

# MARITIME ZONES IN ANTARCTICA

Anna Homan\*

## 1. INTRODUCTION

Underlying the determination of maritime zones is a most fundamental and basic presumption which is not often challenged: that presumption being the existence of a Coastal State. In order for a State to be entitled to exert control over a maritime zone, the State must show that they firstly exercise sovereignty over the adjacent land, and that this is done legitimately and without substantial dispute from other nations. While the territorial sovereignty of States on most continents can be considered established and relatively permanent, the continent of Antarctica is certainly an exception.

The Antarctic area south of 60 degrees latitude with its unique composition of land, ice and sea presents numerous legal challenges regarding both territorial and maritime jurisdiction. All but for a handful of States refuse to recognise territorial sovereignty claims to Antarctica, and consequently reject any assertions of maritime zones which arise. This has been the political atmosphere which claimant States have faced for decades, and the current environment shows no sign of yielding. Due to this absence of undisputed territorial sovereignty in Antarctica, there is a presumption that the land continent is surrounded by high seas,<sup>1</sup> over which no State may validly assert jurisdiction. In fact, the Antarctic Treaty explicitly preserves the freedoms of the high seas within the Antarctic Treaty Area (ATA).<sup>2</sup> It fails, however, to identify exactly which waters constitute high seas, or explain whether there are any legal implications for the waters directly off-shore which may arise from territorial claims. The status at international law of these off-shore waters remains unresolved.

To argue the existence of maritime zones in the Southern Ocean requires proof to refute the presumption of high seas; that is, proof that Coastal States are in existence and may legitimately assert sovereignty over well-defined off-shore areas. There are three major elements to the existence of maritime zones in Antarctica, which shall be examined accordingly: the presence of legitimate coastal States, their legal ability to claim maritime zones and their legitimate means of determining maritime boundary delimitation.

This involves an examination of provisions of the Antarctic Treaty (the Treaty) and the United Nations Convention on the Laws of the Sea 1982 (UNCLOS) and any potential conflicts between. It also considers the question of whether the law of the sea regime can effectively be applied to Antarctica's unique circumstances. The scope of this paper excludes an examination of the maritime zones in Sub-Antarctica, the area below the Convergence Line and above 60 degrees south latitude, since the status of territorial and maritime claims in this area is less controversial and determined differently.

## 2. EXISTENCE OF COASTAL STATES

The ability to claim maritime zones is inherent only in a coastal State which exercises their sovereignty over territory adjacent to a coastline. Therefore Antarctica requires the presence of coastal States in order for the existence of maritime zones to be possible and for the legitimacy of States' claims.<sup>3</sup>

Firstly, this raises the question of whether Antarctica is a territory capable of being controlled by a sovereign, despite 98% of the land being covered by permanent ice. Immediately Antarctica's harsh environment suggests that it is devoid of any territorial qualities and incapable of being the subject of effective occupation and territorial sovereignty.<sup>4</sup> This conclusion is premature, however, as permanent ice-covered lands like Greenland have been held by the Permanent Court of International Justice as

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\* Student, University of Queensland, This essay won the *Morella Calder Memorial Prize for 2006* It was written whilst the author was cross institutionally enrolled at University of Canterbury, New Zealand.

<sup>1</sup> Sir Arthur Watts, *International Law and the Antarctic Treaty System* (1992) 157.

<sup>2</sup> Article 6 of the Antarctic Treaty ('the Treaty').

<sup>3</sup> Patrizia Vigni, 'Antarctic Maritime Claims: 'Frozen Sovereignty' and the Law of the Sea' in Alex G Oude Elferink and Donald R Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (2001) 85.

<sup>4</sup> Watts, above n 1, 112.

capable of attracting territorial sovereignty.<sup>5</sup> Moreover, Antarctica is essentially a vast land mass with mountainous and exposed areas, which is more likely to exhibit territorial qualities than, for example, the Arctic which is devoid of any land mass.<sup>6</sup> Watts concludes that there is no sound justification for denying that Antarctica may be a proper object of territorial sovereignty.<sup>7</sup>

Secondly, it requires that claimant States are justifying their territorial sovereignty claims on legitimate and internationally accepted grounds. Claims to date have been justified using the bases of discovery, exploration, effective occupation, contiguity, geographical work, geographical proximity and sector claims (of doubtful validity under international law.)<sup>8</sup> Australia and New Zealand, for example, partially base their territorial claims on the expeditions Sir Douglas Mawson and Sir Edmund Hillary respectively, in addition to those of 18<sup>th</sup> and 19<sup>th</sup> century British explorers Captain James Cook and John Clarke Ross. Britain and France also base their claims on exploration, discovery and effective occupation of their claimed area.

