Antarctica and the New Law of the Sea

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INTRODUCTION

The purpose of this paper is to examine the effects of the new law of the sea on the Antarctic legal regime. Its classification of those effects as legal and political is arbitrary to some extent. Such a classification nevertheless highlights important distinctions in the emergence of a new law of the sea. Among these are the conceptual distinction between the traditional processes of customary international law and the development of law through global multilateral negotiation; the procedural distinction between regulation by ad hoc functional arrangements among states directly concerned and regulation by a global organization; and the substantive distinction between a body of rules devoted largely to the traditional task of defining the respective rights and duties of states inter se and a body of rules designed to create and give effect to collective legal rights of humanity as a whole.

I. THE ANTARCTIC REGIME

The physical characteristics of Antarctica and its legal regime are amply described by other papers in this series and elsewhere. Certain aspects of that regime will be highlighted for purposes of this paper.

A. THE ANTARCTIC TREATY

Twelve states originally concluded the Antarctic Treaty of 1959. All members of the United Nations may accede to the Treaty.

1. Professor Francioni, for example, might disagree with this classification in some respects, particularly because it treats the principle of the common heritage of mankind exclusively in terms of political effects. See Francioni, *Legal Aspects of Mineral Exploitation in Antarctica*, 19 CORNELL INT’L L.J. 163 (1986). In response, the Author would argue that even if the common heritage principle has legal content and is applicable to the deep seabeds or cultural artifacts as a matter of customary international law, the question of whether it should be applied to Antarctica and, if so, in what form, is at present primarily a political rather than a legal question. No evidence exists of anything approaching a consensus on that matter. On a broader front, the Author has no desire to engage those who regard law as a branch of political science.


3. Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the U.S.S.R., the United Kingdom, and the United States.


5. Antarctic Treaty, Appendix, infra, art. XIII, para. 1. Other states may also be invited to accede. *Id.* The following states have acceded to the Treaty: Brazil, Bulgaria,
It provides that “each of the Contracting Parties undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty.”

The “Consultative Parties” to the Antarctic Treaty are the twelve original parties, and any other party during such time as it demonstrates its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the dispatch of a scientific expedition. “[M]easures in furtherance of principles and objectives of the Treaty” are adopted at meetings of the Consultative Parties and become effective when approved by all the Consultative Parties entitled to attend the meeting at which the measures were considered.

The Treaty permits a Consultative Party to designate observers to inspect all areas of Antarctica. In addition, a Consultative Party may carry out aerial observation “at any time over any or all areas of Antarctica.”

The Antarctic Treaty applies to the area south of 60° South latitude, including all ice shelves. However, the Treaty does not “prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area.”

Certain states have territorial claims over part of the Antarctic continent. Some of these claims overlap. Part of the continent is unclaimed.

A significant number of non-claimant states do not recognize the validity of any of the territorial claims in Antarctica. Some of these states may believe they themselves have a basis for a claim to all or part of the continent.

China, Cuba, Czechoslovakia, Denmark, the Federal Republic of Germany, Finland, the German Democratic Republic, Hungary, India, Italy, the Netherlands, Papua New Guinea, Peru, Poland, Romania, Spain, Sweden, and Uruguay.

6. Id., art. X.
7. Id., art. IX, paras. 1-2. In addition to the original parties, supra note 3, the Consultative Parties now include Brazil, China, the Federal Republic of Germany, India, Poland, and Uruguay. Italy may become a Consultative Party in the near future.
8. Id., art. IX, para. 1.
9. Id., art. IX, para. 4.
10. Id., art. VII, para. 3.
11. Id., art. VII, para. 4.
12. Id., art. VI.
13. Id. (emphasis added).
14. The claimant states are Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom. See Map, Appendix, infra.
15. The claims of Argentina, Chile, and the United Kingdom overlap. See Map, Appendix, infra.
16. This group may include the U.S.S.R. and the United States.
Article IV of the Antarctic Treaty “freezes” the status of territorial claims as of June 23, 1961, the date the Treaty entered into force. The first paragraph protects the position of the claimants, the position of parties that may have a basis of claim, and the position of parties that do not recognize any other state’s claim or basis of claim. The second paragraph provides that, after the Treaty’s entry in force:

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.

The following are among the substantive rules of the Antarctic Treaty relevant to the analysis in this paper:

1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, inter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.

2. Freedom of scientific investigation in Antarctica and cooperation toward that end, as applied during the International Geophysical Year, shall continue, subject to the provisions of the present Treaty.

3. Any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited.

B. OTHER AGREEMENTS PROTECTING ANTARCTIC LIVING RESOURCES

In addition to the Agreed Measures for the Conservation of Antarctic Flora and Fauna adopted under the Antarctic Treaty, three treaties are directly relevant to the conservation of living resources in the waters surrounding Antarctica: (1) the 1946 International Convention for the Regulation of Whaling, which established a system for the global regulation of whaling, including waters of the Southern Ocean; (2) the 1972 Convention for the Conservation of Antarctic Seals (Seal Convention); and (3) the Convention for the Conservation of Antarctic Marine Living Resources (Marine Living

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17. Antarctic Treaty, Appendix, infra, art. IV, para. 1.
18. Id., art. IV, para. 2.
20. Id., art. II.
The latter two treaties deal specifically with the waters surrounding Antarctica and are closely tied to the Antarctic Treaty. Their negotiation as separate treaties, rather than as agreed measures under the Antarctic Treaty, facilitates the participation of concerned states that do not qualify as Consultative Parties under the Antarctic Treaty. In addition, the fact that these are separate treaties permits them to deal with living resources in areas outside the scope of the Antarctic Treaty, such as the high seas and areas north of 60° South latitude.

The 1972 Seal Convention establishes a regulatory system for conserving seals south of 60° South latitude. The Convention was negotiated by a limited number of interested parties and is open to accession by others only "with the consent of the Contracting Parties." With respect to territorial claims, the Seal Convention expressly affirms article IV of the Antarctic Treaty.

The 1980 Marine Living Resources Convention establishes a regulatory system for conserving all Antarctic marine living resources, including birds, south of 60° South latitude; the Convention's regulatory system also extends to "the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem."

The Marine Living Resources Convention was negotiated by a number of interested states who constitute the original parties. Although the Convention is also "open for accession by any State interested in research or harvesting activities in relation to the marine living resources to which [the] Convention applies," membership in the regulatory Commission is limited to the original parties and an acceding party "during such time as that acceding Party is engaged in research or harvesting activities in relation to the marine living resources to which [the] Convention applies." The latter determination is subject to a decision by the Commission which may require consensus.
The Marine Living Resources Convention incorporates by reference numerous provisions of the Antarctic Treaty. Mirroring article X of the Antarctic Treaty, the Convention provides that “[e]ach Contracting Party undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that [none of the signatories] engages in any activity contrary to the objective of this Convention.” With respect to claims, the Marine Living Resources Convention not only expressly affirms article IV of the Antarctic Treaty, but also protects the positions of states that “claim or have a basis of claim to exercise coastal state jurisdiction under international law” within the area, as well as the positions of states that do not recognize any such claim or basis of claim. Thus, in general, the approach of the Antarctic Treaty to disputed claims of territorial sovereignty is expressly applied to claims of coastal state jurisdiction in the Marine Living Resources Convention.

II. THE LAW OF THE SEA

Law is always changing. The date one chooses to distinguish old from new is always somewhat arbitrary, always a half-truth. The focus of this inquiry is the impact on the Antarctic regime of changes in the law of the sea since the conclusion of the Antarctic Treaty on December 1, 1959. For purposes of this analysis, the “old” law of the sea consists of the rules generally recognized as of that date, while the “new” law of the sea consists of the rules generally recognized today.

Careful analysis of the various states’ perceptions of the law of the sea would reveal significant differences regarding the content of that law both in 1959 and today: For the sake of simplicity, arbitrary choices must be made regarding the content of the law at any given time.

A. DESCRIPTION OF THE LAW OF THE SEA

1. The “Old” Law of the Sea

The most convenient, and in many respects the most accurate, evidence of the content of the law of the sea in 1959 can be found in the texts of the four 1958 Conventions on the Law of the Sea. These

34. Id., art. XXII, para. 1; see Antarctic Treaty, Appendix, infra, art. X.
35. Marine Living Resources Convention, supra note 25, art. IV.
Conventions were developed by the International Law Commission after many years of work, relying in part on earlier codification efforts. They were adopted in 1958 by the first United Nations Conference on the Law of the Sea. To varying degrees, the four 1958 Conventions were ultimately ratified by most of the major maritime states and many others.

A majority of states, however, never ratified the 1958 Conventions. At least two Consultative Parties to the Antarctic Treaty—Argentina and Chile—asserted positions in 1958 regarding coastal state rights to offshore resources that are more consistent with the law as it exists today than with the law as described in the 1958 Conventions.

