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False Sanctuary: the Australian
Antarctic Whale Sanctuary and
Long-Term Stability in Antarctica

Donald K. Anton
Australian National University Law School,
anton@law.anu.edu.au

**False Sanctuary:
The Australian Antarctic Whale Sanctuary and Long-Term Stability in
Antarctica**

*Donald K. Anton**

I. Introduction

The 1959 Antarctic Treaty,¹ and the subsequent allied international legal agreements (and related measures) that comprise the Antarctic Treaty System (ATS),² is fast approaching its golden anniversary.³ From a contemporary perspective, it is hard to imagine Antarctica without some established form of legal governance -- a non-judicial Antarctica. Like a number of other perceived essentials, it seems certain if the ATS did not exist, “it would have to be invented”.⁴

· Visiting Professor of Law, University of Michigan Law School (2008-2010); Senior Lecturer in Law, The Australian National University College of Law. An early version of this article was presented at a conference on Whales, Antarctica, Diplomacy and the Law held at The Australian National University College of Law, 4 September 2006. I am grateful for the gracious hospitality of the Alabama Law School, where significant work on this article was completed while I served as a Visiting Professor. Special thanks to the excellent Alabama law library staff, particularly Penny Gibson and Diana May. I am also indebted to Penelope Mathew for her support and keen eyes.

¹ 402 U.N.T.S. 71 (done Dec. 1, 1959).

² The ATS is comprised of: i) the Antarctic Treaty, ii) the more than 200 measures in effect under the Treaty, and iii) associated treaties, and their related measures, that are in force. Art. 1(e), *Protocol on Environmental Protection to the Antarctic Treaty* (1991)(*Madrid Protocol*), 30 ILM 1455 (1991).

³ Indeed, the current 2007-08 International Polar Year (IPY 07-08) represents the 50th Anniversary of the 1957-58 International Geophysical Year (IGY 57-58) that culminated in the 1959 Antarctic Treaty. For current information see the International Polar Year website: <http://www.ipy.org/>. See also Andrew C. Revkin, *2- Year Study of Polar Changes Set to Begin*, N.Y. Times, Feb. 26, 2007, p. A4, col. 3; Celebrating the Anniversaries of the International Polar Years and International Geophysical Year, 150 Cong. Rec. S 11323, 108th Cong., 2d sess. (Oct. 11, 2004).

⁴ This phrase has been used frequently in the context of international organization, highlighting the importance of international cooperation through formalized structures. See, e.g., GEORG SCHWARZENBERGER, *POWER POLITICS: A STUDY OF INTERNATIONAL SOCIETY* 748 (1951)(on the need for the United Nations); JEAN MONNET, *MEMOIRS* 509 (1978)(on the need for European organization); Robert O. Keohane, *The Demand for International Regimes*, 36 INT’L ORGANIZATION 325, 355 (1982) (on the need for international regimes generally); M.H. Mendelson, *Flux and Reflux of the Law of the Sea*, 5 OXFORD JOURNAL OF LEGAL STUDIES 285 (1985)(on the need for a international legal regime for the seas); John Garofano, *Power, Institutions and the ASEAN Regional Forum*, 42 ASIAN SURVEY

This is especially true today when global contact with Antarctica in terms of science, exploration, exploitation of marine resources, and tourism continues to expand and grow in importance.⁵ In these circumstances, the presence of effective regulation which serves as a driver of international cooperation is more and more imperative.

As attention to Antarctica has increased over the past forty-nine years, the ATS has been subject to periodic pressures and tensions, but especially so since the end of the 1970s. From at least 1975, differences (sometimes acrimonious) concerning Antarctic resources, access, and governance began to make themselves felt between and across groups of claimant and non-claimant states,⁶ parties and non-parties,⁷ and developed and developing states.⁸ The ATS, however, has proved

502 (2002)(on the need for the ARF).

⁵ On expanding Antarctic activities and interests, see generally REPORT OF THE U.S. ANTARCTIC PROGRAM EXTERNAL PANEL, THE UNITED STATES IN ANTARCTICA (National Science Foundation, April 1997); U.S. House of Representatives, Hearings before the Committee on Science, 105th Cong., *The United States and Antarctica in the 21st Century*, 1st sess., March 12, 1997, at 6-11 (Statement of Norman R. Augustine); Marcus Haward, et al., *Australia's Antarctic Agenda*, 60 AUSTRALIAN JOURNAL OF INTERNATIONAL AFFAIRS 439 (2006). In terms of sheer regulation, it is telling that the last edition of the HANDBOOK OF THE ANTARCTIC TREATY SYSTEM (9th ed., 2002) runs to 993 pages and still does not include a number of important Consultative Party recommendations, resolutions, decisions and measures.

⁶ States purporting to exercise, assert or claim territorial sovereignty are generally known as "claimant" states despite clear distinctions between "exercise, assert or claim". "Non-claimant" states are those that do not accept the validity of claims that have been made by other states and, in addition, neither advance a territorial claim themselves, nor (except for the U.S. and Russia) assert a historic basis for doing so. See ARTHUR WATTS, INTERNATIONAL LAW AND THE ANTARCTIC TREATY SYSTEM 119-120 (1992).

⁷ This includes differences between the sub-groups of Antarctic Treaty Consultative Parties (ATCPs), with powers of participation and decision-making and Antarctic Treaty Non-Consultative Parties (ATNCPs), without such powers. For the meaning of these terms see Revised Rules of Procedure (2005), ATCM Decision 3 (17 June 2005), available Apr. 2, 2008 at: http://v3.ats.aq/documents/recatt/att264_e.pdf. See also F. M. Auburn, *Consultative Status Under the Antarctic Treaty*, 28 INT'L & COMP. L. Q. 514 (1979).