Norway claimed on the basis of Amundsen's exploration and also the undertaking of *geographical work*. The latter is not a readily recognised basis to territory acquisition in international law. It is not a discovery as such (because there is no claim of being the first people there) but Norway occupied and mapped parts of the coast and undertook a significant amount of whaling in the southern ocean.

In 1940 and 1943 respectively Chile and Argentina proclaimed sovereignty over Antarctic territory, claiming that the basis for their modern title accrues from a 1494 decree by the Pope, the Treaty of Tordesillas, which divided the western hemisphere between Spain and Portugal. Under the theory of patrimony, when Chile and Argentina became independent from Spain, they proclaimed the right to this land through the decree.<sup>9</sup> Another basis of their claims was *geographical proximity* – there is merely a 7 degree latitude gap between Chile and Antarctica, therefore they claim to have a geographical preferential right to this part of Antarctica.<sup>10</sup> A third basis is their effective occupation of the region since the 1940s. The claim by Argentina also asserted *geographical affinity* with Antarctica, created by a shared mountain range which consists of the Andes, crosses the sea bed and continues as the Trans-Antarctic Mountains.

Unfortunately a more thorough examination into the legitimacy of these bases is beyond the scope and purpose of this paper, though it will be an important determinant of valid coastal States. It is sufficient to note that none of the asserted claims over Antarctic territory have been met with substantial international acceptance. Despite seven States having made territorial claims, there are certainly no claimants in Antarctica which are recognised by the international community as coastal States, due to the ongoing territorial disputes. This has the consequence that most States consider Antarctica either an area of *res communis*, *terra nullius* or common heritage of mankind, none of which can give rise to maritime zones but result in offshore high seas. It seems highly unlikely that the territorial disputes will be resolved any time soon, since most States are politically inclined to preserve the constructive ambiguity of the Antarctic Treaty. Until such a time, coastal States in Antarctica will remain elusive.

### 3. ABILITY TO CLAIM MARITIME ZONES

UNCLOS invests in coastal States an inherent right to claim certain maritime privileges. Nevertheless, if coastal States are eventually found to exist in Antarctica, the more specific international legislation of the Treaty *prima facie* may appear to suspend these rights. Article 4 of the Treaty has been interpreted as precluding further claims to territorial and maritime zones. The first sentence of article 4 suspends the existing claims to territorial sovereignty while the second precludes the assertion of any new or enlargement of existing claims to territorial sovereignty in Antarctica. As to whether this also intends to encompass claims to maritime sovereignty, there are numerous legal perspectives.

<sup>5</sup> *Legal Status of Eastern Greenland* [1931] PCIJ Rep. 22.

<sup>6</sup> Watts, above n 1, 112-113.

<sup>7</sup> *Ibid* 114, 118.

<sup>8</sup> *Ibid* 113.

<sup>9</sup> Paul Arthur Berkman, *Science into Policy: Global Lessons from Antarctica* (2001).

<sup>10</sup> *Island of Palmas case; US and Netherlands* [1928] PCIJ.

The most restrictive interpretation considers this to be a blanket prohibition on *any* subsequent assertions of sovereignty since the Treaty came into force in 1961.<sup>11</sup> This is so extensive that it would consider an application for a straight baseline to be a prohibited claim to internal waters.

A more literal and feasible reading of article 4 suggests that only *territorial* claims are suspended. Unsurprisingly, the usual understanding of “territory” relates to land rather than ocean,<sup>12</sup> the consequence being that article 4 does not purport to suspend or preclude assertions of maritime sovereignty.

Watts also distinguishes the difference between claims to ‘sovereignty’ in its strict sense, as article 4 precludes, and to ‘sovereign rights.’<sup>13</sup> This distinction was fresh in the mind of original parties to the Antarctic Treaty due to the negotiations of the Geneva Convention on the Continental Shelf the previous year. Sovereign rights were held to be lesser rights that exist in regard to the continental shelf and EEZ, and arguably the Treaty parties would have expressly prohibited the assertion of sovereign rights as well as claims to sovereignty, if this was their intent.

