

# THE ANTARCTIC TREATY AT SIXTY YEARS: PAST, PRESENT AND FUTURE

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*The 1959 Antarctic Treaty entered into force on 23 June 1961. It remains as a unique example of an international law instrument providing a governance mechanism for a single continent. The Treaty celebrates its 60<sup>th</sup> anniversary at a time when Antarctica is increasingly coming under the spotlight with debate as to whether a Cold War treaty is capable of continuing to provide an appropriate governance framework for Antarctica in the 21<sup>st</sup> century. The debate has raised issues with respect to the ongoing interests and motivations of the seven Antarctic claimant states (Argentina, Australia, Chile, France, New Zealand, Norway, United Kingdom), the role of historically prominent non-claimant states such as the United States and the Russian Federation, and the interests of others such as China. This article assesses whether the Treaty and the associated 'Antarctic Treaty System' are sufficiently resilient to address the challenges confronting Antarctic governance in the 2020s. These challenges extend to accommodating the interests of the founding Treaty parties and subsequent Treaty parties with respect to their Antarctic aspirations, and the ongoing interest of states in Antarctica's mineral resources. Particular attention is given to whether it remains possible for Treaty parties to request an art XII 'Review Conference' and the treaty review mechanisms that exist within the 1991 Madrid Protocol on Environmental Protection. If the Antarctic Treaty is not capable of amendment, the options for treaty withdrawal are assessed.*

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## I INTRODUCTION

Negotiations for *The Antarctic Treaty* ('*Antarctic Treaty*')<sup>1</sup> were concluded in Washington on 1 December 1959 and the Treaty subsequently entered into force on 23 June 1961. The Treaty remains as a unique example of an international law instrument providing a governance mechanism for a single continent. The Treaty celebrates 60 years since its entry into force in 2021 at a time when Antarctica, and the polar regions more generally, are increasingly coming under the spotlight

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

with respect to their governance and applicable international law mechanisms.<sup>2</sup> Unlike the Arctic, however, where there is no regional treaty-based framework,<sup>3</sup> the *Antarctic Treaty* has been the legal foundation for governance in Antarctica and parts of the adjacent Southern Ocean. The Treaty spawned the Antarctic Treaty System ('ATS') which is generally considered to encompass the associated international instruments and treaties adopted by the Antarctic Treaty Consultative Parties ('ATCPs'), including the 1980 *Convention on the Conservation of Antarctic Marine Living Resources* ('CCAMLR')<sup>4</sup> and the 1991 *Madrid Protocol on Environmental Protection to the Antarctic Treaty* ('Madrid Protocol').<sup>5</sup> Membership of the *Antarctic Treaty* has also grown from the original 13 parties in 1961 to a total of 54 parties in 2021.

The *Antarctic Treaty*'s 60<sup>th</sup> anniversary coincides with a debate as to whether a Cold War treaty is capable of continuing to provide an appropriate governance framework for Antarctica in the 21<sup>st</sup> century.<sup>6</sup> The debate has raised issues with respect to the ongoing interests and motivations of the seven Antarctic claimant states (Argentina, Australia, Chile, France, New Zealand, Norway, United Kingdom), the role of historically prominent non-claimant states such as the United States and the Russian Federation, and the interests of powerful states

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<sup>2</sup> See, eg, Timo Koivurova, 'How to Improve Arctic International Governance' (2016) 6(1) *UC Irvine Law Review* 83; Alan D Hemmings, 'The Hollowing of Antarctic Governance' in Prem Shankar Goel, Rasik Ravindra and Sulagna Chattopadhyay (eds), *Science and Geopolitics of the White World: Arctic-Antarctic-Himalaya* (Springer, 2018) 17.

<sup>3</sup> The Arctic Council has established a framework for Arctic regional cooperation; however Arctic states have rejected the need for an 'Arctic-wide' Antarctic type treaty: see generally Timo Koivurova, Pirjo Kleemola-Juntunen and Stefan Kirchner, 'Arctic Regional Agreements and Arrangements' in Karen N Scott and David L VanderZwaag (eds), *Research Handbook on Polar Law* (Edward Elgar Publishing, 2020) 64; Oran R Young, 'Whither the Arctic? Conflict or Cooperation in the Circumpolar North' (2009) 45(232) *Polar Record* 73.

<sup>4</sup> *Convention on the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, 1329 UNTS 47 (entered into force 7 April 1982) ('CCAMLR').

<sup>5</sup> *Protocol on Environmental Protection to the Antarctic Treaty*, opened for signature 4 October 1991, 2941 UNTS 3 (entered into force 14 January 1998) ('Madrid Protocol').

<sup>6</sup> Some of this literature arises in the context of 'Antarctic futures' or assessing future legal options: see, eg, Bob Frame, 'A Typology for Antarctic Futures' (2019) 9(1) *Polar Journal* 236; Luis Valentín Ferrada, 'Five Factors That Will Decide the Future of Antarctica' (2018) 8(1) *Polar Journal* 84; Sanjay Chaturvedi, 'The Future of Antarctica: Minerals, Bioprospecting and Fisheries' in Mark Nuttall, Torben R Christensen and Martin J Siegert (eds), *The Routledge Handbook of the Polar Regions* (Routledge, 2018) 403; Daniela Liggett et al, 'Is It All Going South? Four Future Scenarios for Antarctica' (2017) 53(5) *Polar Record* 459; Alan D Hemmings, 'Re-Justifying the Antarctic Treaty System for the 21st Century: Rights, Expectations and Global Equity' in Richard C Powell and Klaus Dodds (eds), *Polar Geopolitics?: Knowledges, Resources and Legal Regimes* (Edward Elgar, 2014) 55; Karen N Scott, 'Managing Sovereignty and Jurisdictional Disputes in the Antarctic: The Next Fifty Years' (2009) 20(1) *Yearbook of International Environmental Law* 3. For an 'Antarctic futures' science perspective, see SR Rintoul et al, 'Choosing the Future of Antarctica' (2018) 558(7709) *Nature* 233.

that are beginning to express a strong interest in polar affairs such as China.<sup>7</sup> The interests of some states that joined the Treaty since 1961 have also been called into question.<sup>8</sup> For example, are they fully supportive of the key principles of the *Antarctic Treaty*? Are they seeking to use scientific engagement in Antarctica and their participation in the *Antarctic Treaty* as a means to gain leverage in Antarctic affairs and to eventually assert an Antarctic territorial claim? These questions are also being raised at a time when, as a result of climate change and technological advances, Antarctica is becoming more accessible to both states and others (adventurers, corporations, tourists, non-state actors), resulting in new challenges for Antarctic governance that were unforeseen in 1961. The isolation Antarctica once enjoyed from global affairs is no more. This was highlighted in 2020 when for much of the year it was the only continent to have not had COVID-19 cases during the pandemic. This streak was broken in December 2020 when COVID-19 was found amongst personnel at Chilean Antarctic research stations.<sup>9</sup>

The reality is that Antarctica is not the same as when the *Antarctic Treaty* was negotiated. At that time, the continent was just emerging from the ‘heroic era’ associated with its initial exploration and the territorial claims that followed. Science was a constant theme throughout this early period, culminating in the 1957–58 International Geophysical Year, which in turn flowed through to the negotiation of the *Antarctic Treaty* by only 12 states. The mechanisms associated with Antarctica’s governance at that time, when effectively a ‘club’ of states oversaw Antarctic affairs,<sup>10</sup> may not be appropriate in a different century and at a time when the legacies of those states engaged in the initial exploration and discovery of Antarctica are fading in both the political and public consciousness.

This article assesses whether the *Antarctic Treaty* and the ATS are sufficiently resilient to address the challenges that now confront Antarctic governance in the 2020s. These challenges extend to accommodating the interests of the founding *Antarctic Treaty* parties and subsequent Treaty parties with respect to their

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<sup>7</sup> Marcus Haward, ‘Contemporary Challenges to the Antarctic Treaty and Antarctic Treaty System: Australian Interests, Interplay and the Evolution of a Regime Complex’ (2017) 9(1) *Australian Journal of Maritime and Ocean Affairs* 21; Klaus Dodds and Alan D Hemmings, ‘Britain and the British Antarctic Territory in the Wider Geopolitics of the Antarctic and the Southern Ocean’ (2013) 89(6) *International Affairs* 1429; VV Lukin, ‘Russia’s Current Antarctic Policy’ (2014) 4(1) *Polar Journal* 199. See generally Alejandra Mancilla, ‘The Moral Limits of Territorial Claims in Antarctica’ (2018) 32(3) *Ethics and International Affairs* 339. Recent scholarship has suggested Ecuador is also a claimant state, but this view is not widely supported: see Robert Keith Headland, ‘Territory and Claims in the Antarctic Treaty Region: A Disquisition on Historical and Recent Developments’ (2020) 57(2) *Cartographic Journal* 160, 165.