⁸ For a discussion see PETER BECK, THE INTERNATIONAL POLITICS OF ANTARCTICA, 270-319 (1986).

remarkably resilient. As an early example of a “framework” treaty,⁹ it has withstood some formidable challenges to both its legitimacy and effectiveness.¹⁰ In contemporary international environmental law circles the ATS is one of the two treaty regimes¹¹ most often cited as an example of success.¹² Its collective value is rightly viewed as much “greater than just the sum of its various parts”.¹³ Given the underlying stakes in Antarctica -- including contentious issues tied to: i) latent (but certainly not forgotten) territorial claims, ii) the exercise of jurisdiction and iii)

⁹ For an account of how the framework principles of peace and science established by the 1959 Antarctic Treaty have blossomed in subsequent regulation in the form of binding “recommendations” – now known as measures under XIX: Decision 1 (1995) – and the ATS conventions, see CHRISTOPHER C. JOYNER, *GOVERNING THE FROZEN COMMONS: THE ANTARCTIC REGIME AND ENVIRONMENTAL PROTECTION* (1998); ARTHUR WATTS, *INTERNATIONAL LAW AND THE ANTARCTIC TREATY SYSTEM* (1992); Gillian Triggs, *The Antarctic Treaty Regime: A Workable Compromise or a “Purgatory of Ambiguity”?*, 17 *CASE W. RES. J. INT’L L.* 195, 199-208 (1985).

¹⁰ For sapient accounts and analysis of the continuing effectiveness and legitimacy of the ATS, see OLAV SCHRAM STOKKE & DAVOR VIDAS, *GOVERNING THE ANTARCTIC: THE EFFECTIVENESS AND LEGITIMACY OF THE ANTARCTIC TREATY SYSTEM* 35, 37-45 (1996). For lessons to be taken from the ATS model, see ARNFINN JØGENSEN-DAHL & WILLY ØSTRENG, *THE ANTARCTIC TREATY SYSTEM IN WORLD POLITICS* (1991)(especially Section 5).

¹¹ The other regime pointed to is that regulating ozone depleting substances. See, e.g., VED P. NANDA & GEORGE (ROCK) PRING, *INTERNATIONAL ENVIRONMENTAL LAW FOR THE 21ST CENTURY* 270 (2003); DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 526 (2d ed., 2002)(the ozone regime is “the most important precedent in international law for the management of global environmental harms”).

¹² See e.g., Donald R. Rothwell, *Environmental Protection in Antarctica and the Southern Ocean: A Post UNCED Perspective*, in KRIWOKEN, HAWARD, VANDERZWAAG & DAVIS, EDs., *OCEAN LAW AND POLICY IN THE POST-UNCED ERA: AUSTRALIAN AND CANADIAN PERSPECTIVES* 327 (1996)(ATS is “one of the most successful international law regimes in recent history”); Richard Falk, *The Antarctic Treaty System: Are There Viable Alternatives?*, in ARNFINN JØGENSEN-DAHL & WILLY ØSTRENG, EDs., *THE ANTARCTIC TREATY SYSTEM IN WORLD POLITICS* 399 (1991)(“governance of Antarctica . . . is the closest thing to ‘a world order miracle’ that the world has known”); Finn Sollie, *The Development of the Antarctic Treaty System: Trends and Issues* in RÜDIGER WOLFRUM, ED., *ANTARCTIC CHALLENGE: CONFLICTING INTERESTS, COOPERATION, ENVIRONMENTAL PROTECTION, ECONOMIC DEVELOPMENT* 25 (1984) (ATS is “so effective . . . that today it is easy to forget the tension and the risks of political conflict and the dangers of military intervention that did exist before . . . the Antarctic Treaty”); Gillian D. Triggs, *The Antarctic Treaty System: Some Jurisdictional Problems*, in GILLIAN D. TRIGGS, ED., *THE ANTARCTIC TREATY REGIME: LAW, ENVIRONMENT AND RESOURCES* 88 (1987)(“the Antarctic Treaty regime has been a remarkably successful mechanism through which universal interests . . . have been protected and advanced”). See also John D. Negroponete, *The Success of the Antarctic Treaty*, 87 *DEPT. STATE BULL.* 29 (June 1987).

¹³ ARTHUR WATTS, *INTERNATIONAL LAW AND THE ANTARCTIC TREATY SYSTEM* 291 (1992).

governance decision-making -- the ability of the ATS to adapt and retain currency has been remarkable and holds a number of lessons in normativity and diplomacy.¹⁴

The ATS though, like everything else, is not invulnerable.¹⁵ Given the right set of circumstances the equilibrium of the ATS could be upset, with resulting turmoil within the system and increasing pressures from outside. Over the life of the ATS, difficult political circumstances have occasioned others to sound the alarm at times of increased tensions.¹⁶ It is not difficult to see why. It seems hard to argue that the failure of the ATS would be anything but bad; not least because there is no existing alternative vehicle for international cooperation and governance in Antarctica.¹⁷ Among other things, the failure of the ATS would create international instability, uncertainty and increased tensions in relation to Antarctic

¹⁴

See, e.g., DONALD R. ROTHWELL, *THE POLAR REGIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW* (1996); CHRISTOPHER C. JOYNER, *GOVERNING THE FROZEN COMMONS: THE ANTARCTIC REGIME AND ENVIRONMENTAL PROTECTION* (1998). For an assessment on the 25 anniversary of the Antarctic Treaty see *ANTARCTIC TREATY SYSTEM: AN ASSESSMENT – PROCEEDINGS OF A WORKSHOP HELD AT BEARDMORE SOUTH FIELD CAMP, ANTARCTICA, January 7-13, 1985* (National Academy Press, 1986).

¹⁵ Indeed, at the outset of the Antarctic Treaty commentators were not certain about the durability of the solution it provided for the pre-existing conflict. Robert D. Hayton, *The Antarctic Settlement of 1959*, 54 AM. J. INT'L L. 349, 367-371 (1960); M.W. Mouton, *The International Regime of the Polar Regions*, 107 REC. DES COURS 169, 269 (1962). See generally WILFRED JENKS, *THE COMMON LAW OF MANKIND* 366-71 (1958).

¹⁶ See, e.g., BA Hamzah, *Antarctica and the International Community: A Commentary*, in BA HAMZAH, ED., *ANTARCTICA IN INTERNATIONAL AFFAIRS* 4 (1987)(following developing country claims to Antarctica as common heritage, “the 1959 treaty system is fast becoming obsolete and no longer appropriate to deal with new expectations as well as developments in international relations”); Donald R. Rothwell, *The Antarctic Treaty System: Resource Development, Environmental Protections or Disintegration?*, 43 ARCTIC 284 (1990)(following the collapse of the Convention for the Regulation of Antarctic Mineral Resource Activities in 1989, “serious divisions exist among the treaty parties that could conceivably cause the disintegration of the regime . . .”).

