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COMMON HERITAGE OR COMMONWEALTH: AUSTRALIA'S ROLE IN NEGOTIATIONS OVER RESOURCE EXTRACTION IN DOMAINS BEYOND NATIONAL JURISDICTION, 1958–91

CAIT STORR*

The centrality of extractive industry to Australian economic and political history is well known. The influence of extractive interests on environmental and economic policy has been a theme of heated political debate at both state and federal levels for decades. However, the way in which extractive concerns have played into Australia's engagements with international law is a question less considered. This article traces Australia's prioritisation of sovereign resource rights in its approach to international treaty-making, with a focus on Australia's position in international negotiations between the late 1950s and the late 1980s over resource exploitation in outer space, the international seabed and the Antarctic. As the global decolonisation movements forced a readjustment of the legal architecture of resource rights established under imperial and colonial rule, the United Nations hosted a series of protracted — and, in consequential terms, largely failed — negotiations over the principles that should govern resource extraction in domains beyond national jurisdiction. Drawing on original archival research, the article argues that Australia's extractive ethos dominated its engagements in negotiations over a) the Antarctic Treaty in the 1950s; b) the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies negotiated between 1971 and 1979; c) Part XI of the United Nations Convention on the Law of the Sea dealing with resource extraction in the international seabed, negotiated during the Third UN Conference on the Law of the Sea between 1973 and 1982; and d) the failed Convention on the Regulation of Antarctic Mineral Resource Activities, negotiated between 1982 and 1988. The article concludes that acknowledging the dominance of sovereign extractive rights in Australia's historical approach to all three treaty domains provides necessary context to current negotiations, as unsettled questions of the rules that should regulate public and private resource extraction in domains beyond national jurisdiction re-emerge as volatile geopolitical fault lines in the early 21st century.

CONTENTS

* BA(Hons), JD, GDLP, PhD; Senior Lecturer, Melbourne Law School. The research presented in this article was undertaken during a Chancellor's Postdoctoral Research Fellowship at the University of Technology Sydney ('UTS'); sincere thanks to the UTS Law Faculty for its support and to Margaret Hegna for expert research assistance. This article has benefited from feedback from a number of interlocutors. I am particularly grateful to the three anonymous peer reviewers and to the *Melbourne Journal of International Law* editorial team.

I INTRODUCTION: AUSTRALIA'S EXTRACTIVE INTEREST

The centrality of extractive industry to Australian political and economic history is well known.[1] The influence of extractive interests on environmental and economic policy has been a theme of heated political debate at both state and federal levels for decades. However, the way in which extractive concerns have played into Australia's engagements with international law is a question less considered. The extent to which the federal government's identification of the national interest with the interests of extractive industry influences its international conduct was laid bare in Timor-Leste's proceedings against Australia in the International Court of Justice ('ICJ') between 2013 and 2015.[2] Australia's alleged espionage in 2004 conducted against newly independent Timor-Leste during negotiations over Timor Sea boundary delimitation in the Greater Sunrise oil and gas field was widely condemned as a moral scandal as much as one of law or diplomacy.[3] Much coverage treated Australia's aggressive pursuit of extractive rights — in that case allegedly beyond the threshold of legality — as egregious, but atypical.

That narrative obscures the fact that expanding the field of sovereign extractive rights and furthering the interests of extractive industry have long been organising objectives in Australia's engagements with international law and diplomacy. Those objectives have often placed Australia at odds with the international community.[4] From a liberal internationalist perspective, furthering the economic interests of domestic industry is a straightforward objective of any national government's engagement with international law, and treaty negotiations in particular.[5] As such, prioritising the interests of one of Australia's emblematic industries in international legal negotiations is an uncontroversial objective. From an anti-colonial perspective, however, this expansionist approach to sovereign resource rights — largely concerning petroleum and gas, but also mineral and

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1 See, eg, Geoffrey Blainey, *The Rush That Never Ended: A History of Australian Mining* (Melbourne University Press, 3rd ed, 1978); David Lee, *The Second Rush: Mining and the Transformation of Australia* (Connor Court Publishing, 2016).

2 'Application Instituting Proceedings', *Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (International Court of Justice, General List No 156, 17 December 2013).

3 Kim McGrath, 'Drawing the Line: Witness K and the Ethics of Spying' (2020) 9 *Australian Foreign Affairs* 53, 54; Christopher Knaus, 'Witness K and the "Outrageous" Spy Scandal that Failed to Shame Australia', *The Guardian* (online, 10 August 2019) <https://www.theguardian.com/australia-news/2019/aug/10/witness-k-and-the-outrageous-spy-scandal-that-failed-to-shame-australia>, archived at <https://perma.cc/4VMR-K5BC>. Cf Peter Tzeng, 'The State's Right to Property under International Law' (2016) 125(6) *Yale Law Journal* 1805.

4 Michael Slezak, 'Australia's Emissions Reduction Fund Fails to Increase Carbon Abatement, Data Shows', *Australian Broadcasting Corporation* (online, 2 August 2019) <https://www.abc.net.au/news/2019-08-02/emissions-reduction-fund-carbon-abatement-federal-government/11379424>, archived at <https://perma.cc/WW3L-DY8S>; Adam Morton, 'UN Climate Talks: Australia Accused of "Cheating" and Thwarting Global Deal', *The Guardian* (online, 16 December 2019) <https://www.theguardian.com/environment/2019/dec/16/un-climate-talks-australia-accused-of-cheating-and-thwarting-global-deal>, archived at <https://perma.cc/H68T-39NW>.

5 See, eg, Stuart Kaye and Bill Campbell, 'Australia and the Law of the Sea' in Donald R Rothwell and Emily Crawford (eds), *International Law in Australia* (Thomson Reuters, 3rd ed, 2017) 433, 446–7.

biological resources — is directly continuous with Australia's carriage of international relations in the era of colonial and imperial expansion. That expansionist approach warrants renewed scrutiny as the regulation of resource extraction in domains beyond national jurisdiction resurfaces as an acute geopolitical fault line in the early 21st century, and tensions over public and private activity in Antarctica, outer space and the international seabed escalate.

This article traces the prioritisation of extractive interests in Australia's historical approach to international treaty negotiations, with a focus on Australia's position on resource exploitation in the Antarctic, the international seabed and outer space between 1958 and 1991. It draws upon original archival research and mature bodies of scholarship on the legal history and politics of each treaty regime. As the international decolonisation movements of the mid-20th century challenged the legal architecture of resource rights established under imperial and colonial rule, the legal status of natural resources in the Antarctic, oceans beyond national jurisdiction and bodies in near-Earth space became focal points of diplomatic contention over the mid-to-late 20th century. Between the late 1950s and the late 1980s, a series of protracted negotiations over the basic principles that should govern resource extraction in domains beyond national jurisdiction took place. These debates occurred both within the United Nations framework, as in the case of the seabed and outer space, and pointedly outside it, as in the case of Antarctica.

Efforts to assert international oversight of extractive activity in domains beyond national jurisdiction occurred at the intersection of multiple strands of 20th century international history. First, unilateral annexation of territory lost legitimacy after the World War I settlements, in diplomatic if not strictly legal terms. This normative shift intensified doctrinal debates over the status of the international law of territorial acquisition, as states sought to anchor their contested territorial claims in prewar conduct.[6] Secondly, the sharp increase in formal participation of decolonising states in international organisations and the creation of negotiating blocs like the Non-Aligned Movement ('NAM') and the Organisation for African Unity cast further shadow over the rules of territorial acquisition and natural resource rights developed by the European powers over the 19th and early 20th centuries.[7] Thirdly, the experiments in internationalisation of territory developed through the League of Nations ('League') mandate system and the subsequent UN trusteeship system popularised — even through myriad flaws and contradictions — the possibility of multilateral oversight of activity in contested areas.[8]

Fourthly, the instability inherent in a global economy built through colonial and imperial expansion was laid bare in a series of ructions in fossil fuel supply chains, beginning with the Anglo-Iranian oil crisis of 1951–52 and culminating in the 1973 oil crisis resulting from an embargo imposed by the Organisation of the

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[6] See generally RY Jennings, *The Acquisition of Territory in International Law: With a New Introduction by Marcelo G Kohen* (Manchester University Press, 2nd ed, 2017); Cait Storr, 'Denaturalising the Concept of Territory in International Law' in Usha Natarajan and Julia Dehm (eds), *Locating Nature: Making and Unmaking International Law* (Cambridge University Press, 2022) 179.

[7] See generally Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford University Press, 2019).

[8] Anne Orford, 'Book Review Article: International Territorial Administration and the Management of Decolonization' (2010) 59(1) *International and Comparative Law Quarterly* 227, 232.

Petroleum Exporting Countries ('OPEC').[9] This raised the spectre not only of escalating conflict over natural resources, an established mainstay of inter-imperial trade negotiations, but also of natural resource exhaustion. Fifthly, technological and scientific advancements — themselves inextricable from the military imperatives of the Cold War — rendered the prospect of mining the poles, the seabed and near-earth bodies in space a realisable horizon. Lastly, the discourses of environmental protection, economic development and 'scientific internationalism' — all with strong albeit unstable resonances in postwar development discourse — began to emerge as organising concerns of the postwar UN.[10] Debates over the legal status of domains beyond national jurisdiction in this period thus presaged many of the debates over substantive decolonisation, global political economy and international cooperation on environmental risk that have come to dominate the field of international law in the opening decades of the 21st century.

Against this complex historical backdrop, this article examines Australia's carriage of international negotiations over resource extraction in Antarctica, outer space and the seabed. It focuses on four moments of treaty negotiation: first, the negotiation of *The Antarctic Treaty* ('*Antarctic Treaty*')[11] in 1959, against the prospect of UN oversight over the "last continent"; secondly, the seabed resource debates from the late 1960s through to the early 1980s, punctuated by the 1970 *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof; beyond the Limits of National Jurisdiction* and Part XI of the 1982 *United Nations Convention on the Law of the Sea* ('*LOSC*');[12] thirdly, the space resources debates from the late 1960s through to the early 1980s, centred around the 1967 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* ('*Outer Space Treaty*') and the 1979 *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* (the '*Moon Agreement*');[13] and lastly, the debate over Antarctic minerals revived in the 1980s, culminating in the failed 1988 *Convention on the Regulation of Antarctic Mineral Resource Activities* ('*CRAMRA*').[14] The article argues that Australia's foundational objective across all three treaty frameworks has been to secure and expand the field of sovereign

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9 Timothy Mitchell, 'The Resources of Economics: Making the 1973 Oil Crisis' (2010) 3(2) *Journal of Cultural Economy* 189, 195–6.