<sup>8</sup> See, eg, Anne-Marie Brady, ‘China’s Rise in Antarctica?’ (2010) 50(4) *Asian Survey* 759.

<sup>9</sup> ‘COVID-19 Cases Linked to Chilean Antarctic Operations Rise to 58’, *ABC News* (online, 23 December 2020) <<https://www.abc.net.au/news/2020-12-23/more-covid-cases-linked-to-chilean-antarctic-base/13009706>>, archived at <<https://perma.cc/DG8N-EJPN>>. See also Bob Frame and Alan D Hemmings, ‘Coronavirus at the End of the World: Antarctica Matters’ (2020) 2(1) *Social Sciences and Humanities Open* 100054:1–5.

<sup>10</sup> The notion that Antarctica was governed by a ‘club’ of states gained prominence in the 1970s and 1980s at a time when the ATS was under critique from certain states in the United Nations General Assembly: see, eg, Patrick T Bergin, ‘Antarctica, the Antarctic Treaty Regime, and Legal and Geopolitical Implications of Natural Resource Exploration and Exploitation’ (1988) 4(1) *Florida International Law Journal* 1; FM Auburn, ‘Consultative Status under the Antarctic Treaty’ (1979) 28(3) *International and Comparative Law Quarterly* 514.

Antarctic aspirations such as the building of new scientific bases, and the ongoing interest of states in Antarctica's mineral resources. Particular attention is given to whether it remains possible for Treaty parties to request an art XII 'Review Conference' and the treaty review mechanisms that exist within the *Madrid Protocol*. If the *Antarctic Treaty* is not capable of amendment, the options for treaty withdrawal are assessed. The article concludes with some observations as to the future of the *Antarctic Treaty* and the ATS.

## II ANTARCTIC TREATY

The *Antarctic Treaty* was adopted during the height of the Cold War following a conference in Washington that brought together all key states then interested in Antarctic affairs.<sup>11</sup> That the Treaty was able to be negotiated in a relatively short period, albeit against the backdrop of preparatory meetings, was a testament to the level of consensus that existed around key issues at the time. A total of 12 states attended the negotiations and all became original signatories to the Treaty. These states were Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union ('USSR'), UK and the US. This group included the seven territorial claimants, the US and the USSR, the latter two of which had substantial historical interests in Antarctica, including in the immediate postwar period.<sup>12</sup> Pivotal to the Treaty being concluded was art IV concerning sovereignty, the effect of which was to set aside and neutralise sovereignty issues for the duration of the Treaty. The result was that the existing seven territorial claimants were unable to make any new claims or enlarge their existing claims. Potential territorial claimants such as the US and the USSR were likewise constrained from their ability to assert claims. Article IV also sought to deal with future sovereignty claims during the life of the Treaty, or at any time thereafter. The Treaty provided in art IV(2) that no activities taking place in Antarctica while the Treaty was in force were to 'constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica'.<sup>13</sup>

Having resolved, at least for the term of the *Antarctic Treaty*, the issue of sovereignty, the Treaty provided for a series of measures that were designed to facilitate the other objective of the Treaty which was to ensure that Antarctica remained a place where scientific research could be freely undertaken. This was reflected in art II, which sought to continue the spirit of the International

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<sup>11</sup> For a discussion of the negotiation of the treaty and its diplomatic history, see Rip Bulkeley, 'The Political Origins of the Antarctic Treaty' (2010) 46(236) *Polar Record* 9. See generally John Hanessian, 'The Antarctic Treaty 1959' (1960) 9(3) *International and Comparative Law Quarterly* 436; Robert D Hayton, 'The Antarctic Settlement of 1959' (1960) 54(2) *American Journal of International Law* 349.

<sup>12</sup> For a discussion on US and USSR interests, see FM Auburn, *Antarctic Law and Politics* (C Hurst, 1982) 61–83.

<sup>13</sup> The status of sovereignty under the *Antarctic Treaty* is one of the most commented upon aspects and has generated an extensive literature: see, eg, J Peter A Bernhardt, 'Sovereignty in Antarctica' (1975) 5(2) *California Western International Law Journal* 297; Donald R Rothwell, 'Sovereignty and the Antarctic Treaty' (2010) 46(236) *Polar Record* 17.

Geophysical Year.<sup>14</sup> Complementing this measure was art I, which provided that Antarctica was to be only used for peaceful purposes and that a range of military activities were prohibited. These pivotal provisions were supplemented by measures that sought to facilitate the exchange of scientific information,<sup>15</sup> prohibit nuclear explosions<sup>16</sup> and place constraints on the exercise of jurisdiction.<sup>17</sup> The Treaty's limits were set in art VI to encompass the area south of 60° south latitude, including ice shelves. A rudimentary governance regime was provided for by way of a regular meeting of the original parties in addition to those states which subsequently acceded to the Treaty and were able to demonstrate their scientific credentials through the conduct of 'substantial scientific research activity' as interpreted under art IX(2). These Treaty parties are collectively referred to as the Antarctic Treaty Consultative Parties ('ATCPs'). At the meeting of parties that became known as the Antarctic Treaty Consultative Meetings ('ATCMs'), recommendations could be adopted that sought to advance the key objectives of the Treaty in addition to the preservation and conservation of Antarctic living resources. The Treaty and associated instruments under the ATS also have formal procedures for dispute settlement, though to date they have not been activated.<sup>18</sup>

In addition to these measures the *Antarctic Treaty* also included two sets of mechanisms for modification and amendment. The first required the unanimous consent of the ATCPs; that is, those states eligible to attend the ATCMs.<sup>19</sup> The second provided that after 30 years any of the ATCPs could request a conference of the parties to 'review the operation of the Treaty'.<sup>20</sup> Amendments to the Treaty could be adopted by a majority at such a conference, after which following ratification, they would enter into force.<sup>21</sup> However, if such a measure had not entered into force within two years of its adoption, then any party could give notice of its intention to withdraw from the Treaty.<sup>22</sup> The effects of these provisions are discussed in more detail in Part V below.

The *Antarctic Treaty* entered into force on 23 June 1961 with an initial total of 13 states parties, comprising the original 12 states that attended the 1959 Washington conference and Poland, which also had an interest in Antarctic affairs and became the first state to accede to the Treaty. Over the intervening 60 years the number of parties has grown to 54, of which there are 29 ATCPs, as reflected in Table 1. What the historical data reveals regarding *Antarctic Treaty*

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<sup>14</sup> On the significance of the International Geophysical Year for the *Antarctic Treaty*, see Donald R Rothwell, 'The IPY and the Antarctic Treaty System: Reflections 50 Years Later' in Jessica M Shadian and Monica Tennberg (eds), *Legacies and Change in Polar Sciences: Historical, Legal and Political Reflections on the International Polar Year* (Ashgate, 2009) 125.

<sup>15</sup> *Antarctic Treaty* (n 1) art III.

<sup>16</sup> *Ibid* art V.

<sup>17</sup> *Ibid* art VIII.

<sup>18</sup> *Ibid* art XI. For an analysis of the ATS dispute settlement regime, see Donald R Rothwell, 'Dispute Settlement under the Antarctic Treaty System' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press, online at June 2018).

<sup>19</sup> *Antarctic Treaty* (n 1) art XII(1).

<sup>20</sup> *Ibid* art XII(2)(a).

<sup>21</sup> *Ibid* art XII(2)(b).

<sup>22</sup> *Ibid* art XII(2)(c).

membership is that during its first decade the Treaty attracted little additional interest and support from the international community. The 1980s, however, was a peak period of interest in *Antarctic Treaty* matters, with 18 states joining during that decade to effectively double the membership. The addition of new members hit a trough in the first decade of the 21<sup>st</sup> century but has revived to match the levels set during the 1990s since 2010.