¹⁷ John Warren Kindt, *A Regime for Ice-Covered Areas: The Antarctic and Issues Involving Resource Exploitation and the Environment*, in CHRISTOPHER C. JOYNER & SUDHIR K. CHOPRA, *THE ANTARCTIC LEGAL REGIME* 202 (1988)(“dismantling of the Antarctic Treaty system would appear to be a step backwards into the diplomacy of the last Ice Age”); DONALD R. ROTHWELL, *THE POLAR REGIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW* 456 (1996).

activities and Antarctic resources. It would no doubt see the revival of competing, conflicting and unrecognized claims that have been “frozen” for nearly 50 years.¹⁸ Today’s claims, however, would be pressed in a world where increasing population and resource scarcity are much greater than when the claims were “frozen.” It is easy to imagine the heightened instability, competition and tension this would create. Accordingly, threats to the ATS pose serious risks and ought to be avoided.

While the ATS is not near failure or even a crisis, the recent assertion of maritime jurisdiction by Australian courts over a Japanese whaling company for acts contrary to Australian law in the Antarctic Southern Ocean is alarming.¹⁹ The exercise of jurisdiction by Australia over non-nationals in this way makes its claim of territorial sovereignty in Antarctica real again. As professor Bilder noted, “so long as jurisdictional rights are restricted [to nationals in Antarctica,] the issues of territorial claims remain largely theoretical”.²⁰ Once the genie is out of the bottle, it has the potential to excite in other states a new “territorial temptation”²¹ seaward in Antarctica, and with it, the potential for a fundamental destabilization of the ATS.

¹⁸ It is often said the Article IV of the Antarctic Treaty “freezes” the legal status quo for the parties so long as it remains in force. This characterization originates in the letter of invitation sent by President Eisenhower to the original signatories to the 1959 Treaty. Department of State, The Conference on Antarctica, Washington, October 15 – December 1, 1959 2-4 (Pub. No. 7060, Sept. 1960)(“legal status quo in Antarctica would be frozen for the duration of the Treaty”).

¹⁹ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*, [2008] FCA 3 (15 January 2008).

²⁰ Richard B. Bilder, *Emerging Legal Problems of the Deep Seas and Polar Regions*, 61 U.S. NAVAL WAR COLLEGE INT’L LAW STUDIES 504, 511 (1980).

²¹ See Bernard H. Oxman, *The Territorial Temptation: A Siren Song*, 100 AM. J. INT’L L. 308, n. 1 (2006). Professor Oxman’s account of the seaward territorial temptation supports the concern over the dangers associated with Australia’s exercise of jurisdiction against non-nationals in the Southern Ocean.

II. The HSI Litigation²²

On January 15, 2008, the Federal Court of Australia issued declaratory relief and an injunction against Kyodo Senpaku Kaisha Ltd. (Kyodo), a Japanese whaling company operating in the Southern Ocean, including in the Australian Whale Sanctuary (AWS) within a claimed Exclusive Economic Zone (EEZ) off the Australian Antarctic Territory (AAT). The court declared that Kyodo had breached sections 229 - 232 and 238 of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth)(*EPBC Act*) by killing, treating and possessing whales in the Australia Whale Sanctuary in the EEZ adjacent to the Australian Antarctic Territory.²³ It also enjoined Kyodo from the further killing, injuring, taking or interfering with any Antarctic minke whale, fin whale or humpback whale in the AWS adjacent to the AAT.²⁴

²² To trace the case history see *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd.*, [2004] FCA 1510 (initial application for leave to serve originating process in Japan and invitation to Attorney-General (AG) to intervene)(unreported); *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd.*, [2005] FCA 664 (27 May 2005)(dismissal of application following AG intervention); *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd.*, 154 FCR 425 (2006)(appeal order setting aside the dismissal and granting leave to serve process); *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd.*, [2007] FCA 124 (16 February 2007)(order allowing substituted service of process)(unreported); *Society International Inc v Kyodo Senpaku Kaisha Ltd.*, [2008] FCA 3 (15 January 2008)(final judgment issuing declaration and injunction); *Society International Inc v Kyodo Senpaku Kaisha Ltd.*, [2008] FCA 36 (18 January 2008)(order granting leave for substituted service of the final judgment)(unreported).

For background documents see Environmental Law Publishing, *Japanese Whaling Case* at <<http://www.envlaw.com.au/whale.html>>. For case analysis see Sam Blay & Karen Bubna-Litic, *The Interplay of International Law and Domestic Law: The Case of Australia's Efforts to Protect Whales*, 23 EPLJ 465 (2006); Ruth Davis, *Enforcing Australian Law in Antarctica: The HIS Litigation*, 8 MELB. J. INT'L L. 143 (2007); Chris McGrath, *The Japanese Whaling Case*, 22 EPLJ 250 (2005); Chris McGrath, *Japanese Whaling Case Appeal Succeeds*, 23 EPLJ 333 (2006); Joanna Mossop, *When is a Whale Sanctuary Not a Whale Sanctuary? Japanese Whaling in Australian Antarctic Maritime Zones*, 36 VIC. U. WELLINGTON L. REV. 757 (2005).

²³ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd.*, [2008] FCA 3 (15 January 2008).

²⁴ *Id.* Orders were granted for substituted service of the declaratory and injunctive relief on January 18, 2008. *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd.*, [2008] FCA 36 (18 January 2008). Personal service and service by mail has been effected. Chris McGrath, Barrister for the plaintiff, email correspondence of February 4, 2008 to the author.