For the purposes of the present study, the most important characteristics of the 1958 Conventions are the following:

(1) Coastal states are entitled to sovereignty over a territorial sea adjacent to the coast, subject to a right of innocent passage for ships of all states. Agreement could not be reached on the maximum permissible breadth of the territorial sea; the dispute centered on proposals for a three-, six- or twelve-mile maximum limit. The question of coastal state jurisdiction over fisheries was an important part of that dispute.

(2) All parts of the sea beyond the territorial sea are defined as high seas, open to use by all nations under the principle of the freedom of the high seas.

(3) A significant qualification of the foregoing principle is that the “coastal state exercises over the continental shelf [exclusive] sovereign rights for the purpose of exploring it and exploiting its natural resources,” and has a right to consent to “research concerning the continental shelf and undertaken there.” The continental shelf is defined in the 1958 Convention as

the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.

The question of the precise maximum extent of the seabed areas seaward of 200-meters that could be regarded as part of the continental shelf was, in effect, postponed.

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37. Territorial Sea Convention, supra note 36, arts. 1-2, 14-23.
38. All references in this paper are to nautical miles.
41. Id., art. 1.
2. The "New" Law of the Sea

The 1982 United Nations Convention on the Law of the Sea provides the most convenient, and in many respects the most accurate, evidence of the content of the law of the sea today. This Convention was the result of almost fifteen years of active work involving virtually all independent states in existence today—a group twice as large as that attending the 1958 Conference. The Third United Nations Conference on the Law of the Sea functioned on the basis of consensus until the closing moments of its substantive work. While too little time has yet elapsed for the Convention to be widely ratified, almost all states have signed it.

It is important to bear in mind, however, that four parties to the Antarctic Treaty—the Federal Republic of Germany, Peru, the United Kingdom, and the United States—refused to sign the 1982 Convention. In Peru's case, the disagreement appears to relate to the nature of the balance between coastal state and flag state rights in the exclusive economic zone. In the case of the other three parties, the disagreement appears to relate to the nature of the mining regime for the seabed beyond the continental shelf. Their concerns regarding this deep seabed mining regime are shared to some degree by other parties to the Antarctic Treaty—including Belgium, France, Italy, Japan, and the Netherlands—that have signed but not ratified the 1982 Convention. These states have negotiated an agreement that envisages the possibility of deep seabed mining under high seas principles outside the 1982 Convention system.

Deep seabed mining apart, the United States has indicated that it intends to act in a manner consistent with most if not all of the provisions of the 1982 Convention. This may be a generally accurate
description of the current attitudes of the Federal Republic of Germany and the United Kingdom as well.

The 1982 Convention repeats many provisions of the 1958 Conventions, elaborating on some and making significant changes in others. For the purposes of this analysis, the most important elaborations and changes contained in the 1982 Convention are the following:

(1) The 1982 Convention establishes a twelve-mile maximum limit for the territorial sea.\(^{46}\)

(2) The 1982 Convention defines the limit of the continental shelf as the outer edge of the continental margin or 200 miles from the coast,\(^{47}\) whichever is further seaward.\(^{48}\) A coastal state is required to make modest international payments for minerals (presumably hydrocarbons) produced from the continental shelf in areas seaward of 200 miles from the coast, unless it is a developing country that is a net

46. Law of the Sea Convention, \textit{supra} note 42, art. 3.

47. For the purposes of simplicity, references are made to the “coast” in place of the more accurate “baseline from which the breadth of the territorial sea is measured.” While the baseline may not depart appreciably from the direction of the coast, at some points it may be a significant distance from the coast itself.

48. Law of the Sea Convention, \textit{supra} note 42, art. 76.
importer of the resources concerned.49 Those payments are to be distributed among parties to the 1982 Convention "on the basis of equitable sharing criteria, taking into account the interests and needs of developing States."50

(3) The 1982 Convention permits the coastal state to establish an exclusive economic zone beyond its territorial sea extending up to 200 miles from the coast.51 Within the economic zone, the coastal state has

sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters ... and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. ...52

The coastal state also enjoys in the economic zone "the exclusive right to construct and to authorize and regulate the construction, operation and use of" artificial islands as well as economic (and some other) installations and structures;53 rights to be informed of and consent to marine scientific research;54 environmental rights to prescribe and enforce dumping and internationally approved discharge standards for foreign ships;55 and rights to prescribe and enforce environmental standards for foreign ships "in ice-covered areas ... where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance."56 These rights are accompanied by many duties, including the duty to conserve and promote optimum utilization of living resources,57 and the duty to protect and preserve the marine environment.58

(4) At the same time, within the exclusive economic zone, all states continue to enjoy the high seas "freedoms ... of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and sub-

49. Id., art. 82.
50. Id.
51. Id., art. 57.
52. Id., art. 56, para. 1(a).
53. Id., arts. 56, 60, 258.
54. Id., arts. 56, 246-54.
55. Id., arts. 56, 210-11, 216, 220; see id., arts. 223-33.
56. Id., art. 234.
57. Id., arts. 61-62. The duty to promote optimum utilization does not apply to marine mammals. Id., art. 65. The duty to conserve and promote optimum utilization is not expressly applicable to sedentary species of the continental shelf. Id., art. 68.
marine cables and pipelines.”59 These freedoms are accompanied by many duties, including the duty to protect and preserve the marine environment.60

(5) The 1982 Convention contains no definition of the high seas. All of the rules regarding the high seas apply seaward of the exclusive economic zone.61 Except for the provisions on fishing and the list of high seas freedoms, all of the rules regarding the high seas also apply within the exclusive economic zone “insofar as they are not incompatible with” the provisions regarding the exclusive economic zone.62

(6) The 1982 Convention provides that “rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”63

(7) The 1982 Convention declares the seabed beyond the limits of national jurisdiction—normally, the seabed beyond the continental shelf—and its resources to be the “common heritage of mankind.”64 That area is “open to use exclusively for peaceful purposes by all States.”65 Mining by states and private companies is to be authorized and regulated by an International Seabed Authority, to which miners are to make payments.66 The Convention also provides for the establishment of a commercial “Enterprise” to mine directly for the Authority.67 The Convention declares, “No State or . . . person shall claim, acquire or exercise rights with respect to the minerals recovered from the international seabed Area except in accordance with this Part [of the Convention]. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.”68

(8) The 1982 Convention reserves all areas beyond the territorial sea for “peaceful purposes.”69

59. Id., art. 58, para. 1. The full text refers to the “freedoms referred to in article 87 of navigation. . . .” Article 87 is the basic article on freedom of the high seas. The cross-reference to article 87 highlights the fact that the freedoms preserved in article 58 are high seas freedoms.
60. Id., arts. 58(3), 192-96, 210, 211(2), 212, 216, 217, 222.
61. Id., art. 86.
62. Id., art. 58, para. 2. Fishing is excepted because the economic zone articles establish their own elaborate fisheries regime. The list of high seas freedoms is excepted because article 58, paragraph 1, contains its own list of freedoms enjoyed by all states in the economic zone.
63. Id., art. 121, para. 3.
64. Id., art. 136.
65. Id., art. 141.
66. Id., arts. 153, 159-65; Annex III.
67. Id., art. 170; Annex IV.
68. Id., art. 137, para. 3.
B. LEGAL EFFECTS OF THE NEW LAW OF THE SEA

1. Coastal State Jurisdiction

Application of the new law of the sea to Antarctica poses the same basic problem as application of the old law of the sea: coastal state sovereignty over the territorial sea and coastal state jurisdiction over the continental shelf and the exclusive economic zone presuppose the existence of a coastal state. In the absence of a coastal state, no territorial sovereign exists as such to exercise legislative or enforcement competence at sea.

As previously indicated, a number of important states currently refuse to recognize the validity of existing sovereignty claims to any part of the Antarctic continent or its adjacent islands. Consequently, these states do not recognize the existence of jurisdiction over a territorial sea, continental shelf, or exclusive economic zone that is derived from such claims. Because of the refusal of some states to recognize territorial claims to Antarctica, and because parts of Antarctica remain unclaimed, territorial sovereignty cannot provide an agreed basis for exercising coastal state rights off Antarctica.


70. "The sovereignty of a State extends, beyond its land territory and internal waters, to a belt of sea adjacent to its coast, described as the territorial sea." Territorial Sea Convention, supra note 36, art. 1, para. 1; Law of the Sea Convention, supra note 42, art. 2, para. 1 (with technical changes). "The coastal State exercises over the continental shelf sovereign rights . . . ." Convention on the Continental Shelf, supra note 36, art. 2, para. 1; Law of the Sea Convention, supra note 42, art. 77, para. 1. "In the exclusive economic zone, the coastal State has . . . sovereign rights . . . ." Law of the Sea Convention, supra note 42, art. 56, para. 1(a). The descriptions of the continental shelf and the exclusive economic zone presume the existence of a territorial sea landward of those areas. Convention on the Continental Shelf, supra note 36, art. 1; Law of the Sea Convention, supra note 42, art. 55; id., art. 76, para. 1.