*Table 1: Antarctic Treaty Parties, Indicating Year Status Attained*<sup>23</sup>

Number/Total	Period	States
13/13	1961	Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, Poland, South Africa, UK, US, USSR (Russia)
2/15	1962–69	Denmark (1965), Netherlands (1967)
4/19	1970–79	Brazil (1975), Bulgaria (1978), Germany (1979), Romania (1971)
18/37	1980–89	Austria (1987), Canada (1988), China (1983), Colombia (1989), Cuba (1984), Ecuador (1987), Finland (1984), Greece (1987), Hungary (1984), India (1983), Italy (1981), Korea (DPRK) (1987), Korea (ROK) (1986), Papua New Guinea (1981), Peru (1981), Spain (1982), Sweden (1984), Uruguay (1980)
7/44	1990–99	Czechia (1993), Guatemala (1991), Slovakia (1993), Switzerland (1990), Turkey (1996), Ukraine (1992), Venezuela (1999)
3/47	2000–09	Belarus (2006), Estonia (2001), Monaco (2008)
7/54	2010–19	Iceland (2015), Kazakhstan (2015), Malaysia (2011), Mongolia (2015), Pakistan (2012), Portugal (2010), Slovenia (2019)
54 Total		

### III ANTARCTIC TREATY SYSTEM

The *Antarctic Treaty* provided a foundation for the subsequent development of the ATS. This initially occurred through the adoption at ATCMs of recommendations which sought to reflect the agreed views of the ATCPs on a range of matters that fell within the remit of the Treaty. Increasingly the ATCPs sought to adopt recommendations dealing with Antarctic environmental and resource issues, and this resulted in agreement being reached on additional

<sup>23</sup> 'Parties', *Secretariat of the Antarctic Treaty* (Web Page) <<https://www.ats.aq/devAS/Parties?lang=e>>, archived at <<https://perma.cc/KQ5L-7M7T>>. For an assessment of Antarctic Treaty membership, see Melissa Weber, 'Power Politics in the Antarctic Treaty System' in Tim Stephens and David L VanderZwaag (eds), *Polar Oceans Governance in an Era of Environmental Change* (Edward Elgar, 2014) 86.

instruments that were negotiated to operate alongside the *Antarctic Treaty* or within the framework of the Treaty. These instruments are:

- the 1972 *Convention for the Conservation of Antarctic Seals* ('CCAS');<sup>24</sup>
- CCAMLR; and
- the *Madrid Protocol*.

All of these have entered into force, albeit with varying levels of support.<sup>25</sup> In addition, in 1988, the *Convention on the Regulation of Antarctic Mineral Resource Activities* ('CRAMRA')<sup>26</sup> was also concluded. This convention was designed to facilitate the development of a mining regime in Antarctica which would have been the first time such activities would have taken place on the continent. However, CRAMRA was effectively abandoned when key ATCPs decided to favour a regime for enhanced environmental protection rather than Antarctic mining, thereby resulting in the adoption of the *Madrid Protocol*.<sup>27</sup> This decision was a major turning point for the ATS as the ATCPs elected to support comprehensive Antarctic environmental protection over commercial mining. In doing so, Antarctica became further embedded in the global consciousness as a place reserved for environmental protection, the promotion of science and peaceful international relations, rather than the discord that may have developed if commercial mining had proceeded.

The effect of these additional instruments has been to create a regime for the regulation and protection of Antarctic seals, a regime for the regulation of Antarctic marine living resources which over time has been expanded from the regulation of fishing activities to now encompass marine protected areas, a prohibition on Antarctic minerals activities and a regime for the comprehensive protection of the Antarctic environment. This latter achievement, which has been realised under the provisions of the *Madrid Protocol*, also resulted in the creation

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<sup>24</sup> *Convention for the Conservation of Antarctic Seals*, opened for signature 1 June 1972, 1080 UNTS 175 (entered into force 11 March 1978) ('CCAS').

<sup>25</sup> The total number of parties to the various instruments is as follows: CCAS — 16; CCAMLR — 36 (26 Commission for the Conservation of Antarctic Marine Living Resources members and 10 acceding states); *Madrid Protocol* — 41. CCAMLR membership is not limited to *Antarctic Treaty* parties and includes the following non-*Antarctic Treaty* members: Cook Islands, European Union, Mauritius, Namibia, Panama and Vanuatu; see details at 'Membership', *Commission for the Conservation of Antarctic Marine Living Resources* (Web Page, 19 March 2020) <<https://www.ccamlr.org/en/organisation/membership>>, archived at <<https://perma.cc/6KQN-8CTW>>.

<sup>26</sup> *Convention on the Regulation of Antarctic Mineral Resource Activities*, opened for signature 25 November 1988, 27 ILM 859 (not yet in force).

<sup>27</sup> See, eg, Jorg G Podehl and Donald R Rothwell, 'New Zealand and the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA): An Unhappy Divorce?' (1992) 22(1) *Victoria University of Wellington Law Review* 23, 33–4.

of the Committee for Environmental Protection ('CEP'), which oversees a range of environmental protection measures under the *Madrid Protocol*.<sup>28</sup>

A consequence of these developments is that annual ATCMs have now become more important because of the monitoring and oversight role they play with respect to the Antarctic environment.<sup>29</sup> Another consequence of the development of the ATS has been additional commitments and obligations for the states parties. ATCPs, including those states that aspire to that status, are expected to have become parties to the *Madrid Protocol*.<sup>30</sup> Twelve of the current 25 non-ATCPs have also adopted the *Madrid Protocol* and thereby have shown their commitment to protection of the Antarctic environment.<sup>31</sup>

#### IV CHALLENGES AT 60 YEARS<sup>32</sup>

The *Antarctic Treaty* and the ATS have been able to respond to a number of political and legal challenges since 1959. Some of those challenges — including the failure to address the management of Antarctic resources or the Antarctic environment, and developments that have subsequently occurred in international law such as the law of the sea — have arisen as a result of the legacy of the Treaty itself given that it only comprises 14 articles. These challenges have been responded to through the negotiation and adoption of additional instruments such as *CCAMLR* and the *Madrid Protocol*, however these negotiations also created new tensions and challenges which needed to be politically managed. In particular, the conclusion of *CRAMRA* in 1988 was the catalyst for a significant backlash led by Australia and France which eventually resulted in the abandonment of the Treaty and adoption of the *Madrid Protocol* in its place.<sup>33</sup>

<sup>28</sup> For an assessment of the state of Antarctic governance following the conclusion of these instruments, see Davor Vidas (ed), *Implementing the Environmental Protection Regime for the Antarctic* (Kluwer Academic Publishers, 2000); Donald R Rothwell, 'Polar Environmental Protection and International Law: The 1991 Antarctic Protocol' (2000) 11(3) *European Journal of International Law* 591; Christopher C Joyner, *Governing the Frozen Commons: The Antarctic Regime and Environmental Protection* (University of South Carolina Press, 1998); Olav Schram Stokke and Davor Vidas (eds), *Governing the Antarctic: The Effectiveness and Legitimacy of the Antarctic Treaty System* (Cambridge University Press, 1996); Catherine Redgwell, 'Environmental Protection in Antarctica: The 1991 Protocol' (1994) 43(3) *International and Comparative Law Quarterly* 599; Francisco Orrego Vicuña, 'The Protocol on Environmental Protection to the Antarctic Treaty: Questions of Effectiveness' (1994) 7(1) *Georgetown International Environmental Law Review* 1; Francesco Francioni, 'The Madrid Protocol on the Protection of the Antarctic Environment' (1993) 28(1) *Texas International Law Journal* 47.

<sup>29</sup> COVID-19 resulted in cancellation of the 2020 ATCM: Secretariat of the Antarctic Treaty, 'Cancellation of ATCM XLIII — CEP XXIII' (Media Release, 13 March 2020) <<https://www.ats.aq/devph/en/news/176>>, archived at <<https://perma.cc/G7MG-R76G>>.

<sup>30</sup> *Madrid Protocol* (n 5) art 22(4).

<sup>31</sup> These states are Belarus, Canada, Colombia, Greece, Malaysia, Monaco, Pakistan, Portugal, Romania, Switzerland, Turkey and Venezuela: 'Parties' (n 23).

<sup>32</sup> For this author's assessment of the *Antarctic Treaty* after 30 years, see Donald R Rothwell, 'The Antarctic Treaty: 1961–1991 and Beyond' (1992) 14(1) *Sydney Law Review* 62. For an assessment at the 50<sup>th</sup> anniversary of the *Antarctic Treaty*, see Klaus Dodds, 'Governing Antarctica: Contemporary Challenges and the Enduring Legacy of the 1959 Antarctic Treaty' (2010) 1(1) *Global Policy* 108; Peter J Beck, 'Fifty Years On: Putting the Antarctic Treaty into the History Books' (2010) 46(236) *Polar Record* 4.

<sup>33</sup> For an Australian perspective on these developments, see 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* (UNSW Press, 2011) 243.