A. Application for Leave to Serve Process in Japan

The case was brought in 2004 by Humane Society International (HSI), which sued Kyodo for alleged illegal whaling under Australian federal law, seeking the declaration and injunction ultimately granted.²⁵ The law giving rise to the action, including legal standing for HSI,²⁶ is found in the *EPBC Act*. The Australia Whale Sanctuary (AWS) is established under section 225, Part 13, Division 3, Subdivision B of the Act. By virtue of sections 5(1), 5(4), and 5(5) of the *EPBC Act*, section 8 of the *Australian Antarctic Territory Act 1954 (Cth)*, section 10 of the *Seas and Submerged Lands Act 1973 (Cth)* and the 1994 Proclamation of the EEZ adjacent to the Australian Antarctic Territory,²⁷ the Australian Whale Sanctuary applies to the declared AAT EEZ. Section 229 through 230 of the *EPBC Act* make it offence to kill, injure, take, interfere with, treat or possess whales without an Australia permit, within the AWS.²⁸ The offence provisions expressly apply to both

²⁵ It was alleged that Kyodo had illegally taken approximately 428 whales between 2001 and 2004 and evidence was presented that whaling would continue under an ongoing Japanese whale research program known as JAPARA. *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*, Statement of Claim (19 October 2004), ¶ 7. The claim was amended in 2005 after the release of JAPARA II. Amended Statement of Claim (27 July 2005), ¶ 14.

²⁶ Under s 475(7) of the *EPBC Act*, HSI was determined to be an “interested person” for the purpose of standing, presumably on the basis that during the two years prior to the acts complained of HSI had engaged in activities related to the protection of whales in furtherance of its objects or purposes. *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd.*, [2004] FCA 1510, at [15]. see *EPBC Act* s 475(7)(b).

²⁷ *Seas and Submerged Lands Act 1973* Proclamation, COMMONWEALTH OF AUSTRALIA GAZETTE (SPECIAL), No. S 290, Friday, 29 July 1994 (1994).

²⁸ Under section 7 of the *EPBC Act*, Chapter 2 of the *Criminal Code (Cth)*, with the exception of Part 2.5, applies to all offences against the Act.

Australian nationals and non-nationals within the AWS, but only to non-nationals beyond the outer limits of the AWS.²⁹

One of the elements that the applicant had to satisfy in order to be granted leave to serve process in Japan was that the violation complained of took place “in the Commonwealth”.³⁰ Such an investigation, while dictated by Australian law, is also necessary in determining the international legality of the exercise of Australian prescriptive and adjudicative jurisdiction in relation to the AAT EEZ. Initially, Justice Allsop was prepared to treat as conclusive the determination of the boundaries of the Commonwealth by the Executive Branch of government, including the EEZ.³¹

Before denying the initial application for leave to serve process, Justice Allsop took the extraordinary step of inviting the *amicus curiae* intervention of the Attorney-General to provide the government’s views on the application of “legislation and treaties involved . . . in light of what might be seen to be Australia’s national interest, including . . . relations between Australia and Japan.”³² The Attorney-General stated that “an assertion of jurisdiction by an Australian court over claims concerning rights and obligations in the [EEZ of the AAT] would or may provoke an international disagreement with Japan, undermine the status quo attending the *Antarctic Treaty*, and ‘be contrary to Australia’s long term national

²⁹ EPBC Act, ss 224(2) and 5(3).

³⁰ Order 8 rule 1(a), (b), (j), *Federal Court Rules*.

³¹ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd.*, [2004] FCA 1510, at [19]-[22], relying on *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* (2003)126 FCR 354, 361-62.

³² *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd.*, [2004] FCA 1510, at [3].

interests.”³³ According to Justice Allsop, this view was based on the recognition of three realities by the government: First, Japan would regard enforcement of the *EPBC Act* against Japanese vessels and its nationals in the AAT EEZ as a breach of international law.³⁴ Second, the exercise of enforcement jurisdiction against foreigners generally in the AAT EEZ, based on the Australian territorial claim, would “prompt a significant adverse reaction from other Antarctic Treaty Parties.”³⁵ Third, the Australian government has not enforced the Australia law in Antarctica against the nationals of other state parties, except where there has been voluntary submission to Australian law.³⁶

In accepting that exercising jurisdiction might upset diplomatic concord under the Antarctic Treaty and be contrary to Australian national interest, Justice Allsop also stated that any injunctive relief granted would ultimately be futile because of “the difficulty, if not impossibility, of enforcement of any court order”³⁷ and could place the Federal Court “at the centre of an international dispute . . . between Australia and friendly foreign power.”³⁸ As a result, Allsop ruled that he

³³ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd.*, [2005] FCA 664, [14].

³⁴ Violation would arise presumably because either Australia does not have good title to Antarctic territory from which project an EEZ or even it that was so the extension of Australia’s Antarctic claim to the EEZ is prohibited by Article IV of the *Antarctic Treaty*. I return to these issues below.

³⁵ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd.*, [2005] FCA 664, [13].

³⁶ *Human Society International Inc v Kyodo Senpaku Kaisha Ltd*, Federal Court of Australia, Doc. NSD 1519 of 2004, *Outline of Submissions of the Attorney-General of the Commonwealth of Australia as Amicus Curiae*, available at http://www.hsi.org.au/news_library_events/images/Whale%20Case/Attorney-General's_submissions_25_January_2005.pdf.

³⁷ *Id.*, at [28].

³⁸ *Id.*, at [35].

“should not exercise a discretion to place the Court in such a position” and denied the application for leave to serve process in Japan.³⁹

Significantly, following the intervention of the Attorney-General, Allsop appeared prepared to return to consider the merits of the validity or not of the Australian claim to jurisdiction in the AAT EEZ as a predicate to granting or denying leave to serve process related to an event occurring “in the Commonwealth.” Allsop raised the issue of whether all “the area” of Southern Ocean south of 60° South Latitude, in which the AAT EEZ is claimed, is high seas (in which an EEZ may not exist) because Article VI of the *Antarctic Treaty* protects “the rights . . . of any State under international law with regard to the high seas within that area”.⁴⁰ In fact, however, it seems that Allsop was really interested in how Article IV of the *Antarctic Treaty* and its prohibition on making any “new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica” might bear on the proclamation of Australia to an Antarctic EEZ in 1994.

In particular, Allsop noted the submission by the Attorney-General that there is a distinction between the “enlargement of an existing claim to territorial sovereignty” and the claim of Australia to an Antarctic EEZ:

it was submitted on behalf of the Attorney-General, [that] the claim of Australia to the Antarctic EEZ is not one of sovereignty in the full sense over the waters adjacent to the Antarctic Territory (except for the territorial sea), but of claims . . . to exercise the rights of exploitation, conservation,

³⁹ *Id.*, at [36].