The law of piracy treats land areas not subject to the jurisdiction of any state in the same manner as it treats the high seas. Convention on the High Seas, supra note 36, art. 15, para. 1(b); Law of the Sea Convention, supra note 42, art. 101(a)(2).

71. A different argument could be rooted in article 121, paragraph 3, of the Law of the Sea Convention, supra note 42, which provides: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." Sovereignty over the rock itself and a territorial sea around the rock are nevertheless assumed. In context, article 121, paragraph 3 distinguishes certain rocks from "islands" and is not literally applicable to an entire continent. Both habitability and size of the area involved are relevant criteria. The question is whether the provision reflects some underlying principle regarding human habitability that limits or excludes coastal state jurisdiction off the Antarctic continent. Given the practice of coastal states that have extensive coastlines in the Arctic or in other areas that are largely uninhabitable, there appears to be
The absence of recognized coastal states does not necessarily mean that the fisheries and mineral resources off the Antarctic coast are open to unregulated plunder. States may still regulate these resources by agreement. The key question is: agreement among which states? The new Antarctic Marine Living Resources Convention sidesteps the juridical problem by including claimant states and non-claimant states, and remaining open, at least in principle, to all states engaged in fishing in the area. The general law of the sea fishing regimes, applicable in both the exclusive economic zone and on the high seas beyond, contemplates such cooperation.72

The underlying juridical question, which may have particular relevance for non-living resources of the continental shelf, is whether a certain number of states may establish a regulatory regime applicable erga omnes, i.e., binding all other states. Article X of the Antarctic Treaty and articles X and XXII of the Antarctic Marine Living Resources Convention seem to contemplate efforts to secure minimal acquiescence from non-parties.73

At least in theory, it is possible to take the position that certain states—principally the Consultative Parties—have collective rights applicable erga omnes to establish regulatory regimes for the Antarctic continent and for offshore areas subject to coastal state jurisdiction under international law, even if no Consultative Party has perfected a claim to sovereignty over the land territory in question. Such a position could be rooted in the established doctrine of condominium: whatever the merits of the parties' claims inter sese, their rights collectively are superior to those of the rest of the world. This position could also be rooted in the theory that the parties, given their historic role in Antarctica, have a special collective responsibility to establish such regulatory regimes, particularly in light of the elaborate duties imposed by the new law of the sea to conserve living resources and to

no such general principle. Yet an intriguing question remains. Almost all of the largely uninhabitable coastal areas in other parts of the world are physically connected or proximate to land territory (frequently of the same state) that is habitable. In contrast, arguably all of Antarctica is not habitable within the meaning of article 121; Antarctica is arguably the least habitable place on earth. Indeed, the conditions that make Antarctica essentially uninhabitable, absent extraordinary support efforts, are the source of some of the arguments that deny the validity of the territorial claims on the continent itself. The argument is that it has not been possible—or was physically impossible—to achieve in Antarctica the degree of effective occupation required for territorial sovereignty under international law, at least prior to 1961. See generally Conforti, supra note 2.

72. Law of the Sea Convention, supra note 42, art. 61, paras. 2, 3, 5; art. 62, paras. 2-3; arts. 63-65, 118.
73. The reference to the U.N. Charter in these articles supports the inference that they are directed to the activities of other states, rather than persons subject to the jurisdiction of the parties. Article XXI of the Marine Living Resources Convention, supra note 25, deals separately with the obligation to ensure compliance by persons subject to the jurisdiction of the parties.
protect and preserve the marine environment. The former justification might suggest that the parties are free to regulate the area primarily for their own benefit, while the latter justification might suggest a relationship analogous to a trust for the benefit of all.

Other theoretical approaches are possible and have been elaborated by other speakers at this Conference. For the purposes of this paper, it is sufficient to note that the absence of territorial sovereignty by any one state is not necessarily dispositive of the question of whether a suitable group of states may exercise collectively the offshore rights that international law normally vests in the coastal state.

2. New Claims and Enlargement of Existing Claims

Under our working definitions, the old law of the sea permitted a territorial sea of modest breadth and coastal state jurisdiction over the continental shelf to the limits set in article 1 of the Continental Shelf Convention. The Antarctic Treaty, however, does not expressly mention either the territorial sea or the continental shelf.

The new law of the sea extends the territorial sea up to a maximum limit of twelve miles, extends the continental shelf to the edge of the continental margin or 200 miles from the coast, whichever is further seaward, and allows the coastal state to exercise jurisdiction over a 200-mile exclusive economic zone. The new law of the sea thus permits the coastal state to eliminate previous freedom of fishing, to restrict previous rights to deploy certain installations and structures, and to regulate the previous freedom to conduct marine scientific research. The new law of the sea also allows the coastal state to exercise certain rights over navigation for environmental purposes.

Article IV of the Antarctic Treaty does two things. The first paragraph "freezes" the positions of the parties with respect to claims. The second paragraph prohibits new claims or expansion of existing claims. Does article IV apply to coastal state jurisdiction over offshore areas? Article VI of the Antarctic Treaty in principle includes offshore areas within the scope of the Treaty. Article IV, however, refers only to claims of "territorial sovereignty," which might be read literally to include the territorial sea but not the continental shelf or the economic zone.

The most sensible interpretation of article IV, paragraph 1, is that it applies to coastal state rights over all offshore areas, subject to the

74. See Conforti, supra note 2; Simma, supra note 2.

75. Article VI excludes only "the high seas within [the Treaty] area," not all offshore areas. It can be read as implicitly acknowledging a position by the drafters that territorial claims include offshore areas excluded from the high seas, namely the territorial sea, or more broadly include derivative coastal state jurisdiction exercisable in derogation of the high seas regime, including sovereign rights with respect to the continental shelf.
high seas exclusion of article VI.\textsuperscript{76} Article IV applies not because those rights are analogous to territorial sovereignty,\textsuperscript{77} but because the right to coastal state jurisdiction is an incident of territorial sovereignty that inheres automatically in the coastal state.\textsuperscript{78} In common law parlance, it "runs with the land." The fact that article IV of the Marine Living Resources Convention expressly applies the principles of article IV, paragraph 1 of the Antarctic Treaty to coastal state jurisdiction at sea suggests that this is the current understanding of the parties.\textsuperscript{79}

A contrary view of article IV, paragraph 1 of the Antarctic Treaty would imply that the Treaty could be interpreted as constituting a renunciation of offshore rights by the territorial claimants, or as prejudicing the position of those parties that do not recognize territorial claims. This simply does not make sense. A state that does not recognize a territorial claim on land need not recognize the coastal state jurisdiction based on that territorial claim.

The more difficult question is whether the prohibition on new claims or enlargement of existing claims in the second paragraph of article IV of the Antarctic Treaty applies to coastal state jurisdiction. Before reaching this question, one must note that some ambiguity exists as to what constitutes a new claim or an enlargement of an existing claim at sea. The 1958 and 1960 Law of the Sea Conferences failed to agree on the maximum permissible breadth of the territorial sea. Some states might argue that by 1961, they already had vested rights under international law over the continental shelf to the outer edge of the continental margin. Chile already had claimed a 200-mile zone. Notwithstanding these legal problems, assertion of jurisdiction over a 200-mile exclusive economic zone and the associated 200-mile alternative limit for the continental shelf would in fact be new claims or enlargements of existing claims by most if not all the territorial claimants. Does article IV prohibit such extensions of coastal state jurisdiction?

The Marine Living Resources Convention is not entirely clear on

\textsuperscript{76} The question of whether the high seas exclusion applies to activities subject to coastal state jurisdiction beyond the territorial sea is addressed \textit{infra}, Section II(B)(3).

\textsuperscript{77} The analogy is a particularly poor one in the context of article IV because coastal state jurisdiction is not acquired by "claim," i.e., by effective occupation, but is acquired as of right (even if the coastal state is free to claim less than that to which it is entitled as of right). The exception in the case of prescriptive title to so-called historic bays is a limited one and, even then, enures only to the benefit of the coastal state.

\textsuperscript{78} This point is made vividly in connection with the continental shelf: "The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation." Convention on the Continental Shelf, \textit{supra} note 36, art. 2, para. 3; Law of the Sea Convention, \textit{supra} note 42, art. 77, para. 3.

\textsuperscript{79} The changes in wording are not relevant in this regard.
this point.\textsuperscript{80} The argument that the enlargement of coastal state jurisdiction, in accordance with the new law of the sea, does not violate the Antarctic Treaty might rest on the premise that, with the exception of the territorial sea, the new claims are not claims to "territorial sovereignty" but to limited jurisdiction beyond the territorial sea. As previously noted, however, exclusion of offshore jurisdiction from the scope of article IV of the Antarctic Treaty does not make sense. The more sophisticated argument is that the territorial claims as they existed in 1959 or 1961 carried with them the incidents of sovereignty that might emerge under international law in the future, and that increased coastal state jurisdiction is one such incident. In comparison, the argument that expansion of coastal state jurisdiction violates the Treaty adopts the position that the prohibition on new claims or enlargement of existing claims applies to the incidents of territorial sovereignty that emerged after 1959 or 1961, or, at the very least, that were claimed after 1959 or 1961.