Another significant issue that was addressed during the 1980s was the debate over the ‘Question of Antarctica’ in the United Nations General Assembly.<sup>34</sup> United Nations members from the G77 bloc sponsored a debate that raised questions over the legitimacy of the ATS, arguing that it comprised a closed ‘club’ of states who, at that time, were seeking to conclude an Antarctic minerals regime that only they would benefit from. This critique was responded to in the UN by leading Antarctic states,<sup>35</sup> was eventually managed by the increased number of new states that gained ATCP status in the 1980s,<sup>36</sup> and the about turn that resulted in *CRAMRA*’s abandonment and the adoption of the *Madrid Protocol*. Accordingly, the importance of art 7 of the *Madrid Protocol* and the prohibition that it places on any activity relating to mineral resources, other than with respect to scientific research, should not be underestimated. The prohibition on mining significantly changed the discourse about Antarctica from one in which the claimant states and ATCPs were characterised as seeking to assert certain privileges over the continent and enjoy economic benefits to the exclusion of others, to one where Antarctica was presented as a ‘natural reserve’<sup>37</sup> that needed to be protected from the potentially devastating environmental impact arising from mining activities.<sup>38</sup> That change in direction for Antarctica has created significant legacies and expectations which still resonate today in global environmental discourse.<sup>39</sup> The expansion of the ATS over the decades so as to include the additional instruments has nevertheless been successful in keeping the focus on Antarctica being used for peaceful purposes and scientific research.

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<sup>34</sup> See generally Peter J Beck, ‘Twenty Years On: The UN and the “Question of Antarctica,” 1983–2003’ (2004) 40(214) *Polar Record* 205; Peter J Beck, ‘Antarctica at the UN 1988: Seeking a Bridge of Understanding’ (1989) 25(155) *Polar Record* 329; Moritaka Hayashi, ‘The Antarctica Question in the United Nations’ (1986) 19(2) *Cornell International Law Journal* 275; Peter J Beck, ‘The United Nations’ Study on Antarctica, 1984’ (1985) 22(140) *Polar Record* 499.

<sup>35</sup> For Australia’s role in these debates, see 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* (UNSW Press, 2011) 202. For the reflections of Richard Woolcott (Australian Ambassador to the United Nations 1982–88) on this period in the United Nations, see Richard Woolcott, *The Hot Seat: Reflections on Diplomacy from Stalin’s Death to the Bali Bombings* (HarperCollinsPublishers, 2003) ch 14.

<sup>36</sup> See below Table 2.

<sup>37</sup> *Madrid Protocol* (n 5) art 2.

<sup>38</sup> See, eg, Kees Bastmeijer and Steven van Hengel, ‘The Role of the Protected Area Concept in Protecting the World’s Largest Natural Reserve: Antarctica’ (2009) 5(1) *Utrecht Law Review* 61, 64–6; Redgwell (n 28); Francioni (n 28) 66–70; SKN Blay, ‘New Trends in the Protection of the Antarctic Environment: The 1991 Madrid Protocol’ (1992) 86(2) *American Journal of International Law* 377; Rodney R McColloch, ‘Protocol on Environmental Protection to the Antarctic Treaty — The Antarctic Treaty — Antarctic Minerals Convention — Wellington Convention — Convention on the Regulation of Antarctic Mineral Resource Activities’ (1992) 22(1) *Georgia Journal of International and Comparative Law* 211.

<sup>39</sup> See Rupert Summerson and Tina Tin, ‘Twenty Years of Protection of Wilderness Values in Antarctica’ (2018) 8(2) *Polar Journal* 265; Tim Stephens, ‘The Antarctic Treaty System and the Anthropocene’ (2018) 8(1) *Polar Journal* 29; Kees Bastmeijer, ‘Introduction: The Madrid Protocol 1998–2018. The Need to Address “the Success Syndrome”’ (2018) 8(2) *Polar Journal* 230.

## A Resource and Environmental Challenges

The principal challenges facing the *Antarctic Treaty* and the ATS at its 60<sup>th</sup> anniversary are resource and environmental-related. With respect to resources, while the ATS sought to respond to the management of fisheries through the adoption of *CCAMLR* and the issue of mineral resources through art 7 of the *Madrid Protocol*, there remain ongoing challenges and tensions. *CCAMLR* continues to confront issues associated with illegal, unreported and unregulated fishing,<sup>40</sup> and the enforcement and regulation of a fisheries regime in the Southern Ocean that neutralises traditional coastal state sovereignty and places emphasis on flag state and *CCAMLR*-member state enforcement occurring in one of the most remote bodies of water in the world. *CCAMLR* has also faced some challenges to its consensus-based decision-making processes following division amongst parties over efforts to agree upon Southern Ocean marine protected areas in the Ross Sea and adjacent waters.<sup>41</sup> While mining activities have been set aside for the duration of the *Madrid Protocol*,<sup>42</sup> as discussed below, there remains ongoing debate as to whether the mining prohibition may be overturned as a result of a review of the Protocol or the actions of states that choose to act outside of the ATS. There also remain issues regarding the status of the Southern Ocean deep seabed, which is beyond the jurisdiction of coastal states and falls within the remit of the International Seabed Authority.<sup>43</sup> These raise multiple complex issues under the 1982 *United Nations Convention on the Law of the Sea* ('*LOSC*'),<sup>44</sup> including *LOSC*'s application within the Southern Ocean and interaction with the ATS.<sup>45</sup> One particular issue is whether, given the environmental challenges associated with deep seabed mining in the Southern Ocean, the International Seabed Authority would be prepared to license states to undertake initial exploration of the Southern Ocean deep seabed.<sup>46</sup> Another

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<sup>40</sup> See, eg, D Miller and NM Slicer, 'CCAMLR and Antarctic Conservation: The Leader to Follow?' in Serge M Garcia, Jake Rice and Anthony Charles (eds), *Governance of Marine Fisheries and Biodiversity Conservation: Interaction and Coevolution* (Wiley Blackwell, 2014) 253.

<sup>41</sup> See Li Chaolun and Yang Guang, 'Marine Protected Areas in the Southern Ocean: Status and Future' (2018) 29(4) *Advances in Polar Science* 262.

<sup>42</sup> For a review of the potential of mining taking place in Antarctica in a contemporary context, see Karen N Scott, 'Ice and Mineral Resources: Regulatory Challenges of Commercial Exploitation' in Daniela Liggett et al (eds), *Exploring the Last Continent: An Introduction to Antarctica* (Springer, 2015) 487.

<sup>43</sup> See Scott Joblin, 'The Legal Status *Effossio* of the Hydrocarbons of the Southern Ocean Area: Questions of Antarctic Environmental Protection and Possible Minerals Exploitation under International Law' (PhD Thesis, Australian National University, 21 December 2019); Linda A Malone, 'The Waters of Antarctica: Do They Belong to Some States, No States, or All States?' (2018) 43(1) *William and Mary Environmental Law and Policy Review* 53; Christopher C Joyner, 'The Antarctic Treaty and the Law of the Sea: Fifty Years On' (2010) 46(1) *Polar Record* 14; Luigi Migliorino, 'The New Law of the Sea and the Deep Seabed of the Antarctic Region' in Francesco Francioni and Tullio Scovazzi (eds), *International Law for Antarctica* (Kluwer Law International, 2<sup>nd</sup> ed, 1996) 395.

<sup>44</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) ('*LOSC*').

<sup>45</sup> See Christopher C Joyner, *Antarctica and the Law of the Sea* (Martinus Nijhoff Publishers, 1992).

<sup>46</sup> For a discussion of legal issues associated with such activity, see Isabel Feichtner, 'Contractor Liability for Environmental Damage Resulting from Deep Seabed Mining Activities in the Area' (2020) 114 *Marine Policy* 103502:1–10; Joblin (n 43).