⁴⁰ *Id.*, at [7].

management and control, and enforcement thereof, given to coastal States by UNCLOS. . . . The recognition of the limitations (short of full claims to sovereignty) of Australia's claims to the Antarctic EEZ becomes important in assessing whether . . . the acts of the respondent and the contraventions of the *EPBC Act* took place "in the Commonwealth".⁴¹

In the end, however, Allsop did not decide on the operative effect of Article IV of the Treaty in relation to the declared AAT EEZ. Instead, he used the submission by the Attorney-General to contrast the contrary position of Japan (and most of the rest of the world). Allsop noted that "[a]s far as Japan is concerned, the Australian Antarctic EEZ is the high seas which is not subject to any legitimate control by Australia under UNCLOS and domestic legislation provided for thereby (such as the *EPBC Act*)."⁴² The conflicting positions thus contrasted, Allsop accepted the Attorney-General's position that international discord that would follow by granting leave to serve process and it became "unnecessary to decide whether the Antarctic EEZ is, or can be seen as, "in the Commonwealth".⁴³

Significantly too, Allsop noted cultural differences with respect to whaling and hinted that the current stigma attached to whaling might signal a move away from conservation and sustainable utilization to a wish by some to preserve charismatic mega-fauna at all costs.⁴⁴ Allsop explained:

⁴¹ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd.*, [2005] FCA 664, [12].

⁴² *Id.*

⁴³ *Id.*, at [42]. Allsop did, however, indicate that the submission of the Attorney-General had great force.

⁴⁴ Even those opposed to lifting the moratorium on whaling recognize that objections based on threatened, depleted stocks have "a limited duration, as the reintroduction of commercial whaling under the [Revised Management Plan] can be *scientifically justified*. In time, the [International

The whales being killed . . . are seen by some as not merely a natural resource that is important to conserve, but as living creatures of intelligence and of great importance not only for the animal world, but for humankind and that to slaughter them . . . is deeply wrong. These views are not shared by all. . . . They are views which, at an international level, are mediated through the Whaling Commission and its procedures, by reference to the Whaling Convention and the views of nation States. They are views . . . contain a number of normative and judgmental premises . . . which do not arise in any simple application of domestic law, but which do, or may, arise in a wider international context.⁴⁵

B. The Appeal

On appeal, a Full Bench of the Federal Court reversed Justice Allsop. Taking a more dualistic, traditional approach to the underlying legal and international relations issues, none of the appellate judges gave any weight to the international political considerations raised by the Attorney-General. Even the dissent was in agreement on this point stating that:

[c]ourts must be prepared to hear and determine matters whatever their political sensitivity either domestically or internationally. To approach the matter otherwise, is to compromise the role of the courts as a forum in

Whaling Commission] can be expected to authorize commercial whaling of Minke whales.”
Alexandre Gillespie, *The Ethical Question in the Whaling Dispute*, 9 GEO. INT’L ENVTL L. REV. 355, 358-59 (1997)(emphasis in original).

⁴⁵ *Id.*, at [29].

which rights can be vindicated whatever the subject matter of the proceedings.⁴⁶

The majority held that the action was made clearly justiciable by the Australian Parliament under the *EPBC Act* and related authority. The court had clear jurisdiction. The applicant had clear standing. Accordingly, jurisdiction could be assumed by service or submission and questions of futility would arise, if at all, if at the time of the issuance of injunctive or declaratory relief.

C. The Trial

On remand, the matter was heard in September 2007. Kyodo, as expected, did not appear. Instead of relying on a default, HSI proceeded to prove the facts supporting its claim for declarative and injunctive relief. Following the guidance provided by the majority of the Full Federal Court on Appeal regarding public interest injunctions, Allsop granted the declaration and injunction sought by HSI. This, of course, raises the prospect of contempt proceedings in Australian courts if Kyodo does not comply with the injunction in future whaling seasons.⁴⁷ It also raises the question of whether the Federal government is prepared to enforce the injunction in the event of violation by intercepting and seizing Kyodo ships operating in the AAT EEZ. Indeed, it has the potential to bring the unilateral exercise of Australia prescriptive, adjudicative, and enforcement jurisdiction to bear

⁴⁶ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd.*, 154 FCR 425, 435 (2006).

⁴⁷ Order 40, *Federal Court Rules; Federal Court Act 1976* (Cth), s. 31. The injunction could not be enforced in Japan because Japan does not recognize Australian jurisdiction over the matter, is a non-monetary order, and against public policy under Japanese law. See generally Kenneth D. Helm, *Enforcing Foreign Civil Judgments in Japan*, 1 WILLAMETTE BULL. INT'L L. & POL'Y 71 (1993); Leif Gamertsfelder, *Cross Border Litigation: Exploring the Difficulties Associated with Enforcing Australian Money Judgments in Japan*, 17 AUSTRALIAN BAR REV. 161 (1998).

on ships and individuals in an area that almost all other states view as the high seas and, if they are correct, are thus subject to the exclusive jurisdiction of the flag state.⁴⁸ Expanding jurisdiction this dramatically is clearly inconsistent with uniform past Australian practice to not to enforce Australian laws against non-nationals in Antarctica.⁴⁹

Yet, in the 2007 national election campaign, the newly elected Labor government pledged to “enforce Australian law banning the slaughter of whales in the Australian Whale Sanctuary”.⁵⁰ Additionally, the Australian Government Solicitor wrote to Justice Allsop in December 2007 during the trial of the HSI case on instructions from the new Attorney-General. The letter stated that the court should not rely on the views of the Attorney-General of the previous government. Instead, the letter highlighted that the new “Government believes that the matter would best be considered by the Court without the Government expressing its view.”⁵¹

⁴⁸ United Nations Convention on the Law of the Sea, Art. 92(1), U.N. Doc. A/CONF.62/121 (1982), reprinted in 21 I.L.M. 1261 (1982).

