Overlapping legal regimes and the ATS

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4 – Overlapping legal regimes

This seminar introduces the United Nations Law of the Sea Convention, one of the principal legal instruments outside the Antarctic Treaty System that has an impact on the Antarctic. The seminar will highlight overlaps between the ATS and the LOSC and other legal regimes, including the potential for seabed mining in the extended continental shelf zones of Australia, which reach into the Antarctic Treaty Area south of 60º South, and the problem with whaling and a whale sanctuary.
Recommended Reading

Huge maritime area of Southern Ocean...
The Antarctic Governance Structure

ANTARCTIC TREATY
ATCM
Secretariat in Buenos Aires

1991 Protocol on Environmental Protection to the Antarctic Treaty
CEP/ATCM

1972 Convention for the Conservation of Antarctic Seals
UK Depositary Government

1980 Convention on the Conservation of Antarctic Marine Living Resources
CCAMLR Commission in Hobart

NGOs and other experts
Antarctic Treaty Summary

• Peace and science
• Collaboration
• ‘Suspension’ of claims to territory *status quo ante*
• No military activity
• No nuclear testing/dumping
• Compliance through inspection provisions
• Consensus decisions
ATCMs

• All Consultative Parties (28/48) collaborate throughout the year and meet annually at ATCM
• Receive reports from ATS organisations, NGOs and invited experts
• Make decisions (CCAS, CCAMLR, MP etc)
• Produce Final Report (www.ats.aq)
• Supported by Secretariat in Buenos Aires
Seals Convention Summary

- Conservation of seals
- Harvesting permitted within national rules; able to establish a moratorium if parties agree
- Objection to amendments available
- Oversight formally entrusted to SCAR and UK Foreign and Commonwealth Office as no secretariat established (not necessary, no commercial sealing)
CCAMLR Summary

• “Conservation includes rational use”
• Ecosystem approach (time and space; harvested, dependent and related populations)
• Whales/seals covered elsewhere
• Commission (in Hobart) oversees Convention
• Consensus decisions but can opt out (nobody does)
• Observation and inspection procedures
Sub-Antarctic Islands within CCAMLR Area

- Heard and McDonald Islands (Australia)
- Kerguelen and Crozet Islands (France)
- Bouvetøya (Norway)
- Prince Edward & Marion Islands (South Africa)
- South Georgia and the South Sandwich Islands and Shag Rocks (Argentina and United Kingdom – in dispute)
Madrid Protocol Summary

• Limit adverse impacts on Antarctic environment and dependent and associated ecosystems
• Scientific research has priority
• Planned activities must have prior EIA (state responsibility)
• Prohibition on mineral resource activities
• Details set out in 6 annexes
Committee for Environmental Protection

- All signatories to Madrid Protocol consult throughout the year and meet at ATCM
- Examines environmental matters and formulates a report on operation of MP for ATCM
- Makes recommendations (advisory only)
+ other international law

• Marine resources
  – UN Convention on the Law of the Sea
  – International Convention for the Regulation of Whaling

• Biodiversity generally
  – Convention on International Trade of Endangered Species of Wild Fauna and Flora
  – Convention on Biological Diversity

• Marine Operational
  – MARPOL
  – Convention on Maritime Search and Rescue
  – Safety of Life at Sea
  – Ballast Water Management
  – [Polar Code]

• Climate Change
  – UNFCCC
  – Kyoto Protocol
Conceptual regime overlaps

• Exist but are not generally contradictory, eg,
  – Broad appeals through various agreements including LOSC to conserve living resources
  – Many treaties rely on best scientific evidence to inform decision-making
  – Scientific cooperation, collaboration, free exchange of information and acknowledgement of ‘all mankind’ commonly articulated

• Potential to cause conflict escalates when states interpret/demand rights within narrow context of one agreement alone
LOS C

• “Prompted by the desire to settle, in a spirit of mutual understanding, all issues relating to the law of the sea...”
  – This will result in a “just and equitable international economic order” and “strengthening of peace, security, cooperation and friendly relations among all nations”

• Introduction provides special definitions, eg. “Area”, “pollution of the marine environment”
Preamble

1 Introduction
2 Territorial Sea and Contiguous Zone
3 Straits used for International Navigation
4 Archipelagic States
5 Exclusive Economic Zone
6 Continental Shelf
7 High Seas
8 Regime of Islands
9 Enclosed or Semi-enclosed Seas
10 Right of Access of Land-locked States to and from the Sea and Freedom of Transit
11 The Area
12 Protection and Preservation of the Marine Environment
13 Marine Scientific Research
14 Development and Transfer of Marine Technology
15 Settlement of Disputes
16 General Provisions
17 Final Provisions
Territorial Sea/Contiguous Zone

Coastal state has sovereignty over seabed, subsoil, water column and airspace (i.e. to ~100 km above)

Normal baseline is the low water mark (low tide)

All states have right of innocent passage through TS but coastal state can exercise criminal jurisdiction if requested

Coastal state has control over customs, immigration etc
Exclusive Economic Zone

Coastal state has duty to conserve EEZ living resources, incl. licensing foreign fishing vessels, declaring whale sanctuary, etc.