10 Simone Turchetti et al, 'On Thick Ice: Scientific Internationalism and Antarctic Affairs, 1957–1980' (2008) 24(4) *History and Technology* 351, 352.

11 *The Antarctic Treaty*, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961) ('*Antarctic Treaty*').

12 *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof; beyond the Limits of National Jurisdiction*, GA Res 2749 (XXV), UN GAOR, 25th sess, 1933rd plen mtg, Supp No 28, UN Doc A/RES/2749(XXV) (17 December 1970); *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('*LOSC*').

13 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967) ('*Outer Space Treaty*'); *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, opened for signature 18 December 1979, 1363 UNTS 3 (entered into force 11 July 1984) ('*Moon Agreement*').

14 *Convention on the Regulation of Antarctic Mineral Resource Activities*, opened for signature 25 November 1988, 27 ILM 859 (not yet in force) ('*CRAMRA*').

resource rights and its right to grant and profit from extractive interests. Australia's prioritisation of its own extractive interests has been consistent across all three domains. It has leveraged the normative mantles of Cold War scientific internationalism, of the "common heritage of mankind" ('CHM') principle adopted with respect to the international seabed and space, and of environmental protection — culminating in a moratorium on mining in Antarctica in the early 1990s — in service of that foundational objective. In other words, Australia has tended to adopt environmental, scientific and common heritage agendas only where doing so served its underlying goal of securing and expanding the field of sovereign resource rights. The article concludes that this history not only tempers official narratives that figure Australia as a principled defender of internationalist principles with respect to Antarctica, the seabed and space; it also invites consideration of whether Australia's underlying objectives in its approach to international governance of these domains remain the same, as all three treaty regimes come under renewed strain.

II AUSTRALIAN EXTRACTIVISM AND THE POSTWAR INTERNATIONAL

The centrality of extractive industry to 20th century Australian economic and political history is one of the agreed facts of domestic political culture. There is, however, little systematic analysis of the extent to which the domestic dominance of extractive industry has influenced Australia's conduct of international law. The federal government's practice of refracting questions of international principle through the prism of sovereign resource rights established itself early in Australia's practice of external affairs.[15] The close identification of the national interest with those of extractive industry has since manifested itself in multiple ways. These range from the historical, including Australia's early experiences in asserting its independence from the British imperial government by claiming ownership of resources in Papua New Guinea ('PNG') and Nauru;[16] to the biographical, involving the career trajectories of highly influential Australian statesmen who have worked across both government and extractive industry, Richard Casey and Alexander Downer among them;[17] and to the sociological, reflecting the extractive industry's pervasive influence on electoral politics and on traditional media.[18]

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15 Cait Storr, '"*Imperium in Imperio*": Sub-Imperialism and the Formation of Australia as a Subject of International Law' (2018) 19(1) *Melbourne Journal of International Law* 335 ('*Imperium in Imperio*'); Miranda Johnson and Cait Storr, 'Australia as Empire' in Peter Cane, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 258, 259, 279.

16 Antony Anghie, 'Race, Self-Determination and Australian Empire' (2018) 19(2) *Melbourne Journal of International Law* 423, 458.

17 On Casey, see WJ Hudson, *Casey* (Oxford University Press, 1986) 26–9. Alexander Downer was appointed by Woodside as a consultant after leaving federal politics: see Knaus (n 3); Tom Allard, 'Timor Spy Scandal: Former ASIS Officer Facing Prosecution', *The Sydney Morning Herald* (online, 21 June 2015) <https://www.smh.com.au/national/timor-spy-scandal-former-asis-officer-facing-prosecution-20150621-ghtp17.html>, archived at <https://perma.cc/A266-8AUH>.

18 See, eg, Roman Stutzer et al, 'Black Coal, Thin Ice: The Discursive Legitimisation of Australian Coal in the Age of Climate Change' (2021) 8 *Humanities and Social Sciences Communications* 178:1–9.

Given the centrality of extractive industry in Australian economic and political affairs, it is unsurprising — but little remarked upon — that extractive interests have occupied a central position in Australia's carriage of its international obligations. Nearly all instances of Australia's active participation in ICJ proceedings have intersected with attempts to extend or defend Australia's extraterritorial resource rights, whether historical or contemporary.[19] The dispute at the heart of *Portugal v Australia* (the *East Timor* case) emerged from the Whitlam government's extensive negotiations with Indonesia over ownership of oil and gas reserves in the Timor Sea.[20] *Nauru v Australia* (the *Certain Phosphate Lands in Nauru* case) dealt directly with Australia's breach of its mandate and trusteeship obligations in its exploitation of Nauruan phosphate.[21] *Australia v Japan* (the *Whaling in the Antarctic* case), celebrated as a defence of the Antarctic marine environment, was at the same time a territorial defence of Australia's claim to an Exclusive Economic Zone ('EEZ') for the Australian Antarctic Territory ('AAT').[22]

The defence and expansion of resource rights claims has also been an organising objective in Australia's approach to treaty negotiations over resource extraction in domains beyond national jurisdiction. The question of whether and how extractive activity in areas beyond sovereign jurisdiction should be regulated is a foundational concern of international law.[23] The issue re-emerged as a central question of multilateral diplomacy in the decades after World War II. As the postwar decolonisation movements rose to their peak, the various strands of contest over the legal status of Antarctica, outer space and the seabed were increasingly woven together in diplomatic debate. Between the 1950s and the early 1980s, as membership of international organisations swelled and the numeric balance of power shifted toward decolonising states, the presumption that the former colonial and imperial powers would set the terms of diplomatic debate was increasingly contested. Most relevantly here, international administration of contested territory was increasingly raised by decolonising states as a mode of Third World participation in — rather than subjugation to — international law, as

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19 The exception here is *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253. The Whitlam government's international advocacy against French atmospheric nuclear testing in the Pacific should be understood in the context of its contemporaneous plans for expansion of uranium mining within Australia. This introduced a tension into Labor Party nuclear policy that dominated party politics for the Hawke/Keating governments. See below Part V of this article on the *Moon Agreement*.

20 *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90 ('*East Timor Judgment*'); Kim McGrath, *Crossing the Line: Australia's Secret History in the Timor Sea* (Black Inc, 2017) 33–47 ('*Crossing the Line*').

21 'Application Instituting Proceedings', *Certain Phosphate Lands in Nauru (Nauru v Australia)* (International Court of Justice, General List No 80, 19 May 1989); Antony Anghie, '"The Heart of My Home": Colonialism, Environmental Damage, and the Nauru Case' (1993) 34(2) *Harvard International Law Journal* 445; Cait Storr, *International Status in the Shadow of Empire: Nauru and the Histories of International Law* (Cambridge University Press, 2020) ('*International Status in the Shadow of Empire*').

22 *Whaling in the Antarctic (Australia v Japan) (Judgment)* [2014] ICJ Rep 226, 21 [33], 23 [39].

23 Martin J Schermaier, '*Res Communes Omnium*: The History of an Idea from Greek Philosophy to Grotian Jurisprudence' (2009) 30(1) *Grotiana* 20, 21–3.

had been the case under the mandate and trusteeship regimes.[24] Whilst this article deals with each regime in loose chronological order, it is important to acknowledge the cross-pollinating evolution of all three treaty frameworks. Particularly in the late 1970s and early 1980s, negotiating parties across all three frameworks frequently consisted of the same incumbent governments, advised by the same departments and the same international lawyers. As a result, negotiators and advisers frequently formulated both the *problems* requiring regulation — from territorial annexation, military use and resource exploitation to environmental protection and international equity — and the range of potential *solutions* to those problems — from legal concepts to institutional design — with an eye to their position in each or all three of these diplomatic debates.

As a result, this shifting complex of treaty negotiations came to be anchored around common rhetorical elements. First was the threat of nuclear war as an unprecedented and shared regulatory challenge, a framing central to constructing and maintaining the Cold War.[25] Second was the unstable international divide between 'developed' and 'developing' states, a divide that loosely and at times only rhetorically mapped onto the bipolarity between the United States and the Soviet Union in international organisations. Third was the coalescing concept of the CHM.[26] The idea of CHM was a conceptual bricolage in its early iterations, incorporating competing elements from discrete fields of public and private law, including Grotian reworkings of the Roman law notion of *res communis omnium*, and early 20th century experiments with internationalisation of contested territory.[27] The CHM concept, and its ungainly translation into legal principle, is most directly associated with the seabed regime in Part XI of the *LOSC*.[28] But the definition and scope of CHM was worked through at the intersection of all three debates, even if formally adopted only in the seabed and space treaty frameworks, and even then in markedly different ways.

A central contention of this article is that Australia's position in the CHM debates of the 1960s and 1970s was informed less by a consistent approach to the principle itself than by Australia's overriding objective of expanding the field of sovereign resource claims on the one hand and its historical antipathy to regimes of internationalised administrative oversight — namely the League mandate and UN trusteeship regimes — on the other.[29] A second contention is that Australia's position on both fronts — *for* an expanding field of sovereign resource rights, and *against* internationalised administrative oversight — were honed a decade in advance of CHM debates over the seabed and space during postwar debates over the legal status of Antarctica in the 1950s. The Australian colonies had been keenly

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24 Jochen von Bernstorff and Philipp Dann, 'The Battle for International Law: An Introduction' in Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford University Press, 2019) 1, 2.

25 See generally Anna Hood, 'Nuclear Weapons Law and the Cold War and Post–Cold War Worlds: A Story of Co-Production' in Matthew Craven, Sundhya Pahuja and Gerry Simpson (eds), *International Law and the Cold War* (Cambridge University Press, 2019) 98.

26 See generally Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (Martinus Nijhoff, 1998).

27 Surabhi Ranganathan, 'Global Commons' (2016) 27(3) *European Journal of International Law* 693; Cait Storr, 'An Uncommons History of the Common Heritage of Mankind' (manuscript under consideration, copy on file with author).

28 *LOSC* (n 12) pt XI.