Further strengthening the liberal interpretation is the view that maritime claims by existing claimant States are not considered *new* as such, because they are an inherent and appurtenant extension of sovereignty. Watts stated that ‘[i]f a State has such territorial sovereignty, there will be, appurtenant to its coast, the normal adjacent areas of territorial sea, continental shelf, and exclusive economic zone.’<sup>14</sup> For example, since 1961 the right to resources of a continental shelf has been automatically bestowed upon States exercising coastal sovereignty by international law.<sup>15</sup> This right was not dependent upon a new or enlarged claim, it was simply the operation of the law.<sup>16</sup> The International Court of Justice affirmed that the right of a coastal State to assert maritime zones arises via natural operation of international law (specifically UNCLOS articles 2 and 77) and are independent of the international community’s recognition, in the *North Sea Continental Shelf cases*.<sup>17</sup> Unless these maritime rights had been explicitly removed in article 4, they continue to attach to coastal States.

Nor are maritime claims considered to be an *enlargement* of an existing claim. As Watts asserts: ‘while it would enlarge the area subject to a claim of one sort or another, it would not enlarge the claim to territorial sovereignty since the area subject to that specific claim... would remain the same.’<sup>18</sup> The claim itself is not affected, it is merely being invoked to assert appurtenant rights. Watts further considers that an *invocation* of the claim in order to act upon one’s rights may arguably be prevented by article 4, but he considers this subtle distinction to be artificial and avoids entertaining the proposition.<sup>19</sup>

Additionally, this sovereign right is governed and preserved by the law of the sea, and remains unaffected without any express denial of maritime rights in article 4.<sup>20</sup> A liberal interpretation furthermore accommodates for the development of international law, to ‘permit additional rights to accrue as they become available.’<sup>21</sup> Written in 1959 and entering into force in 1961, the Antarctic Treaty could not have addressed, nor in foresight prohibited, sovereign rights which were to be later codified, for example, in the 1982 UNCLOS Treaty. As such evolving rights are governed and preserved by the law of the sea, it is imperative to the survival of the Antarctic Treaty System (the ATS) that it adapts with the evolving international law.<sup>22</sup> In a recent 2005 article, Mossop observed that ‘[d]espite some arguments to the contrary, the majority of commentators consider that article 4 does not proscribe claims to maritime zones off Antarctica.’<sup>23</sup>

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<sup>11</sup> Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World* (5<sup>th</sup> ed, 2005), 535-536.

<sup>12</sup> Kaye and Rothwell cited in Joanna Mossop, ‘When is a Whale Sanctuary not a Whale Sanctuary? Japanese Whaling in Australian Antarctic Maritime Zones’ (2005) 36 *Victoria University of Wellington Law Review* 763, 765.

<sup>13</sup> Watts, above n 1, 133.

<sup>14</sup> *Ibid* 157.

<sup>15</sup> Mossop, above n 12, 765.

<sup>16</sup> Kaye, above n 12, 765.

<sup>17</sup> (*Germany v Denmark; Germany v The Netherlands*) [1969] ICJ Rep 31, para 43; Vigni, above n 3, 94. EEZs may be an exception because UNCLOS requires EEZs to be formally claimed, however it is arguable that a State’s ability to claim an EEZ has developed into a customary right at international law: Kaye and Rothwell cited in Mossop, above n 12, 765.

<sup>18</sup> Watts, above n 1, 133.

<sup>19</sup> *Ibid* 134.

<sup>20</sup> Prescott and Schofield, above n 11, 536.

<sup>21</sup> Kaye, cited *ibid*, 536.

<sup>22</sup> Vigni, above n 3, 96; Prescott and Schofield, above n 11, 536.

<sup>23</sup> Mossop, above n 12, 764.

Article 6 of the Treaty has also been referred to as an impediment to States' capability to claim maritime zones. This provision ensures that nothing shall prejudice or affect the exercise of State rights under international law 'with regard to the high seas within that area.' While this does preserve high sea rights in the Antarctic area, some go to the extent of interpreting this as declaring *all* seas in the Southern Ocean to be high seas.<sup>24</sup> Yet in interpreting the natural meaning of the words, clearly the provision merely suggests high seas might exist within that area, and by no means necessitates that all waters take the status of high seas. In fact, one participant of the Treaty's negotiations stated that 'we drafted that provision so as to leave indefinite the question of what was the high seas', implying there was no consensus on the status of the Southern Ocean.<sup>25</sup>

In conclusion, it seems that neither article 4 nor 6 are obstacles in themselves to maritime claims of existing claimant States, though their claims will remain in abeyance until issues of sovereignty are resolved.