Antarctic resource-related activity that has been under review for over a decade is bioprospecting.<sup>47</sup> Regulation of bioprospecting is challenging, and it raises critical issues with respect to its characterisation.<sup>48</sup> Is it a form of scientific research or is it a commercially extractive activity akin to mining? ATS regulation is made difficult because of the limited reach of the *Antarctic Treaty*, an example being bioprospecting is not an activity that falls within the scope of art 7 of the *Madrid Protocol*. Bioprospecting undertaken as scientific research within an *Antarctic Treaty* context also needs to be assessed against any potential environmental impact, even if the activity is one that is minor or transitory.<sup>49</sup>

Environmental protection and management remains an ongoing challenge. A prominent example has been how proposals for new scientific research stations from both current and prospective ATCPs are to be assessed against the environmental standards of the *Madrid Protocol*. As the Protocol's annex I standards of environmental impact assessment requiring in some instances comprehensive environmental evaluation have been applied, some states have found their proposals for station upgrades and development have been deferred and delayed with consequential impacts upon their Antarctic programs.<sup>50</sup> A related issue arising from another human activity in Antarctica is that of tourism. Prior to the COVID-19 pandemic, a surge in passenger numbers meant that there had been more visitations to Antarctica than at any other time in its history.<sup>51</sup> This has resulted in a range of challenges relating not only to environmental

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<sup>47</sup> For a discussion of a recent bioprospecting activity, see Mariana Elizabeth Danilovich et al, 'Antarctic Bioprospecting: In Pursuit of Microorganisms Producing New Antimicrobials and Enzymes' (2018) 41(7) *Polar Biology* 1417.

<sup>48</sup> See generally Julia Jabour-Green and Dianne Nicol, 'Bioprospecting in Areas outside National Jurisdiction: Antarctica and the Southern Ocean' (2003) 4(1) *Melbourne Journal of International Law* 76. For a detailed discussion of bioprospecting, see Tullio Scovazzi, 'Bioprospecting on the Deep Seabed: A Legal Gap Requiring to be Filled' in Francesco Francioni and Tullio Scovazzi (eds), *Biotechnology and International Law* (Hart Publishing, 2006) 81; Patrizia Vigni, 'Antarctic Bioprospecting: Is It Compatible with the Value of Antarctica as a Natural Reserve?' in Francesco Francioni and Tullio Scovazzi (eds), *Biotechnology and International Law* (Hart Publishing, 2006) 111; Ann-Isabelle Guyomard, 'Bioprospecting in Antarctica: A New Challenge for the Antarctic Treaty System' in Francesco Francioni and Tullio Scovazzi (eds), *Biotechnology and International Law* (Hart Publishing, 2006) 147.

<sup>49</sup> See *Madrid Protocol* (n 5) annex I art 2(2).

<sup>50</sup> See, eg, Secretariat of the Antarctic Treaty, 'CEP XXI Report' in Secretariat of the Antarctic Treaty, *Final Report of the Forty-First Antarctic Treaty Consultative Meeting* (2018) vol 1, 61, 70–1 [19]–[20].

<sup>51</sup> At the 2018 ATCM, it was reported that

Antarctic tourism continued to be primarily focused on traditional commercial ship-borne tourism in the Antarctic Peninsula, which accounted for over 95% of all landed activity. In the 2017–18 season, 42,576 people landed in Antarctica, including those from IAATO land-based operators, which surpassed the previous season. IAATO noted that this was in part due to vessels being operated with higher passenger capacity and that the industry was benefitting from strong world economic growth ... IAATO's estimates for the 2018–19 season indicated that passenger numbers would rise to circa 55,764 individuals, in line with global trends of travel growth to remote and high latitude places.

Secretariat of the Antarctic Treaty, 'Final Report' in Secretariat of the Antarctic Treaty, *Final Report of the Forty-First Antarctic Treaty Consultative Meeting* (2018) vol 1, 13, 36 [73]. See also Nicole A Bender, Kim Crosbie and Heather J Lynch, 'Patterns of Tourism in the Antarctic Peninsula Region: A 20-Year Analysis' (2016) 28(3) *Antarctic Science* 194. As to the impact of the pandemic on Antarctic tourism, see generally Frame and Hemmings (n 9).

impact assessment but also pollution arising from increased shipping operations.<sup>52</sup> It has also raised concerns about the emergency response capabilities of the *Antarctic Treaty* parties in the event of a maritime incident.<sup>53</sup> While the *Madrid Protocol* has a number of provisions capable of regulating tourism, the effectiveness of these measures is dependent upon individual states, especially flag states, and national laws in this respect can prove to be variable.

Antarctica is also confronting the impact of climate change,<sup>54</sup> however this is not something the ATS has oversight of as it is a global environmental, legal and political issue. The international climate law regime postdates the adoption of the ATS, and, notwithstanding the sensitivity of Antarctica to the impacts of climate change, no direct reference is made to the region. Nevertheless, this does not mean that there is no role for the ATCPs in particular in taking a lead role to seek the development and implementation of a robust global climate regime with a view to enhance the protection of Antarctica.<sup>55</sup> In this regard, it can be observed that all parties to the *Antarctic Treaty* are also parties to the *Paris Agreement* and the 1992 *United Nations Framework Convention on Climate Change*.<sup>56</sup>

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<sup>52</sup> See Sira Engelbertz, Daniela Liggett and Gary Steel, 'Values Underlying the Management of Ship-Borne Tourism in the Antarctic Treaty Area' (2015) 5(2) *Polar Journal* 334, 345. For an example of how states approached these emerging challenges, see Daniela Liggett and Emma J Stewart, 'Polar Cruise Tourism' in Karen N Scott and David L VanderZwaag (eds), *Research Handbook on Polar Law* (Edward Elgar Publishing, 2020) 293, 317–22.

<sup>53</sup> See, eg, Martin Boyle, 'Emergency Response in Antarctica' [2017] (32) (January) *Australian Antarctic Magazine* 9; Keyuan Zou and Xinchang Liu, 'New Trends in China's Practice in Antarctic Expedition Management' (2015) 30(3) *International Journal of Marine and Coastal Law* 533.

<sup>54</sup> For recent scientific literature on the evidence of climate change in the Antarctic, see Claire L Parkinson, 'A 40-Y Record Reveals Gradual Antarctic Sea Ice Increases Followed by Decreases at Rates Far Exceeding the Rates Seen in the Arctic' (2019) 116(29) *Proceedings of the National Academy of Sciences of the United States of America* 14414; Alexander A Robel, Hélène Seroussi and Gerard H Roe, 'Marine Ice Sheet Instability Amplifies and Skews Uncertainty in Projections of Future Sea-Level Rise' (2019) 116(30) *Proceedings of the National Academy of Science of the United States of America* 14887; Andrew Shepherd et al, 'Trends in Antarctic Ice Sheet Elevation and Mass' (2019) 46(14) *Geophysical Research Letters* 8174.

<sup>55</sup> For proposals on how this regime can be achieved, see Duncan French and Karen Scott, 'International Legal Implications of Climate Change for the Polar Regions: Too Much, Too Little, Too Late?' (2009) 10(2) *Melbourne Journal of International Law* 631, 652–4.

<sup>56</sup> *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016); *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994). The US withdrew from the *Paris Agreement* as from November 2020; however the Biden Administration gave notice of the intention of the US to rejoin on 20 January 2021: Joseph R Biden Jr, 'Paris Climate Agreement' (Media Release, White House, 20 January 2021) <<https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/>>, archived at <<https://perma.cc/ZR4B-JVN7>>. For a list of parties to the *Paris Agreement* and the *United Nations Framework Convention on Climate Change*, see 'Paris Agreement', *United Nations Treaty Collection* (Web Page) <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-7-d&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en)>, archived at <<https://perma.cc/5H6R-BA9Z>>; 'United Nations Framework Convention on Climate Change', *United Nations Treaty Collection* (Web Page) <[https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg\\_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en)>, archived at <<https://perma.cc/8SXN-C5BX>>.

### B *Interests of the Parties*

A challenge also exists within the ATS with respect to the differing views and interests of the parties.<sup>57</sup> Of the 54 *Antarctic Treaty* states parties, the core group remains the 29 ATCPs. These are the states that have historic interests in Antarctica or, through their commitment to Antarctic science, have indicated a substantial interest in one of the key pillars of the *Antarctic Treaty*.<sup>58</sup> The 29 ATCPs include the original 12 *Antarctic Treaty* parties and Brazil, Bulgaria, China, Czechia, Ecuador, Finland, Germany, India, Italy, Korea (ROK), Netherlands, Peru, Poland, Spain, Sweden, Ukraine and Uruguay. As Table 2 indicates, there have been distinct phases throughout the life of the Treaty when ATCP status has been attained, with a peak occurring in the 1980s.