29 Johnson and Storr (n 15) 272–9.

interested in the British Empire's aspirations to Antarctic territory prior to federation in 1901.[30] Australia's inherited claim to the Antarctic, and its subsequent role in Antarctic Treaty negotiations throughout the 1950s, directly informed its carriage of treaty negotiations over CHM that gained momentum a decade later with respect to the seabed and space. At the same time, Australia's broader attitude to proposals for regulation of resource extraction in all three areas was shaped by its experiences in the earlier 20th century as administering authority in New Guinea and Nauru, first under the League mandate system and then the UN trusteeship system.[31] Australia's prior experience with Antarctic claims on the one hand, and with administering territory under international oversight on the other, formed the ground on which it approached the CHM debates from the late 1960s.

III THE ANTARCTIC TREATY SYSTEM: TERRITORY AGAINST TRUSTEESHIP

Scholars of Australia's relationship to Antarctica have long observed that the continent has occupied an integral place in the Australian imperial imaginary.[32] Well before Federation, Antarctica constituted a 'Southern frontier' in the Australian colonies' expansionist aspirations.[33] Moreover, those aspirations were not limited to a Monrovian exclusion of competing empires or to the establishment of a regional 'sphere of influence'.[34] Rather, Australian Antarctic aspirations were from the outset for full territorial sovereignty over an expansive area of the continent and adjacent waters, and have remained so ever since. Australia derived its territorial claim from the British imperial government. Britain's formal Antarctic claim was made in 1908 by extending the scope of its 1833 Falkland Islands claim. The extent of that extended claim was clarified in 1917.[35] A further British claim was made in 1923 over the Ross Sea sector for administration by New Zealand, expanding the British claim to around two thirds of the continent. As Dominion independence over external affairs solidified over the 1920s, shoring up the British Antarctic claim became a key issue in the Imperial Conferences of 1926, 1930 and 1937.[36] In 1933, the larger part of the British claim was transferred to Australia, becoming known as the AAT, spanning just over 40% of the continent.[37]

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30 See generally Rohan Howitt, 'Ideological Origins of the Australian Antarctic, 1839–1933' (PhD Thesis, University of Sydney, 2019).

31 See generally Storr, *International Status in the Shadow of Empire* (n 21).

32 Shirley V Scott, 'Three Waves of Antarctic Imperialism' in Klaus Dodds, Alan D Hemmings and Peder Roberts (eds), *Handbook on the Politics of Antarctica* (Edward Elgar, 2017) 37, 45; Alessandro Antonello, 'Australia, the International Geophysical Year and the 1959 Antarctic Treaty' (2013) 59(4) *Australian Journal of Politics and History* 532, 532–3.

33 See generally Howitt (n 30).

34 See generally Storr, '*Imperium in Imperio*' (n 15) 344, 348.

35 Shirley V Scott, 'National Encounters with the International Court of Justice: Avoiding Litigating Antarctic Sovereignty' (2021) 21(3) *Melbourne Journal of International Law* 578, 591. The Falkland Islands are known as Las Malvinas pursuant to a competing Argentinian claim.

36 Klaus Dodds, 'The Great Game in Antarctica: Britain and the 1959 Antarctic Treaty' (2008) 22(1) *Contemporary British History* 43, 48–9.

37 Bruno Arpi et al, 'Legal Analysis of the Argentine and Australian Titles to Territory in Antarctica' (2022) 23(2) *Melbourne Journal of International Law* 222.

However, Britain's ambition for full incorporation of Antarctica within the empire was frustrated by France's preceding 1840 claim to Adélie Land — a sectoral claim that cut through the claimed AAT — and Norway's subsequent claim to Queen Maud Land in 1939.[38] Each of the British, Australian, New Zealand, French and Norwegian claims were made on the basis of prewar international laws of territorial acquisition.[39] Modes of demonstrating territorial occupation recognised in international law — including permanent constructions, sustained physical presence and evidence of mapping and surveying — were emphasised within the British Foreign Office from the early 20th century as crucial to maintaining the territorial claim. However, the status of all claims was complicated further still by the subsequent claims of Argentina and Chile, both of which overlapped with areas of British claim.[40] Although these claims were only made formally as late as the early 1940s, both Argentina and Chile claimed title derived by succession of prior Spanish claim and maintained through consistent activity amounting to occupation.[41]

After World War II, territorial conflict over Antarctica attracted increasing international attention. As the new UN system took shape, former League mandates were placed under international trusteeship and the *Charter of the United Nations* was declared to apply to all 'non-self-governing territories'.[42] As international oversight was asserted over colonial territories, all Antarctic claimants were concerned to establish full sovereign rights and avoid UN intervention in Antarctic affairs. The US too was at pains to avoid subjecting the question of Antarctic governance to formal international scrutiny, not least by the Soviet Union.[43] Unwilling to relinquish both the right to make a future sovereign claim itself and its political leverage over claimant parties, the US intervened in escalating tensions between the United Kingdom, Argentina and Chile.[44] In 1948, the US proposed a condominium arrangement of shared sovereignty over Antarctica between existing claimants. The condominium proposal received some traction among claimant states; but Australia resisted it, primarily to avoid relinquishing exclusive sovereign rights to natural resources within the claimed AAT.[45]

While the US condominium proposal failed, it crystallised a process of negotiations between Antarctic claimants that continued throughout the 1950s. The question of Antarctica's legal status became an arena, albeit a less apparent

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38 Scott, 'Three Waves of Antarctic Imperialism' (n 32) 41.

39 Marcus Haward, 'The Originals: The Role and Influence of the Original Signatories to the Antarctic Treaty' in Klaus Dodds, Alan D Hemming and Peder Roberts (eds), *Handbook on the Politics of Antarctica* (Edward Elgar, 2017) 232, 233.

40 Ibid.

41 Shirley Scott, 'The Geopolitical Organization of Antarctica, 1900–1961: The Case for a Revisionist Analysis' (1995) 11 *Australian Journal of Law and Society* 113, 117–9, 134–6 ('Geopolitical Organisation of Antarctica').

42 *Charter of the United Nations* arts 73, 74.

43 Roger D Launius, 'Establishing Open Rights in the Antarctic and Outer Space: Cold War Rivalries and Geopolitics in the 1950s and 1960s' in Klaus Dodds, Alan D Hemming and Peder Roberts (eds), *Handbook on the Politics of Antarctica* (Edward Elgar, 2017) 217, 223.

44 Rob Hall and Marie Kawaja, 'Australia and the Negotiation of the Antarctic Treaty' in Marcus Haward and Tom Griffiths (eds), *Australia and the Antarctic Treaty System: 50 Years of Influence* (University of New South Wales Press, 2011) 68, 69–70.

45 A detailed study is offered in Hall and Kawaja: ibid 70–1.

one, of Cold War realpolitik.[46] For its part, the Soviet Union formalised its Antarctic position in 1950, making clear it would not recognise any regime brokered by the US 'without its participation'.[47] With little common ground established between claimant states in the early 1950s, evidenced by the UK's institution of ICJ proceedings against Argentina and Chile in 1955,[48] Antarctic negotiations attracted increasing attention within the new UN. In 1956, India made an unexpected move to promote the UN as the appropriate forum for internationalised Antarctic governance.[49] India's Antarctic initiative was spearheaded by Krishna Menon, the first official High Commissioner of India to the UK and a close associate of Prime Minister Jawaharlal Nehru.[50] Both Nehru and Menon had proven key advocates of developing world solidarity in the 1955 Bandung Conference and in the new NAM, and saw the Antarctic question as a vehicle for challenging colonial powers' circumvention of the new UN system.[51] At Menon's instigation, India made preliminary moves toward listing 'the Question of Antarctica' for debate in the UN General Assembly.[52] In its early iteration, India's case was that the UN trusteeship system provided a model of internationalised territorial oversight for Antarctica, against the prospect of administration by a closed club of imperial claimants. Menon's personal advocacy of global disarmament provided additional impetus to India's move. Throughout the 1950s, the Soviet Union alleged that the US and UK planned to use Antarctic territory for nuclear weapons testing, allegations clearly within the realm of possibility at that time.[53] The US had been conducting nuclear testing in the Pacific from 1946, using its 'strategic trust territory' of the Pacific Islands as its nuclear 'proving ground'.[54] British nuclear testing in Australia had commenced in 1952, moving inland to Maralinga in South Australia in 1955.[55]

The prospect of international jurisdiction over Antarctica was taken as a serious challenge by all Antarctic claimants. The UK, Australia and New Zealand were particularly taken aback, given India's position within the Commonwealth. The claimants' alliance against the prospect of UN debate was resolute. Claimants took pains to emphasise that the trusteeship model was relevant only to the governance of populated regions and unsuitable for unpopulated domains; as one British Foreign Office official put it in 1956, the 'whole object of trusteeship is to

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46 See generally Launius (n 43).

47 Hall and Kawaja (n 44) 71–2.

48 'Application Instituting Proceedings against the Argentine Republic', *Antarctica (United Kingdom v Argentina)* [1956] ICJ Pleadings 8, 35–6 [40]–[41]; 'Application Instituting Proceedings against the Republic of Chile', *Antarctica (United Kingdom v Argentina)* [1956] ICJ Pleadings 48, 73–4 [39]–[40].

49 Adrian Howkins, 'Defending Polar Empire: Opposition to India's Proposal to Raise the "Antarctic Question" at the United Nations in 1956' (2008) 44(228) *Polar Record* 35, 36–9.

50 Sanjay Chaturvedi, 'Rise and Decline of Antarctica in Nehru's Geopolitical Vision: Challenges and Opportunities of the 1950s' (2013) 3(2) *Polar Journal* 301, 301.

51 Ibid 311–12. See also Itty Abraham, 'From Bandung to NAM: Non-Alignment and Indian Foreign Policy, 1947–65' (2008) 46(2) *Commonwealth and Comparative Politics* 195.

52 Chaturvedi (n 50) 304–6.

53 Howkins (n 49) 40.

54 See MX Mitchell, 'Offshoring American Environmental Law: Land, Culture, and Marshall Islanders' Struggles for Self-Determination during the 1970s' (2017) 22(2) *Environmental History* 209, 210, 214.