#### 4. MARITIME BOUNDARY DELIMITATION

Even if coastal States are found to exist with the capability of asserting maritime zones under the ATS, can maritime zones be effectively identified and implemented considering the particular difficulties in Antarctica of identifying baselines and boundary delimitation? These are very practical obstacles to the application of maritime law in Antarctica, created by its highly unique geographical characteristics.

##### 4.1 Baselines

An assertion of maritime zones requires an accurate identification of the maritime area over which sovereignty will be exercised. It requires the pinpointing of a baseline, the line from which the maritime zones will extend seaward. Conventionally it is defined as 'the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State',<sup>26</sup> though in the case of Antarctica, this line is generally covered by thick ice and lies far from the point where shore meets water. It is virtually impossible to ascertain in most areas.<sup>27</sup>

Therefore the major issue is whether *ice* can legitimately be treated as *territory*, and if so, which forms of ice are stable enough to meet territorial qualities and which will be classified as sea? If this can be established, then an Antarctic baseline will fall between the two; however at present there is no consensus on the issue nor uniformity in State practice.<sup>28</sup> The law of the sea and general principles of law both fail to address the status of ice.<sup>29</sup> There are several opinions on how the existing principles of baselines may apply to the Antarctic region, which will be discussed. It will be seen that the general laws of the sea are insufficient to address Antarctica's geographical exceptionality, and instead the most realistic option is the creation of a specific rule for Antarctic baselines.

The first approach to baselines considers that the edge of the permanent ice cover over the continent is visible and able to be charted, thereby offering an obvious baseline.<sup>30</sup> However ice sheets don't necessarily stop abruptly at the water's edge, but may slide into the sea for a distance, eventually ending with an ice cliff.<sup>31</sup> Under this approach, the expanse of ice above water would then be the subject of territorial claims of sovereignty, the validity of which is highly questionable under international law.<sup>32</sup> In addition, ice by its nature is continuously changing, collapsing and calving, particularly near the ice front, thereby devaluing its status as 'permanent'.

This is closely followed by the second suggestion of using the edge of ice shelves as indication of a baseline, a highly favourable option for claimant States since it maximises both territorial and maritime

<sup>24</sup> Davor Vidas and Philippe Gautier, cited *ibid*, 764.

<sup>25</sup> Herman Phelger, legal advisor of US Department of State, cited in Alex G Oude Elferink and Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (2001, The Hague: Martinus Nijhoff Publishers) above n 3, 15.

<sup>26</sup> Article 5 of UNCLOS 1982 and article 3 of the Geneva Convention on the Territorial Sea 1958.

<sup>27</sup> Donald R. Rothwell, 'Antarctic Baselines: Flexing the Law for Ice-Covered Coastlines', in Elferink and Rothwell, above n 3, 50.

<sup>28</sup> *Ibid* 56.

<sup>29</sup> *Ibid* 57.

<sup>30</sup> Prescott and Schofield, above n 11, 537.

<sup>31</sup> Watts, above n 1, 142.

<sup>32</sup> Prescott and Schofield, above n 11, 537.

space areas in their claim. Ice shelves, however, are not the true edge of the continuous continental mass; as Watts explains the shelf is formed when 'the ice-sheet continues further, and is then lifted off the bottom (because of the ice's buoyancy in water) and floats on the sea for a considerable additional distance.'<sup>33</sup> Therefore this suggestion suffers the same deficiencies of instability and uncertain territorial sovereignty over ice. A variation on this is to use the 'grounding zone' where the ice shelf meets the seabed. This area, by its nature, tends to shift with the seasons and as the ice shelf grounds against the seabed, as well as only being ascertainable via satellite and radar imagery, thereby proving impractical as a baseline.<sup>34</sup>

In the adoption of one of these methods, there will always be the difficulty that any baseline dependent upon the position of ice will be susceptible to shifting and instability. Watts states that these factors do not entirely discount these options for baselines, so long as the normal rules are adapted accordingly.<sup>35</sup> For example, the 'unstable coasts' provision of UNCLOS may be considered, as it allows a straight baseline to be asserted but only where the coastline is deeply indented or dotted with islands,<sup>36</sup> and is therefore only relevant to small portions of Antarctica. Similarly, articles 7(2) and 9 create baselines across highly unstable coastlines like deltas and the mouths of rivers. The approach of combining the traditional baseline with principles of straight baselines was affirmed by the International Court of Justice in the case of *Anglo-Norwegian Fisheries Case*.<sup>37</sup> Commentators have tried to further apply these provisions to coastal glaciers and ice shelves, yet without any detailed plan for adaptation.<sup>38</sup> Moreover this would seem to be an unreasonable and unnecessary extension.