*Table 2: Antarctic Treaty Consultative Parties, Indicating Year Status Attained*<sup>59</sup>

Number	Period	States
12	1961	Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, UK, US, USSR (Russia)
0	1962–69	
1	1970–79	Poland (1977)
11	1980–89	Brazil (1983), China (1985), Finland (1989), Germany (1981), India (1983), Italy (1987), Korea (ROK) (1989), Peru (1989), Spain (1988), Sweden (1988), Uruguay (1985)
3	1990–99	Bulgaria (1998), Ecuador (1990), Netherlands (1990)
1	2000–09	Ukraine (2004)
1	2010–19	Czech Republic (2014)
29 Total		

However, this group itself can be divided into two groups: the 12 original *Antarctic Treaty* parties who by virtue of their status comprised the founding consultative parties and the remaining 17 that have subsequently attained ATCP status. Of the original 12, legitimate questions could be posed with respect to whether they all retain the same level of enthusiasm for Antarctic affairs and science as they did in the 1950s.<sup>60</sup> Likewise, similar questions could be posed with respect to those ATCPs which were accredited 30–40 years ago. A distinction is made in the *Antarctic Treaty* between the original ATCPs which retain that status irrespective of their commitment to Antarctica and the art IX(2)

<sup>57</sup> See also Liggett et al (n 6) 461.

<sup>58</sup> For a discussion of ATCP status, see Auburn, ‘Consultative Status under the Antarctic Treaty’ (n 10); Pavel Sladký, ‘Consultative Status under the Antarctic Treaty’ (2010) 1 *Czech Yearbook of International Law* 146; Andrew D Gray and Kevin A Hughes, ‘Demonstration of “Substantial Research Activity” to Acquire Consultative Status under the Antarctic Treaty’ (2016) 35(1) *Polar Research* 34061:1–12.

<sup>59</sup> ‘Parties’ (n 23).

<sup>60</sup> For an analysis of the scientific output of the ATCPs, see John R Dudeney and David WH Walton, ‘Leadership in Politics and Science within the Antarctic Treaty’ (2012) 31(1) *Polar Research* 11075:1–9.

ATCPs which retain their status ‘during such time’ as they demonstrate their interest in Antarctica by the conduct of scientific research and related activities.<sup>61</sup> The other observation that can be made is that as highlighted in Table 2 the number of newly accredited ATCPs has slowed considerably since the peak of the 1980s when 11 were granted ATCP status. The level of interest in states attaining ATCP status has diminished in recent decades with only five new ATCPs admitted since 1990, the most recent being the Czech Republic in 2014.<sup>62</sup> This general lack of enthusiasm for the *Antarctic Treaty* is also reflected by only seven states having become parties in the past decade and a total of only 10 this century,<sup>63</sup> notwithstanding that there are no constraints upon accession. There may be multiple reasons for an apparent lack of interest by the majority of the international community in *Antarctic Treaty* membership. However, unlike the United Nations debates of the 1980s over the ‘Question of Antarctica’ there are no equivalent present discussions occurring over the legitimacy of the Treaty or the ATS.

Some further observations can be made regarding the mix of states that are ATS parties. Table 3 provides a breakdown of *Antarctic Treaty* parties based on their assigned membership of United Nations Regional Groups.<sup>64</sup> Given their historic interest in Antarctica, and complementary interests of some in the Arctic, it is not surprising that the Western European and Others Group (‘WEOG’) comprises the largest group of states parties to the ATS, including those that are claimant states, original parties and ATCPs. The Eastern European, Asia-Pacific, and Latin American and Caribbean Groups have very similar levels of engagement with the ATS, though the Asia-Pacific Group has lower numbers of original parties and ATCPs and also has no claimant state within its group. The most striking feature of Table 3 is the under-representation of the African Group with South Africa its only member.<sup>65</sup>

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<sup>61</sup> In this respect it can be observed that no ATCPs have had their status removed; as to the requirements for ATCP status, see Serge Pannatier, ‘Acquisition of Consultative Status under the Antarctic Treaty’ (1994) 30(173) *Polar Record* 123.

<sup>62</sup> As to the current procedure for attaining ATCP status, see Secretariat of the Antarctic Treaty, ‘Decisions’ in Secretariat of the Antarctic Treaty, *Final Report of the Fortieth Antarctic Treaty Consultative Meeting* (2017) vol 1, 229–36.

<sup>63</sup> Those states are Belarus (2006), Estonia (2001), Iceland (2015), Kazakhstan (2015), Malaysia (2011), Monaco (2008), Mongolia (2015), Pakistan (2012), Portugal (2010) and Slovenia (2019): see above Table 1.

<sup>64</sup> For details, see ‘Regional Groups of Member States’, *United Nations Department for General Assembly and Conference Management* (Web Page) <<https://www.un.org/dgacm/en/content/regional-groups>>, archived at <<https://perma.cc/3S72-3BU8>>.

<sup>65</sup> For background, see Klaus J Dodds, ‘South Africa and the Antarctic, 1920–1960’ (1996) 32(180) *Polar Record* 25. The only other African states engaged in the ATS are Namibia and Mauritius through their status as CCAMLR parties. Given the physical proximity of parts of Southern Africa to Antarctica, the lack of engagement by African states with the ATS is surprising.

*Table 3: Antarctic Treaty Parties as per United Nations Regional Groups of Member States*

UN Regional Group	Treaty Parties	Original/ATCP	Total
African Group	South Africa	1/1	1
Asia-Pacific Group	China, India, Japan, Kazakstan, Korea (DPRK), Korea (ROK), Malaysia, Mongolia, Pakistan, Papua New Guinea	1/4	10
Eastern European Group	Belarus, Bulgaria, Czech Republic, Estonia, Hungary, Poland, Romania, Russian Federation, Slovakia, Slovenia, Ukraine	2/5	11
Latin American and Caribbean Group	Argentina, Brazil, Chile, Colombia, Cuba, Ecuador, Guatemala, Peru, Uruguay, Venezuela	2/6	10
Western European and Others Group	Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Monaco, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, UK, US	7/13	22

Within this group of states, there are further categories which legally and politically are significant for the future of the *Antarctic Treaty*. The first is the seven claimant states. Each has their own interests in Antarctica which have historical underpinnings that extend back in most cases for over 100 years. For Argentina, Australia,<sup>66</sup> Chile and New Zealand, Antarctica is physically proximate and generally impacts upon the consciousness of each state.<sup>67</sup> In the case of France, Norway and the UK, though their Antarctic historical legacies are foundational, they are all European states from another hemisphere. In addition, Norway has territorial claims and significant scientific interests in the Arctic. For the remaining five original Treaty parties the interests of each differ. Russia and the US are both legitimate polar nations, and in recent years their engagement in Arctic affairs has increased. Nevertheless, both retain significant Antarctic interests through their physical presence on the continent, their research

<sup>66</sup> On Australia's engagement with Antarctica, see Marcus Haward and Tom Griffiths (eds), *Australia and the Antarctic Treaty System: 50 Years of Influence* (UNSW Press, 2011).

<sup>67</sup> In this respect, it needs to be borne in mind that while Antarctic sovereignty has been neutralised under the terms of art IV of the *Antarctic Treaty*, the interests of the claimant states remain. For a discussion of how Antarctic sovereignty is reflected in a form of 'sovereignty watch' amongst and between the territorial claimants, see Klaus J Dodds, 'Sovereignty Watch: Claimant States, Resources, and Territory in Contemporary Antarctica' (2011) 47(242) *Polar Record* 231.

programs and engagement with the ATS.<sup>68</sup> Belgium, Japan<sup>69</sup> and South Africa also have different Antarctic interests, which in the case of South Africa is also reflected in their sub-Antarctic territories. All of the original *Antarctic Treaty* parties, however, would appear to clearly retain a strong interest in maintaining the Antarctic status quo as reflected in the foundational compact provided by the Treaty.<sup>70</sup>

Of the remaining 42 *Antarctic Treaty* parties, 17 of which are ATCPs, there are also a variety of interests. Amongst the ATCP group there are some such as Poland which have historic interests in Antarctica. Others have interests based on geographic proximity, which in turn reflects a geopolitical interest in Antarctica.<sup>71</sup> Asian states are of particular interest, with India, China and Korea (ROK) all becoming ATCPs during the 1980s, with each having gained that status shortly after acceding to the Treaty.<sup>72</sup> China's interests in Antarctica, as noted below, have particularly been the focus of attention, with a significant growth in China's physical presence through both personnel and research stations.<sup>73</sup>

<sup>68</sup> For a review of US interests in Antarctica, see Christopher C Joyner, 'United States Foreign Policy Interests in the Antarctic' (2011) 1(1) *Polar Journal* 17; Christopher C Joyner and Ethel R Theis, *Eagle over the Ice: The US in the Antarctic* (University Press of New England, 1997). For a review of Russian/Soviet interests, see Lukin (n 7); Ekaterina Uryupova and Vasily Spiridonov, 'Russia and the Environmental Protection of Antarctica: The 25th Anniversary of the Madrid Protocol' (2017) 53(271) *Polar Record* 376; Boleslaw A Boczek, 'The Soviet Union and the Antarctic Regime' (1984) 78(4) *American Journal of International Law* 834.