55 *Royal Commission into British Nuclear Tests in Australia: Conclusions and Recommendations* (Report, 1985) 3, 10.

safeguard interests of local inhabitants who do not exist in this case'.[56] Reassessing its position in the fast-moving high diplomacy of the mid-1950s, India opted to amend its proposal for UN trusteeship of Antarctica, instead submitting a call for 'peaceful utilisation' of the continent in October 1956.[57] That call emphasised disarmament and demilitarisation, and avoided raising hard questions of territorial acquisition that would destabilise Commonwealth relations.[58]

Although short-lived on its own terms, the Indian initiative galvanised Antarctic claimants; according to Adrian Howkins, '[o]pposition to India's proposal in 1956 not only helped to lay the foundations for the 1959 Antarctic Treaty, but it also set the tone for the future defence of the Antarctic Treaty system'.[59] This was especially so for Australia, the UK and New Zealand, each with UN trust territories of their own. After heading off the danger of UN debate over Antarctic trusteeship, claimant states refocused themselves on reaching a settlement that would avoid international oversight. Treaty negotiations gathered momentum over the later 1950s, eventually becoming intertwined with preparations for the International Geophysical Year ('IGY') in 1957–58.

The IGY, a program of global geophysical research activity spearheaded by the US and managed by the International Council of Scientific Unions, catalysed two major Cold War developments: the conclusion of the *Antarctic Treaty*, and the inauguration of the so-called space age. According to former NASA historian Roger Launius, the US' ultimate objective in promoting the IGY was to ensure its own free movement in all geophysical domains not already under settled sovereign control, including airspace above sovereign jurisdiction and the Antarctic.[60] In international legal terms, the US' primary aim was to establish a right to full global satellite reconnaissance on the one hand, and a right to defend from aerial attack on the other. According to Launius, US promotion of international scientific collaboration during the IGY served as the 'stalking horse' through which those aims could be realised.[61] The Soviet Union's launch of Sputnik 1 and 2 in 1957 was leveraged by the US as establishing a precedent of freedom of international space and the US quickly followed with the launch of its first orbital satellite.[62]

Australia supported US military objectives in Antarctica, but its own IGY participation focused on the consolidation of its claim to sovereignty over the AAT, including all natural resources within its claim.[63] The mantle of scientific internationalism was readily adapted toward that end. The 1958 Australian National Antarctic Research Expedition (later named ANARE) was funded in part by a donation from Commonwealth Oil Refineries Ltd ('COR'), a subsidiary of British Petroleum Ltd ('BP'), in a deal brokered by Minister for External Affairs Richard Casey.[64] BP also funded the British IGY expedition led by Vivian Fuchs

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56 Howkins (n 49) 38.
57 Ibid 39.
58 Chaturvedi (n 50) 305.
59 Howkins (n 49) 43.
60 Launius (n 43) 217.
61 Ibid 218.
62 Ibid 218–21.
63 Antonello (n 32) 545.
64 'Antarctic Expedition: Aided by Company's Gift', *The Biz* (Fairfield, New South Wales, 31 October 1956) 24.

and the New Zealand expedition led by Sir Edmund Hilary.[65] Richard Casey, routinely cited as one of the major historical champions of the AAT and later Attorney-General, had family and professional connections with Australian extractive industry. Casey's father had served as Board Chairman of the Mount Morgan Gold Mine near Rockhampton in Queensland, one of the most productive gold mines in the world at the time.[66] As Minister for External Affairs, Casey vehemently opposed any internationalisation of Antarctic governance and insisted on protecting Australia's sovereign resource claims in the AAT.[67]

Despite the efforts of Casey, COR and BP, exploratory activity in Antarctica during the IGY failed to locate significant mineral resources. The failure of all claimants to identify exploitable reserves within Antarctic territory effectively cleared a way for the collaborative resolution that was to come.[68] Amid significant flux in Antarctic negotiations over 1957–58 — during which the Soviet Union too reserved the right to make a territorial claim and South Africa, Belgium and Japan sought membership of any treaty regime — the Australian objective of maintaining a sovereign territorial claim with full prospective resource rights was eventually reflected in the *Antarctic Treaty* signed in 1959.[69] Article IV famously froze the status quo of territorial claims, neither prohibiting nor explicitly recognising existing claims, but prohibiting new or expanded claims; and the question of the status of mineral resources was omitted from the Treaty altogether.[70] In place of an explicit territorial settlement, the Treaty asserted two core principles: agreement to use Antarctica for 'peaceful purposes only', prohibiting militarisation; and '[f]reedom of scientific investigation', meaning permissive access to claimed territory by all.[71] Both principles were consonant with the US' nascent space policy, which sought to preserve freedom of access whilst minimising risk of military attack. These basic norms — against *new* territorial claims, against militarisation, and for scientific exploration — laid the foundations for international legal debates over domains beyond national jurisdiction for the rest of the 20th century. The issue of natural resource extraction was left out of the 1959 *Antarctic Treaty*, as IGY activity had failed to locate commercially attractive reserves. The legal issue of whether the Treaty's permissive norm of 'scientific exploration' extended to resource exploration was left for later debate.

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65 Ibid.

66 'Mount Morgan Mine: Visit of Directors', *The Morning Bulletin* (Rockhampton, Queensland, 20 May 1914). Richard Gardiner Casey was an acquaintance of William Knox D'Arcy, an original director and the largest shareholder of the Mount Morgan syndicate: see WJ Hudson, *Casey* (Oxford University Press, 1986) 4–5. D'Arcy used Australian gold profits to fund his prospecting venture in Persia, leading to the granting of the infamous D'Arcy Concession in 1901, later transferred to the Anglo-Persian Oil Company: David Carment, 'William Knox D'Arcy (1849–1917)' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1981) vol 8. See also Sundhya Pahuja and Cait Storr, 'Rethinking Iran and International Law: The *Anglo-Iranian Oil Company Case* Revisited' in James Crawford et al (eds), *The International Legal Order: Current Needs and Possible Responses* (Brill Nijhoff, 2017) 53, 56–7.

67 Hall and Kawaja (n 44) 73, 77–8.

68 Launius (n 43) 224.

69 Scott, 'Geopolitical Organization of Antarctica' (n 41) 114; Antonello (n 32) 545–6.

70 *Antarctic Treaty* (n 11) art IV.

71 Ibid arts I–II. See also Turchetti et al (n 10) 355.

IV THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: DECOLONISATION, THE CONTINENTAL MARGIN AND COMMON HERITAGE

Australia's focus on expanding its field of sovereign resource rights played out in unexpected ways over the following decades, in treaty negotiations over resource rights in the law of the sea and in international space law. The popularisation of a global imaginary during the IGY — and the related adoption of scientific internationalism as a cloak for pursuing military and extractive objectives in the *Antarctic Treaty* — had immediate impacts on negotiations pertaining to space and the seabed. With respect to space, the UN resolved to establish an ad hoc Committee on the Peaceful Uses of Outer Space ('COPUOS') in December 1958.[72] Noting the events of the IGY, the ad hoc Committee was charged with reporting on

> the area of international co-operation and programmes in the peaceful uses of outer space which could appropriately be undertaken under United Nations auspices to the benefit of States irrespective of the state of their economic and scientific development[73]

— an inference to *Antarctic Treaty* negotiations, which had evaded internationalisation in both its institutional and normative dimensions. With respect to the seabed, the First UN Conference on the Law of the Sea ('UNCLOS I') was also held in 1958. It resulted in the four *Geneva Conventions* on the territorial sea and contiguous zone, the continental shelf, the high seas, and fishing and conservation of living resources ('*Geneva Conventions*').[74] The *Geneva Conventions* largely codified existing customary international law, with expanded rules of border delimitation.[75] However, the issue of seabed resources beyond national jurisdiction was left untouched for the same reasons the *Antarctic Treaty* avoided it: as the International Law Commission noted in its preparatory report, there was little need to address regulation of resource extraction in the international seabed as there was as yet no commercial case for mining.[76]

As more decolonising states joined the UN system over the course of the 1960s, the law of the sea codified in the *Geneva Conventions* attracted increasing criticism, both for its European imperial origins and for its favouring of dominant powers in permitting laissez-faire resource exploitation in areas beyond national jurisdiction.[77] The impetus to convene the Third UN Conference on the Law of the Sea ('UNCLOS III') arose from this shifting balance of power within the UN system. That moment was seized to fateful effect in 1967 by Maltese diplomat Arvid Pardo, Malta's first Permanent Representative to the UN.[78] Pardo's famous

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72 *Question of the Peaceful Use of Outer Space,* GA Res 1348 (XIII), UN GAOR, 1st Comm, 13th sess, 792nd plen mtg, Supp No 18, UN Doc A/Res/1348(XIII) (13 December 1958).

73 Ibid para 1(b).

74 See DP O'Connell, *The International Law of the Sea*, ed IA Shearer (Oxford University Press, 1st ed, 1982) vol 1.

75 RD Lumb, *The Law of the Sea and Australian Off-Shore Areas* (University of Queensland Press, 2nd ed, 1978) 46.

76 '*Report of the International Law Commission Covering the Work of Its Eighth Session*', [1956] II *Yearbook of the International Law Commission* 253.

77 Edwin Egede, *Africa and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind* (Springer, 2011) 8–9.

78 Ranganathan, 'Global Commons' (n 27) 694–5.

speech to the General Assembly — delivered within weeks of the *Outer Space Treaty*, with its language of 'province of all mankind' coming into effect in October 1967 — called for international cooperation on a legal regime to regulate seabed resource exploitation.[79] In response, the UN established a 'Committee on the Peaceful Uses of the Seabed and the Ocean Floor' — COPUOS' seabed twin.[80] The Seabed Committee, as it became known, drafted the 1970 *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction*.[81] The 1970 Declaration asserted for the first time that the seabed and its resources 'were' 'the common heritage of mankind', meaning that all activities, including resource extraction, were to be carried out under an international regime established by treaty, 'including appropriate international machinery'.[82] Over the next two years, the UN undertook large-scale preparations for UNCLOS III.[83]

In Australia, the brewing CHM debate seems to have been of little interest to the government in the early years of UNCLOS III.[84] Australia's central objective in law of the sea negotiations was to expand the field of sovereign resource rights by securing recognition of an extended continental shelf. That objective had been established under the Gorton (1968–71) and McMahon (1971–72) governments and was maintained throughout the Whitlam (1972–75) and Fraser (1975–83) governments. From 1972, the Whitlam government was focused on expanding Australia's sovereign rights to the continental shelf and margin by whatever extent possible. Australia's position centred on an expansive interpretation of 'margin' as defined in the 1958 Geneva *Convention on the Continental Shelf*.[85] Given this objective, in the early years of UNCLOS III the Australian delegation focused on mounting calls for an EEZ of 200 nautical miles from the coastal baseline, and specifically on the consequences of a universal EEZ on the prospects of securing recognition of an expansive continental margin. Due to exploratory information provided by the petroleum and gas industry, Australia had been aware from the early 1960s of the likelihood of significant reserves of petroleum and gas on the North West Shelf of the Australian continent, extending into waters that would fall

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79 *Outer Space Treaty* (n 13); *Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil thereof, Underlying the High Seas beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interests of Mankind*, UN GAOR, 1st Comm, 22nd sess, 1515th mtg, Agenda Item 92, UN Doc A/C.1/PV.1515 (1 November 1967).