⁴⁹ *Human Society International Inc v Kyodo Senpaku Kaisha Ltd*, Federal Court of Australia, Doc. NSD 1519 of 2004, *Outline of Submissions of the Attorney-General of the Commonwealth of Australia as Amicus Curiae*, available at http://www.hsi.org.au/news_library_events/images/Whale%20Case/Attorney-General's_submissions_25_January_2005.pdf. It is also inconsistent with the approach by Australian fisheries laws, which apply only to Australian nationals in Antarctica. See *Antarctic Marine Living Resources Conservation Act 1981* (Cth), s 5(2) (applies to non-nationals in with what is defined as the “Australian Fishing Zone” (AFZ). Since there is no AFZ appurtenant to the AAT, the Act only applies to nationals). See also *Fisheries Management Act 1991* (Cth), s 4 and Proclamation No s52, Commonwealth of Australia Gazette (14 February 1992).

⁵⁰ *Federal Labor’s Plan to Counter International Whaling*, Media Statement (19 May 2007), available at: <http://www.alp.org.au/media/0507/msehlo0190.php>.

⁵¹ Letter from Tony Burslem, Senior Executive Lawyer, Australian Government Solicitor, to Ngaire Ballment, Associate to Justice Allsop, 12 December 2007 (copy on file with author).

During the 2007-2008 Southern Hemisphere summer whaling season that has just ended, the Australian government dispatched the *Oceanic Viking* to monitor whaling in the Southern Ocean, but it neither intercepted nor seized any Japanese whaler operating in the AAT EEZ. The government claimed that the *Oceanic Viking* was being used to collect evidence that might be used in international litigation challenging the lawfulness of Japanese whaling for “scientific purposes” under the *International Convention for the Regulation of Whaling*.⁵² But, given the current government’s position, one is still left to wonder if it is only a matter of time before the Australian government will act against Japanese ships and Japanese nationals in the ATT EEZ. This makes it opportune, for the remainder of this article, to consider the implications of such a possibility for stability in Antarctic governance.

III. Implications for ATS Stability

The HSI case establishes that the application and enforcement of the AWS provisions as applied to the AAT under the *EPBC Act* in a private action, against Australian non-nationals, by Australian courts, is not barred by Australian law.⁵³ From an international law perspective this is unfortunate. It is even more so, when one considers the ramifications for the stability of the ATS.

⁵² Joint Media Release by the Minister for Foreign Affairs, the Honourable Stephen Smith MP and the Minister for the Environment, Heritage and the Arts, the Honourable Peter Garrett AM MP, and the Honourable Bob Debus MP, Minister for Home Affairs, Press Release TK01/2008 (7 January 2008), available at: <http://www.australia.or.jp/english/seifu/pressreleases/?pid=TK01/2008>.

⁵³ Nor will the doctrine of futility preclude such an action where it is clear that enforcement will be next to impossible, at least where public interest injunctions are concerned.

In thinking about the use of jurisdiction established under Antarctic claims to territory and maritime zones as a way to provide protection to whales in the Southern Ocean, it is necessary to consider the nature of that jurisdiction. In turn, this requires a consideration of the ways in which both sovereignty and jurisdiction has been addressed by the ATS. In relation to the sovereignty issue, it is important to recognize that Article IV of the Antarctic Treaty⁵⁴ has not solved the conflict so much as it has structured a form a words that allow all parties to ambiguously look past the issue of territorial claims in order to identify with each other on agreed objectives.⁵⁵ The admonition of Professor Watts is worth repeating here:

It does not overstate the case to say that Article IV is the cornerstone of the Antarctic Treaty and thus of the whole system that has grown up around it. The effectiveness of that article has . . . kept Antarctica free of

⁵⁴ 402 U.N.T.S. 71 (done Dec. 1, 1959). Article IV provides in full:

Article IV

1. Nothing contained in the present Treaty shall be interpreted as:
 - a. a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
 - b. a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
 - c. prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's rights of or claim or basis of claim to territorial sovereignty in Antarctica.
2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

For a definitive analysis of the ambiguities and inconsistencies embodied in Article IV, see ARTHUR WATTS, *INTERNATIONAL LAW AND THE ANTARCTIC TREATY SYSTEM* 124-40; Gillian Triggs, *The Antarctic Treaty Regime: A Workable Compromise or a "Purgatory of Ambiguity"?*, 17 *CASE W. RES. J. INT'L L.* 195, 199-204 (1985).

⁵⁵ Jon Bouknight, *Staking a Claim in the Antarctic Treaty: Style is Substance*, XVII *LEGAL STUDIES FORUM* 399, 400-01 (1994); Steven J. Burton, *New Stresses on the Antarctic Treaty: Toward International Legal Institutions Governing Antarctic Resources*, 65 *Virg. L. Rev.* 421, 473-75 (1979).

the conflicts to which its complex territorial situation would have been most likely to lead and generally has removed it from the usual range of international political tensions.

Yet, however satisfactory the results of Article IV have been so far, there are certain limits to its operation and effectiveness. These limits are sometimes obscured by the very success that Article IV has so far had and the tendency to get around its complex drafting by summarizing its broad effect by some such phrase as that it “suspends sovereignty claims” in Antarctica or that it has put “sovereignty in abeyance.”

What is important to always bear in mind is that the various national claims to and rights of sovereignty in Antarctica are still very much alive – as is equally the opposition to them of those states that do not recognize them. The underlying differences of view remain. In that sense, Article IV has not “solved” the problem. What it has done is provide a basis on which conflicts arising out of those continuing differences can be avoided.

. . . Take Article IV away, and sovereignty rights and claims, and opposition to them, will immediately re-emerge, undiminished in vigor. In an extreme case, involving in some way the Antarctic Treaty or at least Article IV ceasing to be in force, the consequential possibility of a resurgence of conflicts over sovereignty is readily apparent.⁵⁶

⁵⁶ Arthur D. Watts, *The Antarctic Treaty as a Conflict Resolution Mechanism*, in *ANTARCTIC TREATY SYSTEM: AN ASSESSMENT – PROCEEDINGS OF A WORKSHOP HELD AT BEARDMORE SOUTH FIELD CAMP, ANTARCTICA, JANUARY 7-13, 1985*, 70-71 (National Academy Press, 1986).