Legal merits apart, the view that expansions of coastal state jurisdiction are not prohibited by the Treaty has three practical advantages: (1) it avoids the intertemporal law issue; (2) it avoids the need to determine what constitutes a new or enlarged claim; and (3) it permits the parties to deal with all coastal state claims in the same way. Under this approach, the Treaty accurately reflects the status quo: claimants may recognize their own and each other's claimed offshore jurisdiction, while those who reject the territorial claims may refuse to recognize any derivative coastal state jurisdiction. This approach also serves as a salutary reminder that the express or implicit recognition of claims either to the continent itself or to offshore jurisdiction may vastly reduce international cooperative efforts to protect continental and marine areas for environmental or other purposes.

It may be that the underlying purposes of the Antarctic Treaty are best served if legal issues relating to territorial claims remain in dispute, thereby encouraging the parties to reach practical accommodations with each other. Thus I would hesitate, and urge others to hesitate, before taking a definitive position on the issue of expansions of coastal state jurisdiction that could be perceived—whatever the

\textsuperscript{80} The Marine Living Resources Convention repeats the Antarctic Treaty's prohibition on new or enlarged claims in a Convention that applies only to marine living resources. If the prohibition is not applicable to coastal state jurisdiction, and is fully incorporated by reference to article IV of the Antarctic Treaty in the previous paragraph, why repeat it? On the other hand, although the Convention substitutes the words "coastal state jurisdiction" for the words "territorial sovereignty" in other provisions copied from the Antarctic Treaty, it does not change these words in connection with this particular prohibition. Marine Living Resources Convention, supra note 25, art. IV, paras. 1, 2(d); cf. id., paras. 2(b)-(c) (referring to "coastal state jurisdiction").
intent—as indirect acceptance of the territorial claims on which coastal state jurisdiction is based.

A related, but distinct, issue is whether coastal states may extend their offshore jurisdiction into the Treaty area—that is, south of 60° South latitude—to the limits permitted under the new law of the sea, where such limits are measured from land territory located outside the Antarctic Treaty area. The issue arises only if one concludes that extensions of coastal state jurisdiction based on sovereignty claims within the Treaty area are prohibited. The advent of the exclusive economic zone and the expansive definition of the continental shelf make this a more important question than it may have been in the past.

An argument can be made that the prohibition on new or enlarged claims does not apply to territorial sovereignty outside the Treaty area, and therefore does not apply to the incidents of that sovereignty, including coastal state jurisdiction extending into the Treaty area. A more persuasive argument can be made that the Antarctic Treaty provisions regarding claims make no such distinction and require application in the same manner throughout the Treaty area whether or not those claims are rooted in territorial sovereignty outside the Treaty area. Some of the claims to the Antarctic continent itself rely in part on a “sector” principle or some principle emphasizing proximity.81

Finally, it might be argued that claims to deep seabed mining sites seaward of the continental shelf, but south of 60° South latitude, constitute new claims prohibited by article IV. In fact, neither existing national legislation, which is based on high seas principles and reciprocal recognition of exclusivity, nor the Law of the Sea Convention recognizes claims of national jurisdiction over the site. The question of deep seabed mining is properly analyzed under article VI of the Antarctic Treaty rather than article IV.

3. Scope of Application of the Antarctic Treaty

Article VI of the Antarctic Treaty provides:

[T]he . . . Treaty shall apply to the area south of 60° South latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area.82

Article VI addresses the scope of the Treaty’s application, not national claims. The high seas exclusion leaves the use of the high seas, by parties as well as non-parties, unaffected by other provisions of the

81. For a description of these principles, see Conforti, supra note 2.
82. Antarctic Treaty, Appendix, infra, art. VI.
Treaty, including the arms control provisions.83

Under the old law of the sea, "The term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State."84 Application of this definition to article VI of the Antarctic Treaty would have raised three issues. The first issue concerns the maximum permissible breadth of the territorial sea under international law. The new law of the sea presumably resolves that issue by confining the breadth of the territorial sea to a maximum of twelve miles.85 The second issue is whether, from the perspective of states that do not recognize territorial claims in Antarctica, all marine areas adjacent to Antarctica are high seas. This position assumes that no coastal state exists to exercise sovereignty over a territorial sea or other forms of jurisdiction beyond the territorial sea. The third issue is whether the continental shelf is covered by the high seas exclusion. The latter two issues also arise under the new law of the sea.

The advent of the exclusive economic zone in the new law of the sea complicates matters further. The 1982 Law of the Sea Convention contains no definition of the high seas. The 1982 Convention replaces the definition with provisions indicating where and to what extent high seas law applies.

Article 86 of the 1982 Convention applies all the rules of high seas law seaward of the exclusive economic zone. It expressly provides, however, that this entails no abridgement of the freedoms enjoyed by all states in the exclusive economic zone pursuant to article 58.

Article 58, paragraph 1 preserves a number of high seas rights in the exclusive economic zone. These rights include the high seas freedoms of navigation, overflight, and the laying of submarine cables and pipelines, as well as other internationally lawful uses related to these freedoms. Article 58's express cross-reference to article 87 (the basic article describing the freedom of the high seas) emphasizes that the freedoms preserved in the exclusive economic zone are qualitatively the same as those freedoms existing on the high seas. The cross-reference was intended to preserve the effect in the exclusive economic zone of existing treaties regulating or otherwise dealing with high seas freedoms; for example, the cross-reference preserves high seas aviation rules in the exclusive economic zone under the ICAO Convention.86

83. See, e.g., id., arts. I, V.
84. Convention on the High Seas, supra note 36, art. 1.
85. Law of the Sea Convention, supra note 42, art. 3.
Article 58, paragraph 2 applies all non-fisheries rules of high seas law to the exclusive economic zone to the extent they do not conflict with the provisions regarding the exclusive economic zone.87

An attempt to sort through the maze of alternatives regarding the meaning of the high seas exclusion in article VI of the Antarctic Treaty requires consideration of the principal consequences of not applying the Treaty to a particular area: (1) the arms control and related inspection provisions would not apply; (2) the prohibition on nuclear explosions and disposal of radioactive waste would not apply; (3) the provisions regarding freedom of scientific research, exchange of scientific information and personnel, and related jurisdictional provisions would not apply; and (4) environmental and other "agreed measures" adopted by the Consultative Parties probably would not apply.88

The first issue is whether states that do not recognize territorial claims in Antarctica would be justified in taking the position that all of the marine areas south of 60° South latitude are high seas outside the scope of the Treaty's regulation.89 From the perspective of a state that

87. The enumeration of high seas freedoms in article 87 is not incorporated in article 58, paragraph 2, because paragraph 1 of that article contains its own enumeration of the freedoms preserved in the exclusive economic zone and its own cross-reference to article 87. See supra notes 59, 62.

88. Since the agreed measures must be approved by the governments of the Consultative Parties, it can be argued that, at least among those governments, the measures have the status of a new agreement that is not necessarily limited by the scope of the Antarctic Treaty. However, absent express provision to the contrary, the geographic scope of the agreed measures adopted pursuant to the Treaty would normally be interpreted in light of the geographic scope of the Treaty. Moreover, in practice, some governments may be reluctant to "delegate" more negotiating power to their participants in the consultative meetings than they believe is provided for in the Antarctic Treaty itself.

89. The related question of whether all seabed areas off Antarctica would, under a "high seas" approach, fall within the definition of the international seabed "Area" of the Law of the Sea Convention is complex. Article 1(1) of the Convention defines the "Area" as the seabed "beyond the limits of national jurisdiction." This may be read as referring to the permissible maximum limits of coastal state jurisdiction under the Convention—that is, 200 miles or the edge of the continental margin—rather than to the actual existence of coastal state jurisdiction over the continental shelf in a particular case. Such a reading renders the dispute over the status of the land areas in Antarctica irrelevant to the issue of whether the continental shelf off Antarctica falls within the definition of the international seabed "Area." This interpretation is supported by the underlying view that the broad limits of the continental shelf were drawn not only to include virtually all known hydrocarbon potential within coastal state jurisdiction, but also to exclude most hydrocarbons from the international seabed "Area," thus avoiding further complication of an already difficult and controversial negotiation over polymetallic nodules. For example, the Conference might have suffered political collapse if proposals for production controls to benefit existing minerals producers were believed to include significant hydrocarbon deposits. Article 134, paragraphs 3 and 4 of the Law of the Sea Convention establish a direct link between the limits of the international seabed "Area" and the limits of the continental shelf. The cross-reference to the continental shelf articles in paragraph 3 emerged from the Drafting Committee. While that would indicate that it was not regarded as a substantive change, since the Drafting Committee was precluded from dealing with matters of substance, it could be read as supporting the underlying interpretation of the definition of the "Area" referred to above. In this connection, it might be noted that representatives of some of the Antarctic
is not a Consultative Party, or at least a party to the Antarctic Treaty, one can see some potential logic in such a position. But from the perspective of a party to the Treaty, particularly a Consultative Party, the position makes little sense. The claimants will take the position that their territorial sea and other offshore jurisdictional claims are valid.