80 *Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil thereof, Underlying the High Seas beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interests of Mankind*, GA Res 2340 (XXII), UN GAOR, 1st Comm, 22nd sess, 1639th plen mtg, Supp No 16, UN Doc A/RES/2340(XXII) (18 December 1967).

81 *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction*, GA Res 2749 (XXV), UN GAOR, 1st Comm, 25th sess, 1933rd plen mtg, Supp No 28, UN Doc A/Res/2749(XXV) (17 December 1970).

82 Ibid.

83 James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press, 2011) 37–40.

84 Department of Foreign Affairs (Australia), *Law of the Sea: Australian Policy in Preparation for the United Nations Conference in 1973* (Cabinet Minute, 6 July 1972) (National Archives of Australia, A5909/1).

85 Ibid.

within a Timorese EEZ.[86] On the basis of the 1958 *Geneva Conventions*, Australia had actively solicited and granted exploration licences in waters very close to prospective Timorese territorial waters. Licences were granted to petroleum companies including Woodside Petroleum Ltd and the Atlantic Richfield Company ('ARCO').[87] Calls for an EEZ, whilst delivering one of the largest maritime zones in the world to Australia, therefore complicated the federal government's campaign to shore up its sovereign resource rights over oil and gas fields beyond its own prospective EEZ on the one hand — namely, in the Exmouth Plateau off Western Australia — and, on the other, in waters within the prospective EEZ of East Timor, were it to achieve political independence from Portugal.[88]

The coalescing right to self-determination in international law — and specifically its impending deployment by the Timor-Leste independence movement against colonial rule — therefore posed a direct challenge to Australia's expansive interpretation of its sovereign resource rights under the 1958 *Geneva Conventions*. Following the UN Trusteeship Council's support of Nauruan independence in 1968, Australia regarded votes for self-determination in Portuguese East Timor and New Guinea — Australia's remaining UN trust territory — as inevitable; but it adopted very different strategic approaches in each case. The Whitlam government openly championed political independence for Papua and New Guinea.[89] At the same time, its attention was trained on defensively consolidating Australian ownership and control over natural resources in the region. The irony of this position became evident in its approach to Timorese independence. In 1972, ahead of UNCLOS III, the McMahon government had secured a quid pro quo agreement with Indonesia regarding impending seabed negotiations. Australia would support Indonesia's campaign for recognition of sovereignty of archipelagic states over waters enclosed by archipelagic baselines — then a potential challenge to open freedom of passage along major trade routes — and Indonesia would recognise Australian territorial sovereignty over oil and gas fields on Timor-Leste's side of a median line between prospective Australian and Timorese EEZs.[90]

The Whitlam government adopted this arrangement with Indonesia on its election in December 1972. While Whitlam championed the causes of Aboriginal and Torres Strait Islander land rights in the Northern Territory and of PNG independence from his election in 1972, including a PNG delegation in UNCLOS III negotiations from 1974, his government's attitude toward the prospect of East Timorese independence was mercenary.[91] A central platform of Whitlam's election campaign was an audacious domestic policy of national ownership and effective control of all phases in the oil and gas production cycle, via a new

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86 Kim McGrath, 'Oceans, Oysters and Oil: A Survey of Australia's Maritime Agenda in the Timor Sea to 1970' in Sarah Smith et al (eds), *Timor-Leste: The Local, the Regional and the Global* (Timor Leste Studies Association, 2016) vol 1, 246, 246.

87 McGrath, *Crossing the Line* (n 20) 30.

88 Ibid.

89 Johnson and Storr (n 15) 278.

90 McGrath, *Crossing the Line* (n 20) 27–32; *Treaty between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea*, signed 20 May 2002, [2003] ATS 13 (entered into force 2 April 2003).

91 'PNG Group Off to Sea Law Meeting', *Papua New Guinea Post-Courier* (Port Moresby, 4 July 1974).

Petroleum and Minerals Authority.[92] Elected amid serious international upheaval leading up to the 1973 oil crisis, the Whitlam government was determined to secure the broadest resource field possible for Australian use. In a bid to provide certainty of tenure to existing and prospective licence-holders in the lead-up to UNCLOS III, the federal government introduced the *Seas and Submerged Lands Act 1973* (Cth), vesting in the Governor-General the power to proclaim the limit of the continental margin in accordance with the 1958 *Convention on the Territorial Sea and the Contiguous Zone*, which allowed annexation of the seabed 'to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas'.[93] The Act thereby grounded Australia's sovereign territorial claim in resource exploitability rather than geographic principle, against potential changes in the international law governing the delimitation of the continental shelf.

At the same time, the Whitlam government excluded Portugal — still then the recognised sovereign power in East Timor — from maritime border negotiations over the Timor Sea, negotiating instead with Indonesia which had agreed in 1972 to support Australia's claim in the North West Shelf. When Portugal withdrew from East Timor in 1975, the Whitlam government infamously threw its support behind Indonesia's violent occupation rather than the Timorese independence movement. These events are well known due to Portugal's later institution of ICJ proceedings against Australia for its later conclusion of a treaty with Indonesia regarding ownership of resources in the Timor Sea.[94] The Whitlam government's rhetorical support for New International Economic Order ('NIEO') principles of political self-determination and permanent sovereignty over natural resources in the early years of UNCLOS III needs to be understood in this light.[95] Australia leveraged NIEO rhetoric less in solidarity with the right of decolonising peoples to economic self-determination than in pursuit of its own ownership and control over natural resources in areas liable to fall within the territorial waters or EEZs of its decolonising neighbours.

Archival records show that Australia's negotiating position throughout UNCLOS III remained fixed on recognition of an expanded continental shelf and margin, and the resolution of potential conflict with neighbouring EEZs. The Department of Foreign Affairs ('DFA') was as alert to the significance of the continental shelf and EEZ debates for Australia's resources claims in the AAT as it was for those relating to the North West Shelf. As such, debate in the First Committee at UNCLOS III over a seabed resources regime — and the legal content of the CHM principle — was a secondary concern. While the Australian delegation monitored US and Soviet critique of the CHM concept closely, the

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92 Gough Whitlam, 'Speech of 12 July 1974' (Speech, Australasian Institute of Mining and Metallurgy, 12 July 1974). See also Matt Harvey, 'Double Disillusion: Legal and Political Aspects of the 1974 Double Dissolution' (2024) 70(2) *Australian Journal of Politics and Society* 232, 234–5.

93 *Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964) art 1. The *Seas and Submerged Lands Act* followed the 1945 Truman Proclamation: see Daniel Margolies, 'Jurisdiction in Offshore Submerged Lands and the Significance of the Truman Proclamation in Postwar US Foreign Policy' (2020) 44(3) *Diplomatic History* 447.

94 *East Timor Judgment* (n 20).

95 Don Willesee, 'Statement on the Law of the Sea' (Media Release, Department of Foreign Affairs (Australia), 2 July 1974).

package deal approach adopted at UNCLOS III meant that Australia stayed open to accepting a CHM regime for the international seabed as a bargaining tool in its continental shelf and EEZ strategy.[96] The DFA and Australia's lead negotiator, Keith Brennan, used Australia's participation in First Committee debates over the institutionalisation of CHM for seabed resources to head off any discussion of applying the CHM principle to Antarctic resources, and to promote the interests of domestic extractive industry, leading a campaign to mitigate the potential effects of future seabed exploitation on land-based producers.[97] Australian mining companies including Woodside Petroleum Ltd, Western Mining Corporation Ltd and Conzinc Riotinto of Australia Ltd were consulted, and their interests remained front of mind in the Australian delegation's strategy.[98]

In the comprehensive settlement reached at the eleventh session of UNCLOS III in 1982, Australia supported the seabed regime laid out in Part XI — not because of any particular support for CHM, but because the DFA regarded its primary objectives of securing an expanded field of sovereign resources and preserving the interests of land-based producers to have been met.[99] The possibility of claiming rights in the continental shelf 'to the outer edge of the continental margin' — and beyond a 200-mile EEZ — was preserved; and provision for 'fair import' of minerals produced from the seabed was included, a protection for land-based producers spearheaded by the Australian delegation.[100] Australia's support for CHM in respect of international seabed resources was, in other words, a tactical concession in service of its main objective of securing sovereign resource rights in an expanded continental shelf; and a concession made only after consideration of the interests of land-based mining companies was included in the text of the *LOSC*. However, despite an initially receptive response to the final form of the 1982 *LOSC*, including the 'parallel system' for seabed exploitation provided for in Part XI, Australia signed but did not ratify the treaty.[101] Although it had previously indicated acceptance of the Part XI framework for seabed resources governance, Australia's support for the Convention was tempered by the election of US President Ronald Reagan, who rejected it explicitly because of the Part XI regime, a position mirrored by UK Prime Minister Margaret Thatcher.[102] This late rejection of Part XI by Australia's principal allies was to leave the law governing international seabed exploitation uncertain for another decade.

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96 Parliament of the Commonwealth of Australia, *Third United Nations Conference on the Law of the Sea: Report of the Australian Delegation* (Parliamentary Paper No 65, 9 March 1977) 9.

97 Joint Committee on Foreign Affairs and Defence, Parliament of the Commonwealth of Australia, *Australia, Antarctica and the Law of the Sea: Interim Report and Appendices* (Report, 1 June 1978).

98 John Bryant, '"The Common Heritage of Mankind": A Concept Sparkling with Promise', *The Canberra Times* (Canberra, 25 July 1980) 2.

99 Parliament of the Commonwealth of Australia, *Third Conference on the Law of the Sea: Report of the Australian Delegation* (Parliamentary Paper No 44, 26 May 1983) 18–20.

100 Ibid.

101 Stuart Kaye, 'Australia and the Negotiation of the Law of the Sea' (2015) 7(4) *Australian Journal of Maritime and Ocean Affairs* 256, 263. On the parallel system, see Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (Cambridge University Press, 2014) 152–61.

102 Donald Cameron Watt, 'To Sign or Not to Sign: The Debate in Britain on the Law of the Sea Convention' (1983) 38(3) *International Journal* 493, 498–500.