It would be more equitable to base any such line on less variable conditions, such as the position of land mass beneath the ice. For example, the actual low-water level as it intersects with the land continent (the true coastline) can be ascertained under heavy amounts of ice. Although this solution may comply with the UNCLOS definition of a baseline, it is arguably a 'false' and 'arbitrary' position since the land has been submerged to deeper levels than it would otherwise sit without the ice.<sup>39</sup> However, it seems far more arbitrary and unrealistic to imagine Antarctica without its ice cover, difficult and futile to calculate where the low-water mark would rise to without the burden of ice. Nevertheless, if the baseline lay at the current low-water level as suggested, it would be significantly landward of the coastline where ice meets water. This approach would greatly diminish the benefit of having maritime zones if they mainly consist of permanent ice, and would prove to be politically unfavourable with claimant States.

Therefore it is argued that the least arbitrary means of establishing a baseline involves the creation of a specific rule, according to which the baseline will be ascertained by locating the subglacial continental edge. This is the 'strict constructionist' solution proposed by Joyner, which provides that the baseline be dictated by the contours of the continental landmass.<sup>40</sup> Although its ascertainment would initially require significant scientific undertakings, modern seismic detection techniques are amply sophisticated, and once charted it will not be continuously changing. The waters within this baseline would logically be treated as internal waters, within the coastal States' territorial sovereignty, and thus not subjected to the freedoms of the high seas. As this proposal shifts the baseline further seaward than the traditional low-water mark, it would seem politically favourable to claimant States, yet may provide less equity for those coastal States having greater ice shelves, thereby reaching a somewhat reasonable and balanced response.

It has been suggested by many commentators that ice shelves cannot be considered land nor ocean, but a kind of *sui generis*, a unique geophysical category.<sup>41</sup> This approach is strengthened by article 6 of the Treaty which implies a distinction between high seas and ice shelves, which are again distinguished from land. Clearly such a conclusion would invite further jurisdictional dilemmas, because ice shelves would not fall within the laws of the land or sea, but require a novel legal regime.

## 4.2 Rules of Delimitation

<sup>33</sup> Watts, above n 1, 142.

<sup>34</sup> Prescott and Schofield, above n 11, 538.

<sup>35</sup> Watts, above n 1, 145.

<sup>36</sup> Article 7(1) and (2) UNCLOS.

<sup>37</sup> This case did not involve ice-covered territories or ice formations: *U.K. v Norway* [1951] ICJ Rep 116.

<sup>38</sup> Watts, above n 1, 145.

<sup>39</sup> Prescott and Schofield, above n 11, 538.

<sup>40</sup> Christopher C Joyner, *Antarctica and the Law of the Sea* (1992) 84-85.

<sup>41</sup> Christopher C Joyner, *Governing the Frozen Commons* (1998) 59; Donald R Rothwell in Elferink and Rothwell, above n 3, 57.

This involves identifying the maritime boundaries between claimants' sectors, since it will not necessarily fall along lines of longitude. It may be based either of two approaches, the equidistance rule or the sector principle, and is required under UNCLOS articles 74 and 83 to be determined by agreement.

#### 4.2.1 Equidistance rule

This is an objectively-applied rule which provides an equitable outcome by taking into account any islands and geographical features that accrue maritime space, and finding the equal distance between territories.<sup>42</sup> Although this approach was earlier rejected, it has since been reinforced by the ICJ in the *Gulf of Maine case* and the *Libya/Malta case*.<sup>43</sup> It is more problematic when applied in Antarctica, however, due to the uncertain status of ice forms and coastlines in international law.