The real issues, therefore, are whether the claimants are subject to the restraints of the Antarctic Treaty with respect to their claimed jurisdiction, and whether agreed measures can be adopted by all the Consultative Parties with respect to the exercise of that jurisdiction. Cooperative regulation seems a more palatable result to claimants than no accepted regulation at all, and a more palatable result to non-claimants than a claimant's attempts to regulate unilaterally. Territorial claimants cannot plausibly maintain that the territorial seas adjacent to claimed territory are excluded from the Treaty as high seas. This leads to a preliminary conclusion that the high seas exclusion of article VI at the least does not apply to areas that could be regarded as part of the territorial sea under international law.

The second issue is whether the high seas exclusion covers all areas beyond the territorial sea in all respects or only with respect to the high seas freedoms enjoyed by all states. As of 1959, this issue concerned mainly the sovereign rights of the coastal state with respect to the continental shelf. Today, the issue implicates both the continental shelf and the exclusive economic zone.

The language of article VI suggests that only the rights and freedoms enjoyed by all states on the high seas are excluded, and not the rights enjoyed only by the coastal state. The exclusion refers to "the rights . . . of any State under international law with regard to the high seas. . ."\textsuperscript{90}

\textsuperscript{90.} Antarctic Treaty, Appendix, infra, art. VI.
Article VI is properly understood as a denial to the Antarctic Treaty parties collectively of powers that no coastal state could lawfully exercise individually. It need not and should not exclude from the Treaty matters that may be regulated lawfully by a coastal state. The sophisticated status of the exclusive economic zone merely confirms the propriety of such a functional interpretation. The exclusive economic zone is treated like the high seas for some purposes but is treated much like the territorial sea for others. A geographic rather than a functional reading of the article VI high seas exclusion requires that either the coastal or the high seas aspects of the exclusive economic zone regime be ignored. Yet the functional combination of those aspects is the essence of that regime.  

Even if article VI excludes only high seas rights and freedoms enjoyed by all states, the intertemporal law problem remains: as of what date does article VI apply? Again, the text of article VI itself suggests the answer. Article VI refers to rights “under international law.” Absent indication of a contrary intent, it seems implausible to assume that the parties desired to freeze the reference to international law as of 1959. Such an interpretation also would require intricate determinations of the nature and extent of coastal state jurisdiction permitted under international law in 1959. The most sensible reading of the article VI reference to rights under international law is that its content changes as international law evolves. It should be read today as referring to high seas rights and freedoms under the new law of the sea.

Under this approach, the Antarctic Treaty applies to the exploration and exploitation of natural resources, marine scientific research, offshore installations, and regulation of pollution from ships in the exclusive economic zone and on the continental shelf, to the extent that these matters are subject to coastal state jurisdiction under the new law of the sea. The Treaty does not apply to navigation, overflight, the laying of submarine cables and pipelines, or other high seas rights and freedoms enjoyed by all states under international law.

91. See Law of the Sea Convention, supra note 42, art. 55.
92. This is particularly true in light of the fact that at least Argentina and Chile did not at all agree with some of the premises accepted by the 1958 Conference on the Law of the Sea. Unless the delegates in fact knew something about the law of the sea, it is not plausible to assume they intended to freeze the content of that law as of 1959. If they did know something about the law of the sea, then they also knew that there were important substantive disagreements among them on the subject. This makes it highly unlikely that they could have agreed on what principles of the law of the sea they were freezing. The absence of any reference to the continental shelf in the Antarctic Treaty tends to confirm this view, although its absence could also be attributed to the fact that the Convention does not address questions of mineral development on land.
The question of the seabed beyond the continental shelf is properly addressed in this context. Several freedoms of the high seas, such as anchoring, laying submarine cables and pipelines, and constructing installations and structures, apply to the seabed. Article VI excludes these freedoms from the Antarctic Treaty. The question remains, however, whether article VI also excludes mining of seabed resources beyond the continental shelf but south of 60° South latitude. States that have enacted national laws governing deep seabed mining proceed on the premise that such mining is a freedom of the high seas; this premise would exclude deep seabed mining from the Antarctic Treaty.

Part XI of the 1982 Law of the Sea Convention expressly sets forth a deep seabed mining regime different in important respects from a high seas approach. A major underlying premise of the 1982 Convention's regime, however, duplicates the premise applicable on the high seas: the seabed beyond coastal state jurisdiction is open to all states without discrimination. Accordingly, the 1982 Convention's approach to deep seabed mining also brings that activity within the high seas exclusion of article VI of the Antarctic Treaty under a functional interpretation of the exclusion.

Nevertheless, under the 1982 Convention, deep seabed mining is subject to consultation with the coastal state and to its environmental rights under certain circumstances. It would be appropriate to conclude that the parties to the Antarctic Treaty collectively may exercise these coastal state rights.

Finally, it should be noted that the only exclusion from the Treaty south of 60° South latitude mentioned in article VI relates to rights on the high seas. Assuming that in principle the Treaty applies to activities subject to coastal state jurisdiction, there is no direct textual basis for arguing that the Treaty nevertheless does not apply to areas south of 60° South latitude over which coastal states exercise jurisdiction on the basis of their sovereignty over land areas north of that latitude. If the sole purpose of the Antarctic Treaty were to achieve a modus vivendi with respect to areas where sovereignty claims are disputed, it could be argued that undisputed claims fall outside the ambit of the Treaty. However, this was not the sole purpose of the Treaty.

The issue of whether collective regulatory measures apply to areas of offshore jurisdiction measured from land areas of uncontested sovereignty arose in the Conference on the Conservation of Antarctic Marine Living Resources. The Final Act of that conference accords

93. See Law of the Sea Convention, supra note 42, art. 87.
94. Id., art. 141; see id., art. 87.
95. Id., art. 142.
somewhat special treatment to waters adjacent to the French islands of Kerguelen and Crozet and adjacent to those islands "over which the existence of State sovereignty is recognized by all Contracting Parties" and that are within the area to which the Marine Living Resources Convention applies (which is broader than the Antarctic Treaty area).  

No clear principle emerges from the result.

Distinguishing between offshore jurisdiction based on territorial claims inside the Treaty area and offshore jurisdiction based on territory outside the Treaty area might prove exceedingly complex. This is particularly true where the same state is involved on both "sides." Moreover, attempts to distinguish between the treatment accorded disputed and undisputed claims could make it more difficult for states with disputed claims to justify cooperative regulatory arrangements to domestic constituencies on grounds other than the fact that their claims are contested.

Thus, we may conclude that neither a literal nor a practical reading of article VI requires different treatment of disputed and undisputed claims. Perhaps the most fruitful approach would be to treat all claims to coastal state jurisdiction within the Treaty area in the same manner whatever their origin but, as under the Marine Living Resources Convention, make practical accommodations where merited that do not prejudice the underlying Antarctic regulatory system.

4. Conservation and Environmental Protection

One of the hallmarks of the new law of the sea is its emphasis on conservation and environmental obligations. Conservation measures must take into account the interdependence of stocks. Protection of the marine environment requires a broad approach that includes protection of the various ecosystems and habitats of marine life. The Marine Living Resources Convention exemplifies this approach. The Convention applies to the entire Antarctic ecosystem south of the Antarctic convergence, and places great emphasis on the relationship between species and the protection of the ecosystem as a whole.

96. Final Act of the Conference on the Conservation of Antarctic Marine Living Resources, 19 I.L.M. 837, 838-39 (1980). The Final Act confers on France the power to regulate the waters adjacent to the French islands. Under the Final Act, measures for the conservation of Antarctic marine living resources adopted by France prior to the entry into force of the Marine Living Resources Convention remain in force until modified by France. Id., art. I, para. 1. The Final Act also allows France to determine whether specific conservation measures will apply to the waters adjacent to the French islands. Id., art. I, para. 2. Finally, the Act provides that France may promulgate national measures stricter than those measures enacted pursuant to the Convention. Id., art. I, para. 3. The Final Act specifies that France shall enforce all conservation measures. Id., art. I, para. 4. See supra note 25 and accompanying text.

97. Id., art. 61, paras. 3-4; art. 119.

98. Id., arts. 194, 196.
The new law of the sea also places substantial environmental duties on coastal states with respect to the development of seabed resources and offshore installations. The states currently engaged in negotiations regarding Antarctic mineral resources appear to be quite willing to fulfill these environmental duties.