It is precisely this situation that the HSI case threatens. Absent agreement of the parties to introduce positive rules related to the exercise of jurisdiction in the Treaty Area over non-nationals,⁵⁷ it seems almost certain that Australia's assertion of maritime jurisdiction over non-nationals will at the least create conditions for dispute and discord. If other states were to follow Australia's lead, in a worst case scenario it might mean the end of the ATS altogether and the revival of old claims and assertion of a host of new claims. As Gillian Triggs observed in 1985:

Were Australia or any other claimant state to give effect to their views of Article IV of [Antarctic] Convention by, for example, exercising the customary jurisdiction of a coastal state in relation to waters adjacent to its sectoral claim in Antarctica, it is likely that the Convention would break down.⁵⁸

It is important to note that the ATS does not seek to regulate Antarctica and its marine environment in its entirety. Indeed, whales are expressly excluded from the ATS in a number of places and it is important to bear in mind that there are existing multilateral agreements that are both consistent with the ATS and do apply to whales in the seas adjacent to Antarctica. The purpose of this article is not to

⁵⁷ That is, general jurisdictional rules beyond the limited provision of Article VIII of the Antarctic Treaty, 402 U.N.T.S. 71 (1961)(dealing with observers, scientific personnel and members of accompanying staffs).

⁵⁸ Gillian Triggs, *The Antarctic Treaty Regime: A Workable Compromise or a "Purgatory of Ambiguity"?*, 17 CASE W. RES. J. INT'L L. 195, 203 (1985). See also Marcus Haward, et al., *Australia's Antarctic Agenda*, 60 AUSTRALIAN JOURNAL OF INTERNATIONAL AFFAIRS 439, 443 (2006) (noting that the controversy surrounding Australian Antarctic maritime claims has only been resolved by Australian forbearance from jurisdictionally "enforcing territorial sea or exclusive economic zone rights"); Jeffrey D. Myhre, *THE ANTARCTIC TREATY SYSTEM: POLITICS, LAW AND DIPLOMACY* 37 (1986)(recognizing it is fortunate that Antarctic Treaty parties have not exercised jurisdiction over non-nationals).

identify all of these agreements.⁵⁹ Rather, the argument here is that the contentious and almost entirely unrecognized exercise of jurisdiction within the ATS over non-nationals in waters adjacent to Antarctica for the purpose of regulating whaling is unsound. It is likely to lead to less overall environmental protection in Antarctica if it engenders conflict and competition.

The crux of the HSI dispute (and any progeny it brings forth) is whaling. The long running battle between the anti-whaling forces and whalers is being played out in Australian courts because of the failure to address the issues within what is seen as a “dysfunctional” whaling regime.⁶⁰ However, the Australian litigation involves what most other states will view as the unlawful exercise of Australian jurisdiction (based on its Antarctic claim) in the Southern Ocean. This raises the very real prospect that ongoing whaling dispute will have a detrimental “ripple effect” on the ATS (and perhaps even beyond).⁶¹

Whaling is largely comprised of politics revolving around a single issue. The danger is that the issue of whales and whaling might distort and obscure the larger environmental picture in Antarctica. This is especially true when

⁵⁹ For a more detailed treatment of the applicability of other multilateral agreements, see the author’s forthcoming article in the *ASIA-PAC. J. ENVTL L.* See also Scott A. Hajost, *International Agreements Applicable to Antarctica: A Survey*, in RÜDIGER WOLFRUM, ED., *ANTARCTIC CHALLENGE III: CONFLICTING INTERESTS, COOPERATION, ENVIRONMENTAL PROTECTION, ECONOMIC DEVELOPMENT* 79 (1988); Maria Clara Maffei, *The Protection of Whales in Antarctica*, in FRANCESCO FRANCONI & TULLIO SCOVAZZI, EDs., *INTERNATIONAL LAW FOR ANTARCTICA* 171 (2d ed, 1996).

⁶⁰ See, e.g., William Aron, William Burke & Milton M.R. Freeman, *The Whaling Issue*, 24 *MARINE POLICY* 179 (2000).

⁶¹ As Orrego Vicuña states, “all of the activities taking place in Antarctic are closely bound together because of their very nature, and all of them have an effect on the values protected by the [Antarctic] Treaty”. Orrego Vicuña, *The Antarctic Treaty System: A Viable Alternative for the Regulation of Resource-oriented Activities*, in GILLIAN D. TRIGGS, ED., *THE ANTARCTIC TREATY REGIME: LAW, ENVIRONMENT AND RESOURCES* 71 (1987).

contemporary international negotiations on whales and whaling within the International Whaling Commission (IWC) often appears in many ways to be meant for consumption of domestic political constituencies.⁶² Fundamental tensions will be created within the ATS if the battle over the whaling issue is brought within. By disrupting set patterns of jurisdiction that provide a fundamental cornerstone for the ATS, the whaling issue will reverberate, and not likely to the good, in the system.

I want to emphasize that most of my sympathy lies with the plaintiff's reasonable objectives in the litigation we are considering.⁶³ It is certain that ensuring the perpetuation of whales in the Southern Ocean is important! However, this worthy goal is only a small part of the common interest of all humankind in the protection and sustainable use of the wider Antarctic environment (marine and terrestrial). Because of this broader common interest, I depart with HSI and its lawyers when we look at the means employed to reach the specific objective of perpetuation. My departure is not so much driven by HSI and its lawyers as it is by the legal tools put at their disposal by the Commonwealth Parliament of Australia in form of the *Environment Protection Biodiversity Conservation Act 1998*.

Private litigation, based on an internationally disputed claim to sovereignty over Antarctic territory and a further contested claim to an EEZ appurtenant to that territory, ought not to serve as a proxy for cooperative (and hopefully effective)

⁶² These concerns, and others, are raised in Robert L. Friedheim, *Introduction: The IWC as a Contested Regime*, in ROBERT L. FRIEDHEIM, ED., *TOWARD A SUSTAINABLE WHALING REGIME* 3, 17, 27, 28 (2001).