V THE *MOON AGREEMENT*: COMMON HERITAGE AND AUSTRALIAN URANIUM

Law of the sea negotiations largely overshadowed parallel negotiations over space resources, which occurred in the wings of the UN across the 1970s and early 1980s. Both seabed and space treaty regimes ultimately adopted the principle of common heritage, but the legal expression of the principle differed markedly between them. Australia supported the space resources settlement in the 1979 *Moon Agreement* before the seabed resources settlement, making the former its first official endorsement of the CHM principle. But even in the case of space, Australia's objective in acceding to the treaty was to expand Australia's sovereign resource base. Whilst now regarded as a contemporary if not futuristic concern, the regulation of resource exploitation on the moon and near bodies had been under debate in the UN COPUOS from its establishment in 1958. The strong association of the Antarctic with outer space instilled by the IGY spurred speculative consideration of the legal status of space resources, well in advance of the technological capacity to exploit them. In 1960, the International Institute of Space Law convened a working group to make proposals on the legal status of outer space. Its 1964 report proposed that celestial bodies or parts thereof should not be subject to 'national or private appropriation', an expansive framing that clearly applied to private proprietary as well as sovereign territorial claims.[103] However, the scope of the proposed prohibition was limited to apply to national entities in 1966.[104]

The 1967 *Outer Space Treaty*, which declared space the 'province of all mankind' and prohibited national appropriation,[105] therefore settled little. Academic and diplomatic debate on the legality of private appropriation of space resources intensified over the late 1960s and 1970s as UNCLOS III negotiations on the seabed regime progressed. The US view, established during the adoption of the *Outer Space Treaty* by the US Senate, was that the Treaty provided that private appropriation of resources once removed was permissible — a view consonant with prevailing understandings of *res communis omnium* — but that domicile states would be liable for any private actions in breach of international law.[106] That view was disputed by developing states, which drew connection with concurrent debates over Antarctica and the seabed to argue that private appropriation of lunar resources would serve the economic interests of a handful of developed states, in contradiction of the *Outer Space Treaty*'s foundational principles.

The *Moon Agreement* itself was drafted within the COPUOS between 1967 and 1979.[107] It was Argentinian diplomat Aldo Armando Cocca — a pioneer of international space law, from an Antarctic claimant state — who first suggested in June 1967 that a notion of *res communis humanitatus* be applied to the issue of space resource utilisation.[108] Following a range of competing submissions to the

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103 Carl Q Christol, 'The 1979 Moon Agreement: Where is it Today?' (1999) 27(1) *Journal of Space Law* 1, 2–3.

104 *Outer Space Treaty* (n 13) art II.

105 Ibid arts I–II.

106 Christol (n 103) 3.

107 Ibid 5.

108 Rüdiger Wolfrum, 'The Principle of the Common Heritage of Mankind' (1983) 43 *Zeitschrift fur ausländisches offentliches Recht und Völkerrecht* [Journal of Foreign Public Law and International Law] 312, 312; Storr, 'An Uncommons History of the Common Heritage of Mankind' (n 27).

COPUOS from Poland, France and the Soviet Union, concerted debate on the legal principles to apply to space resources began in the COPUOS Legal Sub-Committee of in 1972 among 28 member states.[109] Australia was an early supporter of the CHM approach proposed by Argentina along with the US, the UK, Egypt, Iran and India, as well as the bulk of developing countries who progressively joined the COPUOS over the early years. An active member of the COPUOS, the Soviet Union expressed strong suspicion of CHM on account of its imprecision and lack of practical need to settle an international regime, submitting its own working paper in 1973.[110]

Over seven years of debate within the COPUOS Legal Sub-Committee, little agreement was reached on the adoption or content of a CHM approach to space resource utilisation. Over 1978 and 1979, however, an unusual set of events resulted in the adoption of CHM in the final form of the treaty. Austria, which had led the drafting process and strongly supported inclusion of CHM, submitted a consolidated draft in 1978 that circumvented disagreement by declaring the moon and its natural resources the common heritage of mankind, whilst formulating CHM as 'find[ing] its expression in the provisions of th[e] Agreement'.[111] This formulation was intended to sever space resource negotiations from parallel negotiations over CHM in the First Committee of UNCLOS III and any related attempt to claim customary or *jus cogens* status for the principle. The Legal Sub-Committee submitted this consolidated draft to the COPUOS in 1979, which approved the final form of the *Moon Agreement* in July that year.[112] Once the draft *Moon Agreement* was approved in the COPUOS, the text was tabled in the UN's Special Political Committee ('SPC'), established in 1961 to address issues of decolonisation.[113] The SPC recommended adoption by the UN General Assembly, which occurred without a vote in December 1979.[114] Despite their unexpected acquiescence to the treaty text in 1979, neither the US nor the Soviet Union moved to sign, and the UK also backed away.[115]

In stark contrast to the Australian government's concerted focus on UNCLOS III, the UN's adoption of the *Moon Agreement* received little official or public attention in Australia, which at that time had little commercial interest in the issues at stake. Over the 1970s, attention to space policy within the DFA was trained

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109 Christol (n 103) 8–10.

110 Ibid 11.

111 Department of Foreign Affairs (Australia), *UN Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* (13 August 1979) (National Archives of Australia, 1762439); Patricia Minola, 'The Moon Treaty and the Law of the Sea' (1981) 18(3) *San Diego Law Review* 455, 468.

112 Minola (n 111) 457.

113 The SPC was later amalgamated with the UN's Fourth Committee, the Trusteeship Council: see UN Affairs, 'From the Colonies to the Space Race: Past, Present, Future Converge in Fourth Committee' *UN News* (Web Page, 28 December 2018) <https://news.un.org/en/story/2018/12/1029481>, archived at <https://perma.cc/UE3H-MU75>.

114 Christol (n 103) 17; Bin Cheng, 'The Moon Treaty: Agreement Governing the Activities of States on the Moon and Other Celestial Bodies within the Solar System other than the Earth, December 18, 1979' (1980) 33(1) *Current Legal Problems* 213, 217.

115 As Cheng later observed, the final COPUOS debates on the *Moon Agreement* were not recorded, leaving little trace of the reason for the Soviet Union's change of position; however, the signing of the second *Strategic Arms Limitation Treaty* that same day suggested a lateral bargain had been struck: Cheng (n 114).

primarily on the international debate over sovereign air rights and geostationary orbit, prompted by the 1976 *Declaration of the First Meeting of Equatorial Countries*, also known as the *Bogota Declaration*, in which eight equatorial states asserted sovereignty over geostationary orbit above sovereign airspace.[116] Australia participated in COPUOS and SPC negotiations over the 1970s, but with inconsistent degrees of attention and resourcing. Although the Australian delegation supported the final text of the *Moon Agreement* in 1979, the Fraser government made no moves toward signature between 1979 and 1984, when the Agreement entered into force.

Archival records show that Australia's position changed suddenly under the Hawke government in late 1984, resulting ultimately in Australia's accession to the *Moon Agreement* in mid-1986. As with the seabed regime, the government's reason for accepting the *Moon Agreement* had less to do with any support for the CHM principle itself than with domestic extractive interests. The Hawke government essentially acceded to the *Moon Agreement* to mitigate political fallout on the left following Bob Hawke's relaxation of Labor's uranium mining policy.[117] The archival record of Cabinet deliberations reveals a hasty process of ad hoc consultation that began in October 1984, spearheaded by then Minister for Foreign Affairs Bill Hayden.[118] That process was based on the presumption that the *Moon Agreement* was first and foremost a nuclear disarmament treaty. The Hawke government focused on the Agreement's demilitarisation provisions, which reiterated the basic logic of the 1967 *Outer Space Treaty* and, in the process, largely neglected its controversial CHM implications.[119] There were political reasons for this skewed focus: nuclear policy was one of the most volatile issues Hawke faced in his early years as Prime Minister, on both domestic and international fronts. Following his election in March 1983, Hawke walked a difficult line, endorsing both nuclear disarmament at international level, and increased uranium mining in Australia. A lifelong advocate of nuclear power, Hawke saw a key role for Australia in a global nuclear fuel cycle, a policy view developed in close concert with the Australian uranium mining industry.[120]

Hawke's electoral base was divided on this direction in party policy. Faced with mass rallies calling for nuclear disarmament and a ban on uranium in the first month of government, Hawke and Hayden opted to direct the focus to Australia's diplomatic record on disarmament, appointing Richard Butler as 'roving' Ambassador for Disarmament.[121] At the same time, Hawke refused to question the US nuclear build-up under Reagan, or the activity of US bases on Australian soil;

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116 'Australian Practice in International Law 1978–80' (1983) 8 *Australian Yearbook of International Law* 253, 338–9.

117 Cait Storr, 'Why Did Australia Sign the Moon Treaty?', *The Interpreter* (online, 24 May 2021) <https://www.lowyinstitute.org/the-interpreter/why-did-australia-sign-moon-treaty>, archived at <https://perma.cc/VR2X-HP79>.

118 Department of Foreign Affairs (Australia), *Space Law: Moon Treaty* (National Archives of Australia, A9737, 30711506, 1992/012609) pt 1.

119 Department of Foreign Affairs (Australia), 'Disarmament: Moon Treaty' (Outward Cablegram, 26 October 1984) (National Archives of Australia, A9737, 30711506, 1992/012609) pt 1a.

120 See generally Uranium Information Centre Limited, *Australia's Uranium: The Case for Mining and Export* (February 1985).