#### 4.2.2 Sector principle

This principle suggests that the existing boundaries between sector-based claims to Antarctic territory could be extended due north into the Southern Ocean, following the particular meridian without any deviation for geographical features. The delimitation would extend as far as the maritime zones asserted, for example, 12 nautical miles for a territorial sea or 200nm for an exclusive economic zone. This solution, while being simplistic and readily applicable, seems unnecessarily inequitable while States may be able to reach an agreement using the equidistance rule, as has been done around the world. Although some Arctic States have introduced this principle into State practice, it is met with controversy and strong opposition.<sup>44</sup>

States are going to wish to adopt whichever rule of delimitation proves most favourable to their sovereignty claim. After an analysis of the rules' application in the Antarctic, Prescott and Schofield concluded that the sector principle would benefit France's claim and possibly Australia's *vis-à-vis* New Zealand, while Norway and New Zealand are likely to favour the equidistance rule to their advantage, thereby affecting three of the five maritime delimitations between mutually-recognising claimant States.<sup>45</sup> It is reasonably foreseeable that if claimant States are eventually legally capable of asserting and negotiating maritime zones, the customary, non-controversial equidistance rule would serve them well.

### 5. CASE STUDY: AUSTRALIA

Australia has been the most active claimant State to assert rights over maritime space in the ATA. Australia's formal assertion of an EEZ in 1994 (being the only EEZ claim)<sup>46</sup> was accompanied by a disclaimer that they would not exercise these exclusive rights otherwise granted by UNCLOS *vis-à-vis* foreign entities.<sup>47</sup> This was met by protest from the international community (prominently the US), which preferred a restrictive interpretation of article 4 to preclude any new assertions of sovereignty.<sup>48</sup>

Australia is also the only State to have lodged a submission with the Commission on the Limits of the Continental Shelf (CLCS) to claim an extended continental shelf (ECS) in December 2005.<sup>49</sup> This is the procedure required under UNCLOS articles 4, 76.8 and Annex 2, which place a 10 year deadline on applications from the time of that State's ratification or accession to UNCLOS.<sup>50</sup> In Australia's case, this period expired on 16 November 2004. However it is debatable whether the time expiration would necessarily prevent a claimant State from later submitting an ECS claim, if sovereignty claims are

<sup>42</sup> Stuart Kaye, 'Antarctic Maritime Delimitation' in Elferink and Rothwell, above n 3, 158.

<sup>43</sup> *Gulf of Maine case* [1985] ICJ Rep 13 at 35; *Libya/Malta case* 1833 UNTS 396.

<sup>44</sup> Canada and Russia first asserted the sector principle in respect of their Arctic claims: Prescott and Schofield, above n 11, 540.

<sup>45</sup> For an examination of the boundaries between Claimant States and the consequences from each rules' application, see *ibid* 541-543.

<sup>46</sup> *Ibid* 536.

<sup>47</sup> Vigni, above n 3, 88.

<sup>48</sup> Both Argentina and Chile, however, have claimed numerous maritime zones for their national territories in general, in which they include portions of Antarctica.

<sup>49</sup> Details of the submission are viewable at <<http://www.un.org/>> at law of the sea.

<sup>50</sup> Note that the deadline for submissions has since been extended to 2009, due to delays in the preparation of submissions.

revived by article 4 as 'new' claims in the future.<sup>51</sup> It is suggested that claimant States could not rely on the suspension effected by Antarctic Treaty provisions as a defence to non-compliance with UNCLOS, and therefore Australia took a safe approach in their compliance with UNCLOS article 4.

A claim to an extended continental shelf is more complicated than other types of maritime claims due to the Rules of Procedure governing the body which grants such ECSs – the CLCS. Rules 45 and Annex I preclude the CLCS from considering and making a determination on an application for an ECS if the area is the subject of dispute, which is undoubtedly the case in Antarctica.<sup>52</sup> The CLCS does have the jurisdiction to consider such disputes, for example, the question of whether there can legally be a continental shelf in Antarctica at all.<sup>53</sup> However, it is doubtful if the Commission would choose to address such a politically controversial issue, which has the ultimate effect of placing the ECS claims in abeyance, similar to the effect of article 4 of the Treaty, until sovereignty disputes can be resolved. In recognition of this reality, Australia lodged a request that the CLCS not take any action regarding their ECS submission, and explained that the claim was made with the intention to preserve their position under international law.<sup>54</sup>