The exercise of coastal state environmental powers over ships poses a complex problem. Under article VI, the Antarctic Treaty may not affect the freedom of navigation. Yet an attempt to adopt special regulations for navigation in ice-covered areas by ships not entitled to sovereign immunity, to the extent permitted by the law of the sea, could and presumably would be intended to have a profound effect on navigation. In my view, the proper reading of article VI is that the Treaty may not affect high seas freedoms to the extent that a coastal state lacks the competence to affect those freedoms under international law. Thus, the parties could adopt collective environmental measures with respect to navigation in the area to the extent that a coastal state is entitled to do so. Moreover, nothing in high seas law prevents flag states from agreeing among themselves to observe special measures. In addition, observance of such measures could be made a condition for access to the continent or its mineral resources.

Those concerned with freedom of navigation may initially shrink from this broad reading of the Consultative Parties' collective powers to regulate pollution from ships. They might bear in mind, however, that the adoption of agreed measures under the Treaty requires the approval of all the Consultative Parties, and that the existence of an environmental hazard that is not controlled collectively could inspire more vigorous unilateral efforts by territorial claimants, which might destabilize the entire Treaty system. To the extent one contemplates the development of hydrocarbons in Antarctica, the environmental risks arising not only from their extraction but from their transport must be addressed.

5. Revenue Sharing From the Continental Shelf

Article 82 of the Law of the Sea Convention requires a coastal state to make modest payments in respect of the production of non-living resources from the continental shelf seaward of 200 miles, unless the coastal state is a developing country and a net importer of the resource concerned. “The payments . . . shall be made through the [Seabed] Authority, which shall distribute them to States Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States. . . .”

99. Id., art. 82(4).
A state that is a party to the 1982 Law of the Sea Convention and a territorial claimant would, from its perspective, be subject to this obligation, at least if that state administered the area itself. On the other hand, a state that does not recognize the territorial claims in Antarctica might argue that the revenue-sharing obligation is a concomitant duty imposed as a direct quid pro quo for broad coastal state rights over the continental margin seaward of 200 miles, and does not apply where there is no coastal state jurisdiction as such.

A state that is not party to the Law of the Sea Convention might argue that, even if most of the Convention's rules regarding coastal state jurisdiction are declarations of customary international law binding all states, the continental shelf revenue-sharing obligation is not customary international law, but rather is a purely "contractual" arrangement among the parties. Alternatively, a state that is not party to the Law of the Sea Convention might argue that a general revenue-sharing obligation may exist in principle under international law, but that the precise details set forth in the Convention—in particular, the mode of distribution of revenues—are binding only on the parties, because non-parties would have no voice in the manner in which the Seabed Authority decided to effect the distribution.

Assuming the negotiation of some international system to regulate the exploitation of continental shelf resources in Antarctica, the question will arise whether an Antarctic minerals regime will be designed to generate any net public revenues from miners even within 200 miles and, if so, how the revenues will be distributed. If, as is proposed later in this paper, any such revenues were dedicated to research and environmental protection in Antarctica—i.e., to purposes that benefit the international community as a whole—it can be argued that the purpose, if not the letter, of the international revenue-sharing obligation with respect to the continental shelf beyond 200 miles would be fulfilled.

Revenue-sharing from the areas seaward of 200 miles is an issue that those negotiating the Antarctic minerals regime might profitably leave undecided for now. Development of the Antarctic continental shelf seaward of 200 miles is not imminent. The revenue-sharing obligation would first attach five years after commercial production begins at any given site.100 By that time, a clearer picture may emerge of the extent of ratification of the Law of the Sea Convention and the practice of states that are not party to the Convention with respect to the revenue-sharing obligation.

100. *Id.*, art. 82(2).
6. Summary of Legal Effects

The Antarctic Treaty does not preclude the exercise of coastal state jurisdiction south of 60° South latitude to the extent permitted by the new law of the sea. Whether an individual coastal state may exercise that jurisdiction depends on one’s position regarding that state’s sovereignty claim to the land areas from which such jurisdiction is measured and, in part, on one’s interpretation of the prohibition on new or expanded claims. Moreover, insistence on exercising jurisdiction measured from land areas of uncontested sovereignty could make it more difficult for states with contested claims to justify cooperative regulatory arrangements. The view that a particular state is entitled to exercise coastal state jurisdiction does not preclude that state from entering into the international arrangements regarding the subject matter of its regulatory competence.

The law of the sea does not preclude certain states, such as the Antarctic Treaty Consultative Parties, from collectively exercising coastal state jurisdiction to the extent a coastal state may exercise such jurisdiction under the law of the sea. Whether the collective exercise of jurisdiction is valid _erga omnes_ depends on one’s view of the status of the land areas from which such jurisdiction is measured. If, with respect to the continent, one recognizes individual sovereignty or some sort of collective condominium, or accepts the principle of the collective responsibility of the states concerned, then the same approach could extend seaward to the limits of coastal state jurisdiction.

The Antarctic Treaty applies to all activities of the parties south of 60° South latitude except for the exercise of high seas freedoms recognized in the new law of the sea and deep seabed mining seaward of the continental shelf. The Treaty parties, however, are not precluded from collectively exercising the environmental rights accorded coastal states by the new law of the sea with respect to navigation and deep seabed mining.

The conclusion that the Antarctic Treaty applies to offshore activities subject to coastal state jurisdiction does not mean that those activities must be regulated, if at all, only under the Antarctic Treaty. Antarctic seals and, more generally, Antarctic marine living resources are regulated under separate but related treaties.

The conclusion that the Antarctic Treaty does not apply to high seas freedoms does not mean that those freedoms are not regulated by general international law or treaties of general application, or cannot be regulated further by agreement. The new law of the sea contains elaborate environmental and conservation obligations that apply to all flag states. Various pollution and arms control treaties also apply uni-
versally. Whaling is regulated by a commission with global responsibilities.

C. POLITICAL EFFECTS OF THE NEW LAW OF THE SEA

The fundamental political question posed by the new law of the sea is participation. The idea of the "common heritage of mankind," developed with respect to deep seabed mining, suggests at least some qualities of universal participation.\textsuperscript{101}

The question of participation may be examined from three different perspectives: (1) participation in the regulation of activities; (2) participation in the conduct of activities, including the question of rights of access and the question of assistance in exercising those rights; and (3) participation in the benefits of activities.

1. Participation in Regulation

The basic approach to international regulation applied in Antarctica until now is the same functional approach that was classically applied to high seas fisheries. Regulatory power is vested in interested states. Interested states are those in the immediate vicinity and those conducting activities that are the object of the regulation.\textsuperscript{102}

With respect to most matters, the new law of the sea does not contradict this functional approach to participation in regulation. The 1982 Convention specifically confirms this functional approach for the regulation of fisheries.\textsuperscript{103}

\textsuperscript{101} See Francioni, supra note 1.

\textsuperscript{102} Examples of such regulation include the following:

(1) Article IX of the Antarctic Treaty limits participation in the consultative meetings to the original Treaty parties (who include the territorial claimants, the southern hemisphere states in the vicinity, and a few other states with historic ties to Antarctica) and to other Treaty parties during such time as they conduct substantial scientific research in Antarctica.

(2) The Seal Convention, supra note 24, under articles 10 and 12, is open only to the states that negotiated the Convention and to such other states as may accede with the consent of the other parties.

(3) The Marine Living Resources Convention, supra note 25, contains numerous deferential references to the Antarctic Treaty and to the agreed measures adopted under that Treaty, and incorporates by reference certain basic provisions of the Treaty. Article V of the Convention specifically recognizes the "special obligations and responsibilities of the Antarctic Treaty Consultative Parties for the protection and preservation of the environment of the Antarctic Treaty area." Article VII of the Convention limits membership in the regulatory commission to the original parties and other parties during such time as they are engaged in research or harvesting activities with respect to the resources regulated. This determination is left to a decision of the existing members that may require consensus.

(4) Article X of the Antarctic Treaty and articles X and XXII of the Marine Living Resources Convention contemplate efforts to secure the acquiescence of states that are not parties to those treaties.

\textsuperscript{103} Law of the Sea Convention, supra note 42, arts. 61(5), 63(2), 64(1), 66, 118, 123.
With respect to seabed minerals, however, a new approach emerged in the 1982 Convention. By virtue of the very broad definition of the continental shelf, the Convention placed most important non-living seabed resources, including almost all known hydrocarbon potential, under coastal state jurisdiction. However, the remaining non-living seabed resources were not left for functional regulation by the states engaged in or affected by the mining activity. Rather, the Convention subjected these resources to regulation by a universal organization, the International Seabed Authority.

Nevertheless, the 1982 Convention manifests the idea of functional participation in regulation to some degree in the structure and voting rules of the Council of the Seabed Authority. The Council is accorded effective control over virtually all regulatory decisions. Interested states enjoy semi-vested positions on the Council and veto power over major decisions that must be taken by consensus, but they do not have the affirmative power to make regulatory decisions on their own.

The Convention prohibits the parties from entering into agreements with each other in derogation of the common heritage principle. Interested parties are not precluded, however, from entering other agreements compatible with the Convention that do not affect third-party rights.