121 Michael Foster, 'Ambassador for Disarmament: Trying to Make Sure that Australia's Voice Is Heard', *The Canberra Times* (Canberra, 28 August 1983).

and at the Labor Party Conference in July 1984 he moved to relax the Party's awkward 'no new mines' policy to allow uranium mining to commence at Olympic Dam in South Australia.[122] Olympic would soon join Ranger and Nabarlek in the Northern Territory to become Australia's third operational uranium mine.[123] Hawke's softening of Labor's nuclear policy split the Party's left, spurring a defection of members, who joined with anti-uranium activists to form the new Nuclear Disarmament Party ('NDP') that month.[124] The NDP united a loose coalition against Hawke's nuclear policy, including the new Olympic Dam mine, the presence of US bases and warships, unreliable controls on the end use of exported uranium, and export to France.[125]

The NDP fast became an appreciable threat to Hawke, who took advantage of high personal approval ratings to call an early election for December 1984.[126] With only a few short months to stem the potential flow from its left, the Hawke government doubled down on its disarmament record. In October 1984, as the election campaign began, archival records show that Hayden directed his department to 'examine all multilateral disarmament … Treaties' to ensure that Australia's record was 'as complete as possible'.[127] The DFA honed in on the *Moon Agreement*, drawing little connection to a decade of international debate over CHM. Hawke won the election in December 1984, but the NDP's efforts made their mark. The NDP attracted over 7% of the Senate vote and deprived Labor of control in the upper house.[128] Anxious to recoup votes, Hawke pledged 'renewed vigour' in his 'unremitting efforts in the cause of peace and nuclear disarmament'.[129] From February 1985, the Disarmament and Multilateral Section in the DFA forged ahead with its *Moon Agreement* plan, despite clear international disinterest.[130] In May 1986, Australia's accession to the *Moon Agreement* was formally approved, as 'the last multilateral disarmament treaty open to Australia to become a party to'.[131] An instrument of accession was lodged with the UN that July. As such, Australia endorsed the adoption of CHM with respect to outer space well before it formally did so with respect to the seabed in the 1990s. Given the lack of Australian industrial interest at that time in space infrastructure or

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122 Paul Malone, 'Centre-Left Proposal Adopted: Pro-Uranium Plan for ALP Meeting', *The Canberra Times* (Canberra, 5 July 1984).

123 Paul Kay, 'Australia's Uranium Mines: Past and Present' (Research Paper, Parliamentary Library, Parliament of Australia, 1997).

124 Paul Malone, 'ALP Votes for Export of Uranium: Left to Continue Fight from within the Party', *The Canberra Times* (Canberra, 11 July 1984); Sian Prior, 'The Rise and Fall of the Nuclear Disarmament Party' (1987) 6(4) *Social Alternatives* 5.

125 Michael Denborough, 'Issues of Nuclear Disarmament', *The Canberra Times* (Canberra, 15 August 1984).

126 Brian Galligan, 'Political Review: The 1984 Australian Election' (1985) 57(1–2) *Australian Quarterly* 165, 173.

127 Department of Foreign Affairs (Australia), *Space Law: Moon Treaty* (n 118).

128 Jack Waterford, 'No Majority for Labor: NDP Has Chance of Two Senate Seats', *The Canberra Times* (Canberra, 2 December 1984) 16; Prior (n 124) 5.

129 Bob Hawke, 'Speech of 13 November 1984' (Speech, Sydney, 13 November 1984) <https://electionspeeches.moadoph.gov.au/speeches/1984-bob-hawke>, archived at <https://perma.cc/M636-44VW>.

130 Department of Foreign Affairs (Australia), *Space Law* (n 118) pt 1.

131 Department of Foreign Affairs (Australia), 'Moon Treaty: Australian Accession' (Ministerial Submission, 16 September 1985) (National Archives of Australia, A9737, 30711506, 1992/12609) pt 1.

resources, the DFA regarded CHM in space as of little, and potentially positive, consequence, and a small price to pay to insulate increased uranium extraction from domestic critique. As with the international seabed, then, Australia's endorsement of the CHM principle with respect to space was a tactical move in another battle: this time, for the Hawke government's uranium mining policy.

VI THE CONVENTION ON THE REGULATION OF ANTARCTIC MINERAL RESOURCE ACTIVITIES: SOVEREIGN RESOURCE RIGHTS VERSUS INTERNATIONAL REGULATION

In the early 1980s, the endorsement of CHM in the 1979 *Moon Agreement*, and its protracted and difficult path to elaboration in Part XI of the *LOSC* in 1982, increased international attention on the legal status of Antarctic resources.[132] As discussed above, the uneasy compromise between existing claimant parties formalised in the *Antarctic Treaty* only narrowly escaped direct diplomatic challenge from India in the UN in 1956 in the lead up to the IGY, when Nehru and Menon mounted a short-lived challenge to the pending Antarctic settlement on behalf of the NAM. The NAM challenge to the foundations of the Antarctic Treaty System ('ATS') resurfaced in 1982, this time led by Malaysia under Prime Minister Mahathir bin Mohamad.[133] In a speech to the General Assembly in September 1982, Mahathir linked both the principle of decolonisation and the CHM regime in *LOSC* Part XI to the broader theme of resource regulation in domains beyond national jurisdiction.[134] Mahathir then narrowed his focus to Antarctica, arguing that:

> [l]ike the seas and the sea-bed, those uninhabited lands belong to the international community. The countries now claiming them must give them up so that either the United Nations can administer those lands or the present occupants can act as trustees for the nations of the world.[135]

Mahathir's speech was prompted by the finalisation of the *Convention for the Conservation of Antarctic Marine Living Resources* ('*CCAMLR*') by ATS claimant and consultative parties in 1980. Malaysia sought support for its Antarctic challenge from fellow members of the NAM in New Delhi in March 1983.[136] However, Malaysia's campaign was met with predictable resistance from Argentina, and less predictable resistance from India, by that time itself preparing to accede to the ATS as a consultative party.[137] Brazil had become a consultative

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132 Christopher C Joyner, 'Antarctica and the Law of the Sea: Rethinking the Current Legal Dilemmas' (1981) 18(3) *San Diego Law Review* 415, 415–6, 425; Shirley V Scott, 'The Evolving Antarctic Treaty System: Implications of Accommodating Developments in the Law of the Sea' in Erik J Molenaar, Alex G Oude Elferink and Donald R Rothwell (eds), *The Law of the Sea and the Polar Regions: Interactions between Global and Regional Regimes* (Martinus Nijhoff, 2013) 17, 24 ('The Evolving Antarctic Treaty System').

133 Moritaka Hayashi, 'The Antarctica Question in the United Nations' (1986) 19(2) *Cornell International Law Journal* 275, 275.

134 *General Debate (Continued)*, UN GAOR, 37th sess, 10th plen mtg, Agenda Item 9, UN Doc A/37/PV.10 (29 September 1982) para 36.

135 Ibid.

136 Hayashi (n 133) 276.

137 Marcus Haward and David Mason, 'Australia, the United Nations and the Question of Antarctica' in Marcus Haward and Tom Griffiths (eds), *Australia and the Antarctic Treaty System: 50 Years of Influence* (University of New South Wales Press, 2011) 202, 206.

party in 1975 and China was to follow in 1985.[138] Despite this divergence of interests, the 1983 *NAM Economic Declaration* ultimately promoted Malaysia's Antarctica campaign in the UN. But it avoided CHM language, calling instead for 'comprehensive study' of the ATS by the UN General Assembly, with a view to widening international cooperation.[139] When Malaysia formally requested that the matter be inscribed for debate in the UN General Assembly in 1983, all *Antarctic Treaty* parties and consultative parties abstained from voting, and the question was referred to the First Committee without a vote.[140] The matter was listed annually for General Assembly debate between 1983 and 1988.

Malaysia's raising of the 'Antarctica question' in the UN General Assembly was prompted by the recommencement of mineral extraction negotiations within the *Antarctic Treaty* regime.[141] Between 1982 and 1988, ATS parties attempted the impossible task of devising a regime to regulate resource extraction that would both preserve original claimants' sovereign rights and accommodate consultative party and external developing country calls for inclusion. As discussed above, the *Antarctic Treaty* had — partly at Australia's insistence — avoided reference to resource extraction altogether and declared a general freedom of scientific exploration. This cemented a crucial distinction between the *Antarctic Treaty* and the later space and seabed regimes in their approaches to resource exploitation. In the later two treaty frameworks, the norm of 'peaceful purposes' explicitly included both scientific exploration *and* commercial resource exploitation, and allowed all states formally equal access for both purposes, albeit under some future regime of international oversight to give effect to the CHM principle of benefit sharing.[142] The *Antarctic Treaty*, on the other hand, permitted open scientific exploration, whilst leaving the question of commercial resource exploitation unanswered.[143] The attempt to insulate scientific from resource exploration was a logical consequence of the preservation of existing sovereign resource claims in Antarctica; but it inevitably proved absurd in practice. Exploration for petroleum, gas and mineral resources gathered pace over the 1970s, prompted in part by attempted nationalisations, the 1973 oil crisis and declarations on the NIEO and permanent sovereignty over natural resources in the UN.[144] In 1977, amid serious speculation regarding the grant of domestic licences to commercial entities, ATS parties agreed to a temporary moratorium on extractive activity to enable negotiation of a regulatory regime that would clarify the legal status of Antarctic resources.[145]

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138 Ibid 216.

139 Ibid 206–8.

140 Hayashi (n 133) 277.

141 Rolf Trolle Andersen, 'Negotiating a New Regime: How CRAMRA Came into Existence' in Arnfinn Jørgensen-Dahl and Willy Østreng (eds), *The Antarctic Treaty System in World Politics* (Palgrave Macmillan, 1991) 94; Rohan Tepper and Marcus Haward, 'The Development of Malaysia's Position on Antarctica: 1982 to 2004' (2005) 41(2) *Polar Record* 113, 114.

142 *Moon Agreement* (n 13) art 11; *LOSC* (n 12) arts 136, 140(2), 141.

143 *Antarctic Treaty* (n 11) art II.

144 Joyner (n 132) 427.

145 Andrew Jackson and Peter Boyce, 'Mining and "World Park Antarctica", 1982–1991' in Marcus Haward and Tom Griffiths (eds), *Australia and the Antarctic Treaty System: 50 Years of Influence* (University of New South Wales Press, 2011) 243, 244.