<sup>69</sup> On Japan's engagement with the Antarctic Treaty System, see Christopher C Joyner, 'Japan and the Antarctic Treaty System' (1989) 16(1) *Ecology Law Quarterly* 155; Akiho Shibata, 'Japan and 100 Years of Antarctic Legal Order: Any Lessons for the Arctic?' (2015) 7 *Yearbook of Polar Law* 3.

<sup>70</sup> For example, the US Department of State has the following statement on its website: 'The Office of Ocean and Polar Affairs develops and coordinates US policy affecting the Antarctic region, working to ensure that the Antarctic continues to be reserved for peace and science and to conserve marine life in the Southern Ocean': 'Key Topics: Office of Ocean and Polar Affairs', *US Department of State* (Web Page) <<https://www.state.gov/key-topics-office-of-ocean-and-polar-affairs/>>, archived at <<https://perma.cc/5EWY-LH66>>. The Australian Antarctic Division states as follows:

Australia has strong and longstanding interests in Antarctica which are protected by the Antarctic Treaty system. The Antarctic Treaty system maintains Antarctica's freedom from strategic or political confrontation, protects its unique environment, and safeguards our sovereignty over the Australian Antarctic Territory.

'Australia and the Antarctic Treaty System', *Australian Antarctic Program* (Web Page, 7 April 2016) <<https://www.antarctica.gov.au/about-antarctica/law-and-treaty/australia-and-antarctic-treaty-system/>>, archived at <<https://perma.cc/2CUF-HQSW>>.

<sup>71</sup> This encompasses the Latin American states of Brazil, Ecuador, Peru and Uruguay: see generally Jack Child, "Latin Lebensraum": The Geopolitics of Ibero-American Antarctica' (1990) 10(4) *Applied Geography* 287.

<sup>72</sup> China acceded to the *Antarctic Treaty* in 1983 and became an ATCP in 1985, India acceded in August 1983 and became an ATCP in September 1983, while Korea (ROK) acceded in 1986 and became an ATCP in 1989. For background on the interest of Asian states in Antarctica, see RA Herr and BW Davis (eds), *Asia in Antarctica* (Centre for Resource and Environmental Studies, 1994).

<sup>73</sup> For some historical background on China's then developing *Antarctic Treaty* interests and presence, see Zou Keyuan, 'China's Antarctic Policy and the Antarctic Treaty System' (1993) 24(3) *Ocean Development and International Law* 237. While for a more contemporary assessment, see Brady, 'China's Rise in Antarctica?' (n 8).



Of the remaining 25 acceding states parties, some have polar interests arising from their engagement in the Arctic such as Canada and Iceland.<sup>74</sup> Others, such as Malaysia, have had a longstanding interest in Antarctic affairs<sup>75</sup> but have only in the past decade begun to actively engage with the ATS and Antarctic science. Some states have become *Antarctic Treaty* parties but have since not actively engaged in the ATS, as reflected in their failure to accede to the *Madrid Protocol*, *CCAS* or *CCAMLR*. There may be a number of reasons for this, including the costs associated with active engagement with the ATS, such as attending the annual ATCMs.<sup>76</sup>

While the level of ATS engagement amongst states may be variable, one state whose level of Antarctic engagement and in the ATS more generally which has attracted increasing attention has been China. After having acceded to the *Antarctic Treaty* in 1983, China became an ATCP in 1985.<sup>77</sup> China has been able to participate in all of the major legal and political debates concerning Antarctica in recent decades, including the negotiation of *CRAMRA*, the *Madrid Protocol* and the 2016 adoption by *CCAMLR* of the Ross Sea Marine Protected Area.<sup>78</sup> Consistent with China's ATCP status, it has a significant Antarctic scientific research presence which now encompasses four research stations, three airfields and two field camps.<sup>79</sup> A fifth research station is under construction and projected to be completed in 2022.<sup>80</sup> China is also engaged in the deployment of new icebreakers and fixed wing aircraft to support its Antarctic research programs,<sup>81</sup> which Nengye Liu and Cassandra M Brooks characterise as allowing China to 'better understand Antarctica and strengthen the Chinese presence in the region, while supporting China's ambition to become a

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<sup>74</sup> For a discussion of Iceland's accession to the *Antarctic Treaty*, see Sune Tamm, Julia Jabour and Rachael Lorna Johnstone, 'Iceland's Accession to the Antarctic Treaty' (2017) 9 *Yearbook of Polar Law* 262.

<sup>75</sup> See generally Rohan Tepper and Marcus Haward, 'The Development of Malaysia's Position on Antarctica: 1982 to 2004' (2005) 41(217) *Polar Record* 113.

<sup>76</sup> Brady takes this critique further, noting that '[t]he high cost of research and base building is a crucial important barrier to emerging and developing countries participating in the ATS': Anne-Marie Brady, 'Opinion: Democratising Antarctic Governance' (2012) 2(2) *Polar Journal* 451, 453 ('Democratising Antarctic Governance').

<sup>77</sup> For a review of China's engagement in Antarctica, see Jonathan Harrington, 'China in Antarctica: A History' (2015) 37 *Southeast Review of Asian Studies* 1; Keyuan (n 73).

<sup>78</sup> See Nengye Liu and Cassandra M Brooks, 'China's Changing Position towards Marine Protected Areas in the Southern Ocean: Implications for Future Antarctic Governance' (2018) 94 *Marine Policy* 189.

<sup>79</sup> For details on all Antarctic research bases, installations and facilities, see Council of Managers of National Antarctic Programs, *Antarctic Station Catalogue* (2017) <[https://static1.squarespace.com/static/61073506e9b0073c7eaaf464/t/611497cc1ece1b43f0eeca8a/1628739608968/COMNAP\\_Antarctic\\_Station\\_Catalogue.pdf](https://static1.squarespace.com/static/61073506e9b0073c7eaaf464/t/611497cc1ece1b43f0eeca8a/1628739608968/COMNAP_Antarctic_Station_Catalogue.pdf)>, archived at <<https://perma.cc/4YJT-FQLR>>.

<sup>80</sup> Craig Hooper, 'New Polar Strategy Must Focus on China's Long March to Antarctica', *Forbes* (online, 10 January 2021) <<https://www.forbes.com/sites/craighooper/2021/01/10/new-polar-strategy-must-focus-on-chinas-long-march-to-antarctica/>>, archived at <<https://perma.cc/GM9E-PP8T>>. See also Indi Hodgson-Johnston, 'Collaborating with China in Antarctica', *The Interpreter* (Blog Post, 19 February 2018) <<https://www.lowyinstitute.org/the-interpreter/collaborating-with-china-in-antarctica>>, archived at <<https://perma.cc/BK5U-BF8W>>; Anne-Marie Brady, *China's Expanding Antarctic Interests: Implications for Australia* (Special Report, August 2017) <<https://www.aspi.org.au/report/chinas-expanding-interests-antarctica>>, archived at <<https://perma.cc/9Q2S-7QRW>> ('*China's Expanding Antarctic Interests*').

<sup>81</sup> Liu and Brooks (n 78) 193.

significant player in Antarctic governance'.<sup>82</sup> In that regard, China in 2017 for the first time hosted an ATCM and associated CEP meetings in Beijing.

China's significant Antarctic engagement, both at a physical level on the continent and also within ATS fora, is generating considerable debate as to China's long-term intentions.<sup>83</sup> Antarctica is becoming part of China's 'national narrative',<sup>84</sup> in much the same way China is promoting its engagement in the Arctic.<sup>85</sup> In Anne-Marie Brady's view, the scale and extent of China's Antarctic activities, especially within the Australian claimed 'Australian Antarctic Territory', where three research stations, three airfields and two field camps have been established, suggests China is 'building up a case for a territorial claim'.<sup>86</sup> While any potential Chinese territorial claim would be inconsistent with the *Antarctic Treaty*, this does raise the issue as to whether the Treaty could be amended to allow for the assertion of territorial claims or whether a party dissatisfied with the constraints placed upon its activities by the Treaty could withdraw. These matters are discussed below.