The deep seabed mining system of the Convention may be seen as a compromise between the idea of universal participation in regulation and the idea of functional participation in regulation by directly interested states. By contrast, the deep seabed mining agreements entered into by several industrial states proceed on a functional premise, albeit imperfectly realized. The parties are states whose nationals are interested in conducting deep seabed mining, but the arrangements do not include all such states: Canada, India, and the U.S.S.R. are notable non-participants.

The deep seabed mining experiment at the Law of the Sea Conference undoubtedly played a role in stimulating interest in Antarctic mineral resources in the United Nations General Assembly. As the Antarctic Treaty Consultative Parties struggle to deal with mineral resources, the uncertain level of expectation of universal participation in regulation poses a threat to their functional monopoly. Deflecting this threat is probably one of the reasons the Consultative Parties have acquiesced in a modest expansion of their number.

104. Id., arts. 76-77.
105. Id., art. 162.
106. Id., art. 161.
107. Id., art. 311, paras. 2, 6.
108. See supra note 44.
The threat to the functional monopoly presents a particularly serious problem for two types of Treaty parties: the claimant states and the states potentially interested in exploiting Antarctic minerals. The former would find it difficult to accommodate their claims with the idea of universal regulation. The latter would fear that their access to resources would fall under the political control of U.N. voting majorities.\textsuperscript{109}

Indeed, a close examination of the types of solutions that may emerge from discussions among the Consultative Parties may reveal that potential exploiters would rather give the Soviet Union considerable power over Western access to Antarctic energy and mineral resources than deal with the Third World over Western access to deep seabed manganese nodules. Some may find such a result anomalous: if the United States and some of its allies do not have a vital interest in politically unimpeded access to Antarctic energy reserves, it is difficult to understand why they have an overwhelming interest in politically unimpeded access to deep seabed nickel. The anomaly thus suggests that the true objections to the deep seabed mining regime of the Law of the Sea Convention had little to do with politically unimpeded access to resources. Rather, the objections were to ideologically offensive rhetoric and, at least in some quarters, to the very idea of universal participation in regulation. However, I have little doubt that government officials could offer an elegant explanation of the reasons why such comparisons are unwarranted.

In considering the question of participation in regulation, one must bear in mind that strong impetus for strict universalist control over deep seabed minerals came from states that produce similar minerals on land. These states won semi-vested positions on the Council of the Seabed Authority as well as mandatory production controls in the Convention.\textsuperscript{110} Notwithstanding the high cost of Antarctic operations, one could well imagine current oil-exporting nations worrying, if only slightly, about the effects of an Antarctic oil discovery. Were these states admitted to the Antarctic regulatory "club," currently composed largely of net importers of energy, the exporters might, at the least, disfavor a pro-production regime.

Some environmentalists might welcome opposition to development for any reasons. However, from a consumer's perspective (and most people in the world are direct or indirect consumers of hydrocarbons), the possibility of economically motivated pressures to restrict

\textsuperscript{110} Law of the Sea Convention, supra note 42, arts. 151, 161(1)(c).
production constitutes a significant argument against universal participation in the regulation of Antarctic mineral resources.

The regulatory mechanism developed by the Law of the Sea Conference for deep seabed mining is sometimes regarded as an implementation of the "New International Economic Order" demanded by developing countries. As the discussion on participation in regulation suggests, the rhetoric of the New International Economic Order may have a negative long-term impact on the acceptability of the idea of universal participation in the regulation of mineral production from other areas, including Antarctica. At the least, the major role assumed by minerals exporters at the Law of the Sea Conference casts doubt on the acceptability to major consumers of universal participation in minerals regulation.

2. Participation in the Conduct of Activities

Neither the Antarctic Treaty nor the two related conservation treaties declare that Antarctica and its resources are open to use by all. At the same time, those treaties contemplate the possibility of new entrants, at least with respect to scientific research and fishing. While it is uncertain how many new entrants the Consultative Parties would welcome, the liberal idea of equality of opportunity to conduct activities in Antarctica is not necessarily excluded, at least for the nationals of other states if not for the states themselves. The potential political difficulty arises because participation by nationals in the conduct of activities is the functional criterion applied under the existing Antarctic treaties to determine a state's right to participate in collective regulation of those activities.

The practical question of access to Antarctic mineral resources should not prove too difficult for the Consultative Parties. Most enterprises with the technical capacity to conduct hydrocarbon and mineral activities in Antarctica are nationals of one of the Consultative Parties or their close allies, or have other close ties to one of the Consultative Parties. Moreover, it would be difficult to conduct such activities without support facilities in nearby southern hemisphere states; those states, too, are Consultative Parties.

The key legal question is whether an enterprise conducting activities must be incorporated under the laws of a Treaty party, must have a minimal "genuine link" with a Treaty party under whose authority it

111. Article VI of the Antarctic Treaty disclaims any prejudice to the rights "of any State under international law with regard to the high seas within [the Treaty] area." This right of access for all states derives from general international law, not from the Antarctic Treaty itself. The reference to freedom of scientific research in article II of the Treaty might be read as applying to non-parties.
purports to function, or must have more substantial contacts with a Treaty party. Acceptance of supervision by one of the Treaty parties undoubtedly can be made a condition for access to minerals. That condition can be satisfied easily by the formation of a corporate subsidiary. Therefore, the real issue is whether the parties wish to exclude outside companies or wish to pressure the outside companies' states of nationality to become party to the relevant treaty.

An attempt to discriminate formally against outside companies is largely unnecessary for the practical reasons discussed. Such discrimination would also call into question the theory that the Antarctic Treaty Consultative Parties are merely exercising a special responsibility in Antarctica for the benefit of all.

The desire to encourage universal ratification of the Law of the Sea Convention may have led some delegates to prefer substantial restrictions on access to deep seabed resources for nationals of non-parties. Universal ratification, however, has not been a major objective of the Antarctic treaties, and does not appear necessary to fulfill the purposes of those treaties.

Accordingly, it would appear sensible for the parties to take a relatively liberal view of which companies have the nationality of a state party, as long as that party has juridical control over the company's activities in and with respect to Antarctica. Incorporation of a subsidiary under the laws of a party, perhaps with some minimal "genuine link" thought necessary to confer nationality under international law, should be sufficient. Thus, the result would be a mining regime in which access in principle is open to all, subject to regulation under a nondiscriminatory treaty regime and a link with a treaty party sufficient to allow that party to enforce relevant Antarctic regulations.

The deep seabed mining regime of the Law of the Sea Convention is not universalist merely in its declaration of open access to all in accordance with the liberal idea of equal opportunity for those with

112. Article 153, paragraph 2(b) of the Law of the Sea Convention indicates that either nationality of, or effective control by, a party is necessary for access to deep seabed resources. However, Annex 3, article IV, paragraph 3, provides that if "the applicant is effectively controlled by another State Party or its nationals, . . . both States Parties shall sponsor the application." This raises not only the question of whether mere incorporation is sufficient for nationality in the absence of a more substantial "genuine link," but also the question of whether nationality under either standard is sufficient if the company is effectively controlled by a non-party or its nationals. Resolution II, paragraph I(a)(ii), adopted by the Law of the Sea Conference with respect to preparatory investment in pioneer activities, suggests that either nationality or effective control is sufficient where private companies are concerned. Final Act of the Third United Nations Conference on the Law of the Sea, Annex 1, Res. 2, U.N. Doc. A/CONF.62/121, reprinted in 21 I.L.M. 1245, 1254 (1982). The Soviet Union abstained on the final vote on the Convention and Resolutions as a whole because it felt this provision of Resolution II discriminated against state corporations and in favor of American private companies in particular.
the capacity to exploit. The Convention's universalist approach goes further to require technology transfer and a reservation of mine sites. The purpose of these requirements is specifically to stimulate participation in mining by all states, either directly or through a universal mining "Enterprise."113

If one carefully distinguishes participation in the conduct of activities from participation in the regulation or benefits of activities, it may be that universal participation in the conduct of activities is not a major issue.

Stimulating universal participation in the conduct of hydrocarbon and mineral extraction in Antarctica is a more theoretical than practical issue—perhaps even more theoretical than participation in deep seabed mining. The idea of a universal intergovernmental oil company would certainly arouse concern among the territorial claimants, the adherents to free market principles, and those otherwise satisfied with a less-than-universal regulatory system in Antarctica.

On the other hand, it is possible that the question of "equitable" participation in resource development may arise among the Consultative Parties themselves. As complex as the question may be, its resolution may in turn help resolve differences between claimant states and non-claimant states. Some participation by southern hemisphere states is inevitable because operators would doubtlessly need support facilities in the territory of those states. Thus, in light of the practical situation, elaborate formal structures for promoting shared participation among the Consultative Parties may not be necessary or desirable.

3. Participation in Benefits

At one level, anyone who participates in the exploration and exploitation of Antarctic hydrocarbons and minerals expects a potential benefit from the risk and investment of labor and assets. To that extent, participation in the activity itself is one aspect of participation in the benefits (or losses) of the activity.