Australia's position on Antarctic mineral resources, established in the 1950s, was that the *Antarctic Treaty*'s freezing of sovereign claims preserved claims of exclusive and full sovereign resource rights.[146] Unsurprisingly, that view was shared by claimant parties but not consultative parties, who argued for the extension of freedom of scientific exploration to resource exploitation. In response to the real possibility of challenge to claimant parties' sovereign rights both outside and within the ATS, archival records show that the Hawke government initially moved to temper its position on resource rights, following internal advice in 1983 that 'concessions in the minerals area may have to be made so as to defuse the challenge to the [Antarctic Treaty] system'.[147] In the first few years of negotiations, Australia therefore indicated willingness to consider an inter-party regulatory regime for resource exploration and exploitation, subject to claimant party rights to levy tax on activity within claimed areas.[148] To counter escalating calls for full internationalisation of Antarctica, the federal government conceded that such a regime should include 'some form of external accommodation involving benefits for developing countries'.[149] At the same time, it sought superior financial recognition of claimant parties, protection of land-based producers via prohibition of 'unfair economic practices' via state subsidisation, and environmental protections.[150] Over the 1980s, however, negotiations progressively drifted away from these central objectives. The final version of *CRAMRA* concluded in June 1988 provided for the establishment of an Antarctic Mineral Resources Commission with delegated powers to grant exploration and development permits to regional Regulatory Committees.[151] It did not include special financial rights for claimant parties or prohibitions on state subsidisation of extractive activity.[152]

From 1988, the Hawke government was internally divided over the costs and benefits of *CRAMRA* to the maintenance of Australia's sovereign claim. Treasurer Paul Keating was critical of the potential for *CRAMRA*'s proposed regulatory regime to undermine Australia's sovereign resource rights claim.[153] Others within Cabinet were concerned over the domestic electoral fallout on the left of supporting resource exploitation in Antarctica, as non-governmental organisations including Greenpeace campaigned for the continent to be declared a 'world park'.[154] Despite initially supporting the *CRAMRA* compromise, then, in 1989 Hawke ultimately opted to promote a mining ban for Antarctica instead.[155] Hawke's mining ban had a strategic double effect: it placated environmental

146 'Cabinet Submission 746: Australian Objectives in Antarctic Minerals Negotiations' (Cabinet Submission, 4 May 1984) (National Archives of Australia, A13977, 31424725, 746); Gillian D Triggs, *International Law and Australian Sovereignty in Antarctica* (Legal Books, 1986) 233–5.

147 Ibid.

148 Ibid.

149 Ibid.

150 Ibid. As Scott and others have long noted, the ATS — and the failed *CRAMRA* — 'prioritiz[e] freedom of Antarctic science over the newer norm of comprehensive environmental protection': Scott, 'The Evolving Antarctic Treaty System' (n 132) 24.

151 *CRAMRA* (n 14) art 18.

152 Jackson and Boyce (n 145) 246.

153 Ibid 246–7.

154 Ibid.

155 Ibid 251.

NGOs and activists on the left while preserving Australia's sovereign resource claims within the AAT and its proclaimed EEZ. Domestically, Hawke was again faced in the late 1980s with the prospect of a new coalition of green left parties, this time ahead of the 1990 federal election.[156] The Antarctic mining ban was unilaterally legislated by Australia in the *Antarctic Mining Prohibition Act 1991* (Cth), following an established pattern of using domestic legislation to assert sovereignty over the AAT.[157] Australia's move was widely hailed as an environmental watershed, in a global moment sensitised by a series of major oil spills culminating in the Exxon Valdez disaster in Alaska, and the rise of environmental NGOs and electoral movements.[158] However, Australia's imposition of a mining ban was at heart less a rejection of resource exploitation in Antarctica per se than of the legal and financial terms of *CRAMRA* negotiated over the 1980s — and above all, of the risk a multilateral Antarctic Mineral Commission posed to the preservation of Australia's claim to exclusive sovereign resource rights.[159]

Australia's abandonment of *CRAMRA* effectively shelved the Convention, which required all claimant states to join as parties. However, Australia was not the only deserter. The attempt made in the final text to preserve sovereign claims whilst providing for a centrally managed licensing regime left the legal status of resources and profits derived unclear, and the environmental provisions proposed were ambiguous. Neither claimant nor consultative parties were satisfied, and neither were extractive interests or environmental campaigners.[160] Although *CRAMRA* was ultimately abandoned, Christopher Joyner has observed that the negotiation process was its most significant legacy, as it laid the normative groundwork for the *Protocol on Environmental Protection to the Antarctic Treaty* (the '*Madrid Protocol*') that followed in 1991.[161] The *Madrid Protocol* explicitly reinforced the *Antarctic Treaty* settlement itself, whilst designating Antarctica as a 'natural reserve, devoted to peace and science', and providing that '[a]ny activity relating to mineral resources, other than scientific research, shall be prohibited'.[162] The Protocol introduced environmental provisions for impact assessment and information sharing, and established a Committee for Environmental Protection. Most importantly, it provided a mechanism for review after the expiration of 50

156 See Hugh Compston, 'The Australian General Election of 1990' (1990) 9(3) *Electoral Studies* 237.

157 *Antarctic Mining Prohibition Act 1991* (Cth); James Crawford and Donald R Rothwell, 'Legal Issues Confronting Australia's Antarctica' (1992) 13 *Australian Year Book of International Law* 53, 77–8.

158 Andrew Jackson, *Who Saved Antarctica? The Heroic Era of Antarctic Diplomacy* (Palgrave Macmillan, 2021) 368–84.

159 Triggs (n 146) 233–5.

160 See generally Christopher Joyner, 'CRAMRA's Legacy of Legitimacy: Progenitor to the Madrid Environmental Protocol' (Antarctic and Southern Ocean Law and Policy Occasional Paper 7, University of Tasmania Institute of Antarctic and Southern Ocean Studies, 1995) 1–33.

161 Ibid 14–32.

162 *Protocol on Environmental Protection to the Antarctic Treaty,* opened for signature 4 October 1991, 2941 UNTS 3 (entered into force 14 January 1998) arts 2, 7.

years, in effect asserting an indefinite moratorium on resource exploitation.[163] Australia's endorsement of that moratorium, however, is entirely consistent with its underlying claim to sovereign resource rights in the AAT.

VII CONCLUSION: AUSTRALIA AND THE FUTURE OF RESOURCE EXTRACTION IN DOMAINS BEYOND NATIONAL JURISDICTION

As Shirley V Scott has long noted of the unusual détente established in the 1959 *Antarctic Treaty*, 'there is no reason to be complacent as to its future viability or longevity'.[164] This could well be said of all three of the three regimes negotiated between the late 1950s and the early 1990s to regulate resource extraction in areas beyond national jurisdiction. To date, only the Part XI regime in the *LOSC* has been implemented. The establishment of the International Seabed Authority occurred only after the 1994 *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea*, which largely gutted the CHM principle of any distributive potential, thereby facilitating acceptance of the comprehensive *LOSC* framework.[165] From the mid-20th century onward, when common rhetorical elements if not proto-principles could be discerned across all three domains, the question of how resource extraction beyond national jurisdiction should be regulated fractured into three geophysical- and function-specific treaty frameworks. For several decades, this fragmentation worked to stave off open debate within international institutions regarding the common conceptual, political and ultimately metaphysical problems of environmental and distributive justice that pertain to resource exploitation in all three domains. It also worked to stave off open reckoning, at least within international institutions, with the extractive foundations of 20th century constructs of development, themselves derived from far older constructs of European imperialism, as Third World Approaches to International Law ('TWAIL') and Marxist scholars in international law have now comprehensively documented.[166] To that extent, Australia's consistent prioritisation of sovereign extractive interests, even where it seemed to adopt the CHM principle, merely reflects the broader ascendance of liberal economic development as the proclaimed normative foundation of postwar international ordering, at least between the mid-1940s and the 2010s.

The aim of this article, however, is not to provide a conceptual explanation of Australia's carriage of Antarctic, outer space and seabed negotiations. It is simply to establish that across all three treaty frameworks, and despite appearances to the

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163 Anthony J Press and Andrew W Jackson, 'Mining in Antarctica to 2048 and Beyond' in Shirley V Scott, Tim Stephens and Jeffrey McGee (eds), *Geopolitical Change and the Antarctic Treaty System: Historical Lessons, Current Challenges* (Springer, 2024) 231, 240–1.

164 Scott, 'The Evolving Antarctic Treaty System' (n 132) 34.

165 *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, opened for signature 28 July 1994, 1836 UNTS 3 (entered into force 28 July 1996). See generally Isabel Feichtner, 'Sharing the Riches of the Sea: The Redistributive and Fiscal Dimension of Deep Seabed Exploitation' (2019) 30(2) *European Journal of International Law* 601.

166 See generally Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011); Ntina Tzouvala, *Capitalism as Civilization: A History of International Law* (Cambridge University Press, 2020).

contrary, Australia has consistently worked to secure and expand the field of sovereign resource rights. It has leveraged normative discourses of scientific internationalism, environmental protection and common heritage in order to pursue that organising objective. Narratives that champion Australia's environmental record in Antarctica and its formal adoption of CHM with respect to the seabed and space tend to avoid reckoning with the fact that environmental, scientific and common heritage justifications can be — and in fact have been — continuous with an approach to international law that remains at its core extractive and expansionist.

Now is an important moment to reassess both the history and the future of Australia's approach to the problem of resource extraction beyond national jurisdiction. The durability and longevity of the *Antarctic Treaty* regime is now in question, as US hegemony wavers and China and Russia test the limits of claimant states' capacity and willingness to defend their 20th century settlement.[167] At the same time, rapid movement in private and public space activity over the last few decades has once again rendered the failure of agreement on the foundational principles of space resources law a geopolitical fault line as the multilateral principles of the *Moon Agreement* are sidelined by the US' competing attempt to establish a regulatory regime for space activity via *The Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets and Asteroids for Peaceful Purposes*.[168] While the seabed regime administered by the International Seabed Authority has until recent years been less contentious, due to its institutional implementation over the last 30 years and its embeddedness within a far more comprehensive and widely accepted *LOSC*, the current transition from exploration to exploitation licensing is escalating tensions between states party committed to seabed mining, and those committed to a moratorium.[169] As each treaty regime again becomes a focal point of diplomatic tension with potentially sprawling consequences in international law and politics, it is time to examine Australia's historical prioritisation of its sovereign resource rights in these fields of international law — and to question whether that objective remains strategically and morally appropriate in a time of escalating geopolitical conflict and climate crisis.

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167 See generally Evan T Bloom, 'Implications of Current Global Tensions on the Effectiveness of the Antarctic Treaty System' in Shirley V Scott, Tim Stephens and Jeffrey McGee (eds), *Geopolitical Change and the Antarctic Treaty System: Historical Lessons, Current Challenges* (Springer, 2024) 135.

168 See generally Rossana Deplano, 'The Artemis Accords: Evolution or Revolution in International Space Law?' (2021) 70(3) *International and Comparative Law Quarterly* 799.

169 See generally Aline Jaeckel, 'Benefitting from the Common Heritage of Humankind: From Expectation to Reality' (2020) 35(4) *International Journal of Marine and Coastal Law* 660. See also Surabhi Ranganathan, 'The Participatory Scope of the Common Heritage Principle' (2024) 118 *AJIL Unbound* 88.