Freedom of all states to navigate, over-fly, lay pipes and cables and operate ships and aircraft under their flag in EEZ.
Coastal state can claim shelf where it extends beyond 200 nm by making a submission with the coordinates, using variety of formula.
Aus zones

Officially publicised maritime zones of Australia

- Territorial sea
- EEZ
- Extended continental shelf
  - note Antarctic territorial sea and EEZ
- Joint petroleum development area
High Seas

Maritime Zones

- **Continental Shelf**: Sovereign rights for exploring and exploiting non-living resources of sea-bed and subsoil, plus sedentary species.
- **Exclusive Economic Zone**: Sovereign rights for exploring, exploiting, conserving and managing living and non-living resources of the water, sea-bed and subsoil.
- **Contiguous Zone**:
  - Internal Waters: 12nm
  - Territorial Sea: 12nm or 200nm
  - **Continental Shelf**: Claimable to a maximum of 350nm or 100nm from the 2500m isobath.
- **The Area**: Mineral and other non-living resources on seabed and subsoil and sedentary species all belong to the coastal state claiming the extended shelf zone; all other living resources are subject to high seas regime for The Area (Part XI).
- **The High Seas**: Freedoms: navigation, overflight, submarine cables & artificial islands, fishing (qualified) scientific research (qualified). Cannot be claimed as sovereign territory.
High Seas

• Ships must fly a flag from one country only
  – Flag states have specific responsibilities for activities of ship/crew

• Duty to render assistance

• Prohibition of transport of slaves
  – *Jus cogens*

• Duty to repress piracy
  – Also *jus cogens*
  – Piracy has specific definition

• Suppression of drugs trafficking and illegal broadcasting

• Right of hot pursuit
  – Must only begin from territorial/contiguous waters and must not be interrupted

• Right to fish
  – Conservation to be based on scientific evidence
  – Cooperation between harvesting states
  – Right to fish subject to treaty obligations
The Area

All solid, liquid or gaseous mineral resources in situ in the Area or beneath the sea-bed, including polymetallic nodules = “minerals”

Regime does not cover high seas water column or airspace

“common heritage of mankind”; no claims to individual sovereignty; International Seabed Authority
Protection and Preservation of the Marine Environment

- States have the obligation to protect and preserve the marine environment

Marine Scientific Research

- All states have the right to conduct marine scientific research
- No research activities shall constitute a legal basis for any claim to any part of the marine environment
Dispute Settlement

• 4 alternatives –
  – International Tribunal for the Law of the Sea (ITLOS)
  – International Court of Justice (ICJ)
  – an arbitral tribunal constituted in accordance with LOSC Annex VII (Arbitration on any dispute)
  – a special arbitral tribunal constituted in accordance with Annex VIII (Special Arbitration on fishing, marine environment, scientific research or navigation)

• State Parties free to choose one or more of these by written declaration

• If parties to a dispute have not accepted same settlement procedure, dispute may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree
Potential contradictions with LOSC

LOSC

– Promotes coastal state jurisdiction over maritime zones (eg, EEZ, extended continental shelf zone)
– Provides regulatory regime for seabed mining

Antarctic Treaty Art IV suspends territorial claims
Protocol Art 7 mining prohibition v. Heard Is ECSZ
Contradictions with ICRW

International Convention for the Regulation of Whaling

– Promotes orderly development of whaling industry;
– Moratorium on commercial whaling but permits objections, lethal research for science

Australia’s whole EEZ is whale sanctuary

ATCM, CCAMLR ignore whales, thus difficult to make it an Antarctic issue
Potential contradictions with CBD

Convention on Biological Diversity

- State jurisdiction over resources in sovereign territory and over processes and activities of nationals outside
- Provides rules for access and benefit-sharing

Antarctic Treaty promotes peaceful scientific cooperation

Antarctic Treaty Art IV suspends territorial claims, so resources in claimed areas are not “owned” exclusively by claimants

Antarctic Treaty Art III promotes free exchange of “observations and results from Antarctica”, cf. obligations of commercial-in-confidence
Benefiting from overlaps with IMO

- **Polar Shipping Code**
  - ATCPs asked IMO in 2009 for mandatory polar shipping code

- **MARPOL HFO ban**
  - came into force August 2011
  - bans use and carriage all intermediate and heavy fuel oil south of 60º South

- **Ballast Water Management Convention**
  - Timely and useful enhancement of Madrid Protocol’s rules on marine protection
  - Essential in waters that are increasing in temp.
  - Adopted 2004, 28/30 signatories so in force as soon as % shipping tonnage increases
Tutorial Topic

In 200 words, is the seabed below 60º South in the Antarctic Treaty Area part of The Area under the International Seabed Authority’s jurisdiction, and thus able to be “mined”, or is it subject to the Madrid Protocol’s Article 7 prohibition on mineral resource activities?