At another level, one must ask who will benefit from the economic activity associated with the use of the resources. Who will transport them? Where will they be refined? Who will consume them? Will they be sold on the world market at world market prices?

From one perspective, it is certainly true that all consumers everywhere in the world benefit indirectly from an increase in world supply, whether or not they benefit directly from the Antarctic supply. This appears to be the underlying approach of the Law of the Sea Convention, despite its distributive ideas with respect to participation in exploitation. Transport, processing, and marketing by private miners are not regulated by the Seabed Authority. One of the underlying policies of the system is "increased availability of the minerals derived from the Area as needed in conjunction with minerals derived from other sources, to ensure supplies to consumers of such minerals."  

Nevertheless, the stated objectives of the United States in the deep seabed mining negotiations were not limited to increased supply in response to world market demands. Constant references were made in the domestic debate to politically secure sources of raw materials—a reaction to the efforts of certain oil producers to use their control over supply for political as well as economic leverage. Thus, the United States insisted on a right of access related not only to a private citizen's right to derive profit from investment, but also to the state's interest in securing supplies of raw materials under the control of its own or friendly nationals. This benefit is a further aspect of the question of the right to participate in mining activities. Its value depends in large measure on one's assessment of the potential strategic or economic effectiveness of a boycott.

The question of a state's direct financial benefit is largely a question of royalties and taxation where private companies are involved. To the extent that states tax the activities or income of their nationals, this benefit will also flow from participation in mining activities. There is little indication that national income taxes were regarded as a major source of benefit in the deep seabed mining negotiations.

The main issue is whether the parties collectively will extract payments from miners in excess of those necessary to cover administrative
costs. Whether in the form of payments on production or payments on profit, most states require such payments for mining on land. The Law of the Sea Convention requires international payments both from miners in the International Seabed Area\textsuperscript{117} and from the coastal state for minerals produced from the continental shelf in areas seaward of 200 miles.\textsuperscript{118}

Some may argue that if payment is not extracted, it may result in a windfall to the exploiter, who will nevertheless sell his product at market prices. On the other hand, fixing a rate of payment that will not deter investment involves substantial difficulties, particularly under the harsh and pioneering circumstances that will exist in Antarctica for the foreseeable future. Economists as well as environmentalists would caution against regarding Antarctica as a pot of gold.

An expectation of substantial "royalties," however unrealistic, could promote pressure by the beneficiaries to proceed with exploitation. On the other hand, the absence of royalties and taxes could produce similar pressure from private companies. Environmental groups would have legitimate concerns about such pressure from either source.

These problems aside, the collection of a payment raises difficult political issues regarding its distribution. As its etymology suggests, a "royalty" implies a sovereign. If distribution is limited to Consultative Parties,\textsuperscript{119} an issue arises regarding their legal right to appropriate all "benefits" to themselves. If a preference is given to the territorial claimants, the implication of some "recognition" of the territorial claim is unavoidable, textual assertions to the contrary notwithstanding. If distribution is universal,\textsuperscript{120} presumably with a preference for countries in need, the implication arises of some universal "property" interest in the minerals.\textsuperscript{121} If universal revenues are distributed only from the unclaimed part of Antarctica, the implication regarding the claimed areas is clear.

Perhaps more than any other question regarding exploitation of Antarctic minerals, the question of whether to collect and distribute payments from miners poses difficult theoretical issues regarding the

\textsuperscript{117} Law of the Sea Convention, supra note 42, arts. 140, 160(2)(f)(i), 162(2)(o)(i); Annex 3, art. 13.
\textsuperscript{118} Id., art. 82.
\textsuperscript{119} Distribution limited to parties to a special treaty on Antarctic mineral resources may be the equivalent of this result if the treaty is not automatically open to accession by all.
\textsuperscript{120} Distribution limited to treaty parties may be the equivalent of this result if the treaty is automatically open to accession by all, which is essentially the case with the Antarctic Treaty itself. Antarctic Treaty, Appendix, infra, art. XIII, para. 1.
\textsuperscript{121} The question of a distribution mechanism would also exist, which would raise the political issue of United Nations involvement.
legal status of the Consultative Parties and the legal status of the territorial claims. If the basis for the special position of the Consultative Parties is something like a condominium, then there is no need to distribute payments outside the group; if the basis is "special responsibility" in the nature of a trust, then presumably the trust must benefit all.

These problems suggest two alternative approaches. First, states might defer a decision on the question of payments from miners until the economics of Antarctic oil and mineral development are better understood. Alternatively, states might decide in principle that payments made will be used exclusively to administer the minerals regime and to promote scientific research and environmental protection in Antarctica. Everyone with an interest in Antarctica would benefit to the extent of that interest. If certain states do indeed have a special interest in Antarctica, they will receive special benefit from such expenditure of the funds.

For the foreseeable future, perhaps the most important benefits the world as a whole can expect to derive from the Antarctic regime are scientific knowledge, protection of the environment, avoidance of discord, and increased supply of food and perhaps other raw materials. From that perspective, haggling over the distribution of "royalties" (that, at least at the outset, will certainly be meager) may have a more detrimental effect on the major values at stake than investing the "royalties" to promote those values, either indirectly by foregoing the payments or directly through research and environmental projects.

The environmental regime applicable to deep seabed mining in the Law of the Sea Convention is a strong one. All indications suggest that the fragility of the Antarctic environment will result in yet a stronger environmental regime applicable to Antarctic mineral development. I leave to Professor Joyner\(^\text{122}\) the elaboration of this point with one warning: the environmental regimes in the Law of the Sea Convention are strongest in areas of no territorial sovereignty, and are especially weak with respect to pollution resulting from activities within the land territory of states. Those who are prepared to make implicit concessions to the territorial claimants in Antarctica for the sake of environmental (or other) values may be buying short-term rhetoric at the expense of substantial long-term risk.

4. **Summary of Conclusions Regarding Political Effects**

A strong chance of a universal regulatory regime for Antarctica similar to the deep seabed mining regime of the Law of the Sea Convention has never existed. Some who favor or oppose the Law of the

\(^{122}\) See Joyner, supra note 2.
Sea Convention because of the potential precedential effects of its deep seabed mining regime may understand too little about Antarctica and worry too much about the moon. Aside from questions of political philosophy and global institution building, it is not clear that a universal regulatory regime for Antarctica is either necessary or desirable, even if it were possible.

The political effects of the Law of the Sea Convention derive largely from its controversial deep seabed mining regime. The controversy over this regime is driving the Antarctic Consultative Parties closer together. Both the territorial claimants and the major industrial powers believe they have strong reasons to resist applying in Antarctica the kind of universal minerals regime set forth in the Law of the Sea Convention. Industrial states that are not Consultative Parties may also believe they are better off dealing with the Consultative Parties than with politicized U.N. voting majorities.

The reaction to the deep seabed mining regime in the Law of the Sea Convention confirms that the only likely result regarding Antarctic hydrocarbons and minerals is an arrangement among the states most concerned. In the context of the Antarctic “club,” the states concerned may well make concessions to each other that they might never consider making in a universal negotiation.

Those who think the result in Antarctica therefore will be the “guaranteed access” to minerals that the United States sought on the deep seabeds are probably very optimistic. True enough, the small group negotiation minimizes the risk of offensive economic rhetoric and confusing detail on access to resources. The real political restraints on access will be written cleanly in the rhetoric of environmental protection and decision-making procedures. Because the motives of those states given the power to impose political restraints will not be written into text, one can more easily avoid confronting them. The absence of a meaningful guaranty of access is likely to become apparent only if territorial claimants are given the special controls over access that some are now suggesting.

The “right” of access to Antarctic minerals is likely to be far less certain and less free of foreign political control under an Antarctic arrangement of the kind now being discussed than it is under the deep seabed mining provisions of the Law of the Sea Convention. A minority of governments represented in an international political body is likely to have effective (if not explicitly discretionary) power to decide whether any given company can drill or mine in Antarctica or the adjacent continental shelf.123 This could change if the United States

123. Compare Law of the Sea Convention, supra note 42, art. 162(2)(j)(i): "[I]f the [Legal and Technical] Commission recommends the approval of a plan of work, ... the
dramatically reasserts an interest in access to resources and the free-
market, consumer-oriented principles that led it to reject the Law of
the Sea Convention. At present, there is no indication that this will
occur.

The objective of ensuring that Antarctica "shall not become the
scene or object of international discord" may be too important to
the states most concerned to be confused by rhetoric and ideology, be
it free markets or the common heritage of mankind.

 plan of work shall be deemed to have been approved by the Council unless the Council
disapproves it by consensus among its members excluding any State or States making the
application or sponsoring the applicant." (Emphasis added).
124. Similar changes might occur under pressure from the Federal Republic of Ger-
many and the United Kingdom.
125. Antarctic Treaty, Appendix, infra, preamble.