developed by Molenaar, but the Arctic coastal states will be pivotal in any specific regime for the marine Arctic.

In one sense there may be a convergence between the Arctic and Antarctic. The Arctic Council and its subsidiary bodies, like the different components of the ATS in relation to the Southern Ocean, have a potential for contributing to a cross-sectoral approach to the regulation of the marine Arctic.

LESSONS TO BE LEARNED FOR OTHER REGIONS¹²⁰

Regional cooperation to manage ocean areas is a global phenomenon. Cooperation in the polar regions has common traits with other regions, but particularly the Antarctic also has its idiosyncrasies. In view of the many different factors that contribute to shaping cooperation in specific regions, it is not possible to be too prescriptive about the kind of lessons to be learned for other regions. Some points nonetheless can be made. The political, economic and legal geography of a region will always have a major impact on regional cooperation. This will among others determine the capabilities of states to commit resources to regional cooperation, and the distribution of resources in a marine region and their actual exploitation is highly significant for determining the extent of cooperation that is required. The kind of cooperation taking place in the Arctic Council and its subsidiary bodies would be difficult to envisage in certain other areas of the globe, having less resources at their disposal.

¹²⁰ The conclusions contained in this section in large part would seem to coincide with those of political scientists looking at regime effectiveness. For an example see E.L. Miles et al. *Environmental Regime Effectiveness: Confronting Theory with Evidence* (The MIT Press, Cambridge: 2002).

The legal geography of the oceans based on the LOS Convention is another major factor shaping regional cooperation. In Antarctica, this legal geography interacts with the ATS and has given rise to a situation that is dissimilar from other marine regions. Still, it does show that regional cooperation, to be successful, has to account for the division of competences between states resulting from the international legal order. In the Arctic, the legal geography prescribed by the LOS Convention results in a marine region that is largely covered by coastal state maritime zones. The example of fisheries in the Barents Loophole described by Molenaar in chapter II illustrates that in such a case coastal states may exert pressure to acquire *de facto* control over activities in a high seas area that is completely surrounded by their 200-nautical-mile zones. The Arctic Ocean coastal states have also suggested that they have a stewardship role in relation to the central Arctic Ocean that is enclosed by their 200-nautical-mile zones. In view of the current uncertainty about the further development of the legal regime of the marine Arctic, such statements may raise a certain wariness in other states. At the same time, the governance of areas beyond national jurisdiction requires reinforcement. Regional cooperation is likely to provide an essential component of such a governance system and it is obvious that coastal states in that case have a significant interest and will be best placed to take the lead in this respect.¹²¹ Experiences in the Arctic, and also in the Antarctic, may provide building blocks for such regimes in other regions with marine areas beyond national jurisdiction.

The individual case studies also point to the importance of the basic (institutional) design in setting up regional cooperation. Once regimes have been created they will have a continuing impact on regional cooperation. The Antarctic Treaty has provided the basic design for dealing with claims to sovereignty over Antarctica and this design has impacted on all subsequent treaty regimes dealing with specific issues developed over the years. A similar observation holds true for the Arctic. The Arctic Council presently provides the main forum for region-wide cooperation in the marine Arctic. The ministerial meetings of the five Arctic Ocean coastal states in Ilulissat and Chelsea in 2008 and 2010 could be seen as a challenge to the Arctic Council. No further ministerial meetings took place after 2010 and this is probably in large part due to pressure from those interested in the Arctic Council remaining the focal point of the development of the governance regime of the Arctic.

The individual case studies also point to the importance of basic (institutional) design in another respect. As was pointed out above, a number of the case stud-

¹²¹ As is concluded by Baker in chapter 3:

Collective efforts of the [Arctic (coastal) states] to prove that they are adequately fulfilling obligations under the global regime for the law of the sea will be the best response to claims by non-Arctic states that their legitimate interests in the region are not being met.

ies indicate that the strength of regional regimes will be an important factor in determining their success in interacting with global and extra-regional regimes. A weak regional regime will not be able to successfully translate action at the global level to action at the regional level and will have difficulty in engaging in interregional cooperation and coordination. This conclusion also points to the importance of complementarity of global and regional cooperation. In an era of globalization, global cooperation and global rules and regimes on the oceans are essential in creating a framework within which regional regimes can successfully operate.