The area being claimed beyond the standard continental shelf was identified as approximately 686.821 square kilometres, though exact boundary locations were not given due to outstanding delimitation issues with France and Norway.<sup>55</sup> Interestingly, in the extension of its territorial sea claim (1990) and assertion of an EEZ (1994), Australia was reluctant to ascertain baselines and did not assert any straight baselines.<sup>56</sup> Under national legislation, baselines to the Australian Antarctic Territory (AAT) are established by the Governor-General's proclamation, and must be consistent with UNCLOS principles of normal and straight baselines.<sup>57</sup>

Although Australia's claims to maritime zones may have complied with international legal obligations and may eventually be held as legitimate, most significantly Australia has assumed the risk of diplomatic retaliation, of disturbing the delicate compromise created by article 4 of the Treaty and again forcing the issues of Antarctic sovereignty into the limelight.<sup>58</sup> Russia, the United States, Germany, Japan and the Netherlands responded to Australia's submission by reiterating their position of non-recognition of any sovereignty claims to Antarctica, including maritime.<sup>59</sup> However, their fear of an impending sovereignty feud seemed somewhat dispelled by Australia's additional request for inaction on the part of CLCS, amounting to a relatively mild response.

## 6. CONCLUSION: THE POTENTIAL RESOLUTION OF MARITIME CLAIMS

Despite the Treaty's suspension of claims to Antarctica, actual practice shows that claimant States are frequently legislating for their Antarctic territories and exercising jurisdiction over them in courts and administrative agencies. Nearly all claimant States have asserted Antarctic maritime zones.<sup>60</sup> Nothing about these assertions of sovereignty is actually in breach of the Antarctic Treaty,<sup>61</sup> nor contrary to the Treaty norms,<sup>62</sup> yet the legitimacy of claims relies upon acquiescence in the conduct of other States.<sup>63</sup> In this sense, the existing claims to Antarctica could not be considered legitimate.

Furthermore, the relevant law governing Antarctic waters is inadequate. UNCLOS is valuable in its preservation and articulation of maritime rights and rules of delimitation, although its specific rules concerning baselines are inappropriate for the Antarctic area. In fact, none of the current baseline principles have attracted widespread support, nor are they likely to in the immediate future.<sup>64</sup> UNCLOS

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<sup>51</sup> See Mossop, above n 12, 767.

<sup>52</sup> Stuart Kaye, 'The Outer Continental Shelf in the Antarctic' in Elferink and Rothwell, above n 3, 128.

<sup>53</sup> Watts, above n 1, 158.

<sup>54</sup> Mossop, above n 12, 766.

<sup>55</sup> Andrew 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, 208.

<sup>56</sup> Donald Rothwell in Elferink and Rothwell, above n 3, 59.

<sup>57</sup> *Seas and Submerged Lands Act 1973* (Cth), section 7.

<sup>58</sup> Mossop, above n 12, 765-766.

<sup>59</sup> *Ibid* 766-767.

<sup>60</sup> Vigni, above n 3, 87.

<sup>61</sup> Watts, above n 1, 135.

<sup>62</sup> Vigni, above n 3, 94.

<sup>63</sup> *Ibid* 91.

<sup>64</sup> Prescott and Schofield, above n 11, 537.

fails to specifically address the distinctive polar conditions found in Antarctica, and to date, little State practice has evolved in this area.<sup>65</sup> It is somewhat surprising that no specific law of the sea regime has been developed for the polar regions, considering the multitude of unique problems raised by their geophysical characteristics.<sup>66</sup> Such a regime could address the proposition that ice shelves exist as a *sui generis*, and could generally provide more specific and appropriate regulation than the current land and sea regimes.

Until a time when the international community may recognise the claimant States' rights to maritime zones in Antarctica, third party States will continue to treat the Southern Ocean extending up to the Antarctic continent as high seas. One commentator noted that while the issue of territorial sovereignty in Antarctica remains so politically contentious, there is no urgency to establish the applicable rules for maritime delimitation; it amounts to little more than 'idle speculation' at this point in time.<sup>67</sup> Nevertheless, while consensus on the major issues of coastal States, Treaty article 4 and maritime delimitation is foreseeable on the horizon, it is conceivable that coastal States will someday legitimately and effectively exercise sovereignty over maritime zones in the Southern Ocean.

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<sup>65</sup> Rothwell in Elferink and Rothwell, above n 3, 50.

<sup>66</sup> Ibid and Joyner, above n 40, 1.

<sup>67</sup> Kaye cited in Prescott and Schofield, above n 11, 544.



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