⁶³ In my view, both ends of the spectrum of the whaling debate (prohibition in perpetuity v. open commercial whaling) are unreasonable and wrong. That, however, is a matter for a different article.

international management of the Antarctic environment. The negative incentives presented by such an extreme unilateral measure are just too dangerous. That is not to say other, less provocative unilateral measures need to be avoided. Indeed, in the appropriate circumstances unilateral measures can be viewed as international leadership.⁶⁴ Lower level, less contentious, unilateral measures might present a possible way forward in the establishment of effective international management.

Instead of a unilateral Australian approach, what is required is a more concerted multilateral attempt to address the issue of whales and whaling through the whaling regime established by the 1946 International Convention on the Regulation of Whaling (ICRW). Even if such an attempt involves a difficult and long drawn out process, or even if the deadlock remains, a continuing interregnum of uncertainty and contest within the Whaling regime⁶⁵ is better than destabilizing the ATS – an extremely important regime of broader scope and objective.

IV. Conclusion

It is a truism that good faith cooperation between states is required to successfully tackle environmental and resource problems which are international in

⁶⁴ David A. Wirth & Douglas J. Caldwell, *Unilateral Trade-Based Measures for Protection of the Marine Environment*, in DORINDA G. DALLMEYER, *VALUES AT SEA: ETHICS FOR THE MARINE ENVIRONMENT* 147, 162-63 (2003).

⁶⁵ Indeed, David Victor claims that the uneasy *status quo* within the whaling regime is as good as it gets and that forcing any plausible alternative will lead to losers who will abandon the regime. David Victor, *Whale Sausage: Why the Whaling Regime Does Not Need to be Fixed*, in ROBERT L. FRIEDHEIM, ED., *TOWARD A SUSTAINABLE WHALING REGIME* 292, 304-305 (2001). In the same volume Milton Freeman makes a similar observation: "It would be naïve not to recognize that for the majority of participants in IWC discussions, the current nonresolution . . . is the desired outcome. Milton M.R. Freeman, *Is Money the Root of the Problem? Cultural Conflicts in the IWC*, in *Id.*, 125. The same could be said of the solution afforded by the ATS and that introducing unilateral exercises of jurisdiction over non-nationals will also lead to regime abandonment.

scope.⁶⁶ In the case of whale stocks, a *res nullius* common property resource,⁶⁷ cooperation is required on account of the externalities that have driven unsustainable exploitation.

It is well known that over the past 10 years or so the struggle between the conservation and utilisation camps within the International Whaling Commission (IWC) has intensified as stocks (at least minke whale stocks) have apparently been gradually replenished since the whaling moratorium.⁶⁸ This increasingly acrimonious struggle seriously threatens the normative effectiveness of the Whaling Convention and the IWC. By comparison to the IWC, the Antarctic Treaty System (ATS), has been relatively stable since controversy raged around the issue of minerals exploration and exploitation in the 1980s.

The recent *HSI* case, and the broader context in which it arises, has the potential to dangerously destabilize the ATS. At bottom, this potential is driven by the somewhat jaded, but I believe basically accurate, perspective expressed by Wilbert Chapman in 1969. Chapman said:

⁶⁶ Charter of the United Nations, 59 Stat. 1031, 3 Bevans 1153, [1976] Yb.U.N. 1043, Art. 1(3). See also Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV)(24 October 1970).

⁶⁷ Whale stocks are a classic example of a “common property” or “common pool” resource. See R. Quentin Grafton, Dale Squired & Kevin J. Fox, *Private Property and Economic Efficiency: A Study of a Common Pool Resource*, 43 J. L. & Econ. 679 (2000)(examining the British Columbia halibut fishery).

⁶⁸ Karl-Hermann Kock, *Antarctic Marine Living Resources – exploitation and its management in the Southern Ocean*, 19 ANTARCTIC SCIENCE 231, 236 (2007)(it is possible to conduct sustainable commercial whaling of a number of minke whale stocks today).

The nature of [humans] abhors something of value not being owned by an individual, or by groups of individuals organized into states or business entities.⁶⁹

This acquisitive view of human nature frames, in large part, the centuries old argument about open and closed seas that all lawyers of the sea are familiar with. This acquisitive habit lies behind the capture and use of whales by the nationals of whaling states, just as much as lies behind claims to sovereign rights in natural resources in an EEZ off Antarctica. Indeed the drive to acquisition applies to all common Antarctic marine biological resources and helps explain why states have entered into agreements that seek to frame principles for sharing these marine resources. More troubling though, is that in what appears to be coming times of increasing scarcity, this acquisitive habit will apply with equal force to oil and mineral resources (and even genetic material) found off-shore in Antarctica.⁷⁰ For many, this explains why the 1991 Protocol on Environmental Protection to the Antarctic Treaty contains the Article 25 “escape clause” built around disagreement concerning mineral resource activities.

This habit of acquisition, and the tendency to exclusive use of what is thus acquired, highlights the great failing of Australia’s unilateral approach to the

⁶⁹ Wilbert McLeod Chapman, *Concerning Fishery Jurisdiction and the Regime of the Deep-sea Bed*, in WILLIAM T. BURKE, ED., *TOWARDS A BETTER USE OF THE OCEAN: CONTEMPORARY LEGAL PROBLEMS IN OCEAN DEVELOPMENT* 154, 155 (1969).

⁷⁰ In 2000, the U.S. Energy Information Administration reported that “[t]he continental shelf of Antarctica is considered to hold the region’s greatest potential for oil exploration projects, and although estimates vary as to the abundance of oil in Antarctica, the Weddell and Ross Sea areas alone are expected to possess 50 billion barrels of oil - an amount roughly equivalent to that of Alaska’s known reserves.” Energy Information Administration, *Antarctica – Fact Sheet* (Sept. 2000), available at <http://www.eia.doe.gov/emeu/cabs/antarctica2.html>.

protection of the Antarctic marine environment in this case; an approach predicated on a claim to exclusive sovereign rights and the projection of Australian prescriptive, adjudicative and enforcement jurisdiction in the zone. The big danger is that if other states follow Australia's lead in claiming sovereign rights and exercising attendant jurisdiction the chances of natural resource over-exploitation and environmental harm in the Antarctic is increased. It will, I believe, in the long run exacerbate the likelihood of a scramble for important, scarce and economically viable resources.