## V REVIEW CONFERENCES AND TREATY WITHDRAWAL

At 60 years old, all of the indicators are that the *Antarctic Treaty* and the larger ATS are suffering from a range of geopolitical tensions.<sup>87</sup> Some of the core fundamentals upon which the treaty was negotiated are being tested by a range of different state activities. China's increasing presence within the Australian claimed Australian Antarctic Territory, for example, has raised the spectre of territorial tensions and a challenge to art IV of the Treaty. Likewise, the capacity of the claimant states to make submissions to the Commission on the Limits of the Continental Shelf with respect to their potential art 76 continental shelf claims under the *LOSC* highlighted a desire to bolster their

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<sup>82</sup> Ibid 193–4. See also Nengye Liu, 'The Rise of China and the Antarctic Treaty System?' (2019) 11(2) *Australian Journal of Maritime and Ocean Affairs* 120.

<sup>83</sup> See Nengye Liu, 'What are China's Intentions in Antarctica?: Reviewing China's Activities and Commitments under the 60-Year-Old Antarctic Treaty', *The Diplomat* (online, 14 June 2019) <<https://thediplomat.com/2019/06/what-are-chinas-intentions-in-antarctica/>>, archived at <<https://perma.cc/Q5KD-HRAG>>; Bernard Lagan, 'China's March across Antarctic Raises Fears of Expansionism', *The Times* (online, 8 April 2019) <<https://www.thetimes.co.uk/article/china-s-march-across-antarctic-raises-fears-of-expansionism-8zs86fst9>>, archived at <<https://perma.cc/47VS-5CRQ>>.

<sup>84</sup> Anne-Marie Brady, 'The Past in the Present: Antarctica in China's National Narrative' in Klaus Dodds, Alan D Hemmings and Peder Roberts (eds), *Handbook on the Politics of Antarctica* (Edward Elgar Publishing, 2017) 284. For similar analysis, see Jonathan Harrington, 'China, Global Ecopolitics and Antarctic Governance: Converging Paths?' (2017) 22(1) *Journal of Chinese Political Science* 37.

<sup>85</sup> See Kong Soon Lim, 'China's Arctic Policy & the Polar Silk Road Vision' in Lassi Heininen and Heather Exner-Pirot (eds), *Arctic Yearbook 2018* (Northern Research Forum, 2018) 420; Frédéric Lasserre, Linyan Huang and Olga V Alexeeva, 'China's Strategy in the Arctic: Threatening or Opportunistic?' (2015) 53(268) *Polar Record* 31.

<sup>86</sup> Brady, *China's Expanding Antarctic Interests* (n 80) 5. See also Anne-Marie Brady, *China as a Polar Great Power* (Cambridge University Press, 2017).

<sup>87</sup> Marcus Haward, 'The Antarctic Treaty System: Challenges and Opportunities' (2019) 27 *Waikato Law Review* 6, 6 ('The Antarctic Treaty System').

territorial claims.<sup>88</sup> Many of these tensions are being seen against the backdrop of how some Treaty parties view the *Madrid Protocol*'s prohibition on minerals activities and whether it remains appropriate to continue with that moratorium.<sup>89</sup> The *Madrid Protocol*, however, does not expire in 2048. Nevertheless, it may become subject to a formal Review Conference as noted below.

A counterpoint to these apparent tensions is that the ATS has been able to evolve over time and that as a result the modifications and supplementary instruments that have been adopted have allowed the *Antarctic Treaty* and its associated regime to retain their currency. This was particularly important during the 1980s when the ATS faced the dual challenges of United Nations General Assembly debates on the 'Question of Antarctica' and ATS debates on the development of a minerals regime. The first debate was partly resolved by effectively relaxing standards for attaining ATCP status and thereby opening up the Treaty and ATS to many more states, while the second debate was resolved through the abandonment of *CRAMRA* and adoption of the *Madrid Protocol*. The timing of these developments is important, occurring as they did in and around the time of the 30<sup>th</sup> anniversary of the adoption and entry into force of the Treaty in 1991.

While these examples are helpful reminders of the capacity of the ATS to respond to new challenges and of its resilience,<sup>90</sup> they do not address situations where there are fundamental disagreements within the ATS over some of the founding principles of the *Antarctic Treaty* and its associated instruments. To date, the Treaty has not been subject to any amendment, which is exceptional for any instrument that has been in force for 60 years. This is not a bar to amendments being sought in the future, raising questions as to whether current parties may seek an amendment or seek to withdraw if they are unable to gain agreement on amendments. These matters are discussed below.

#### A *Antarctic Treaty Review Conference*

Of particular significance to these debates is art XII(2)(a) of the *Antarctic Treaty*, which provides:

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<sup>88</sup> See Carlos R Hernández-Salas, 'Distinguished Status Quo: The American Antarctic Quadrant after Submissions to the Commission on the Limits of the Continental Shelf' (2015) 30(2) *International Journal of Marine and Coastal Law* 285; Harald Brekke, 'Defining and Recognizing the Outer Limits of the Continental Shelf in the Polar Regions' in Richard C Powell and Klaus Dodds (eds), *Polar Geopolitics?: Knowledges, Resources and Legal Regimes* (Edward Elgar, 2014) 38, 47–51; Alan D Hemmings and Tim Stephens, 'The Extended Continental Shelves of Sub-Antarctic Islands: Implications for Antarctic Governance' (2010) 46(239) *Polar Record* 312. See generally Alex G Oude Elferink, 'The Outer Limits of the Continental Shelf in the Polar Regions' 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 Publishers, 2013) 61, 69–71, 79–82.

<sup>89</sup> See Alan D Hemmings, 'The Antarctic Treaty System' (2016) 14 *New Zealand Yearbook of International Law* 287, 292, discussing Secretariat of the Antarctic Treaty, 'Resolutions' in Secretariat of the Antarctic Treaty, *Final Report of the Thirty-Ninth Antarctic Treaty Consultative Meeting* (2016) vol 1, 405–6, confirming the commitment of the ACTPs to the prohibition on Antarctic mineral resource activities. See also Haward, 'The Antarctic Treaty System' (n 87) 6–7.

<sup>90</sup> See Haward (n 87) 8–14 for a discussion of the ATS response to some of these issues.

If after the expiration of thirty years from the date of entry into force of the present Treaty, any of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX so requests by a communication addressed to the depositary Government, a Conference of all the Contracting Parties shall be held as soon as practicable to review the operation of the Treaty.

This provision became known as the 'Review Conference' mechanism,<sup>91</sup> which provided that modifications or amendments proposed at such a conference adopted by a majority of those states in attendance would then be subject to the adoption mechanisms as provided for under art XII(1).<sup>92</sup> Importantly, however, art XII(2)(c) added that if the proposed modification or amendment had not entered into force within a period of two years, then

any Contracting Party may at any time after the expiration of that period give notice to the depositary Government of its withdrawal from the present Treaty; and such withdrawal shall take effect two years after the receipt of the notice by the depositary Government.<sup>93</sup>

Prior to 1991 there was considerable debate as to whether an art XII(2) Review Conference would be called and what consequences could arise from such a conference, especially if disaffected states sought to eventually withdraw from the *Antarctic Treaty* as per the mechanism outlined in art XII(2)(c).<sup>94</sup> However, a Review Conference was not called for in 1991 and no request has subsequently been made. This raises the issue as to whether it would be possible

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<sup>91</sup> On treaty Review Conferences generally, see Burrus M Carnahan, 'Treaty Review Conferences' (1987) 81(1) *American Journal of International Law* 226.

<sup>92</sup> *Antarctic Treaty* (n 1) art XII(1) provides as follows:

The present Treaty may be modified or amended at any time by unanimous agreement of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX. Any such modification or amendment shall enter into force when the depositary Government has received notice from all such Contracting Parties that they have ratified it.

Such modification or amendment shall thereafter enter into force as to any other Contracting Party when notice of ratification by it has been received by the depositary Government. Any such Contracting Party from which no notice of ratification is received within a period of two years from the date of entry into force of the modification or amendment in accordance with the provisions of subparagraph 1(a) of this Article shall be deemed to have withdrawn from the present Treaty on the date of the expiration of such period.

<sup>93</sup> *Antarctic Treaty* (n 1) art XII(1) also allows withdrawal, but this only applies to non-ATCPs that have not endorsed a treaty modification or amendment adopted, endorsed and unanimously ratified by the ATCPs, in which case a non-ATCP is deemed to have withdrawn from the Treaty if they have not ratified the treaty action within a period of two years.

<sup>94</sup> Donald R Rothwell, *The Polar Regions and the Development of International Law* (Cambridge University Press, 1996) 101–3; William M Welch, 'The Antarctic Treaty System: Is It Adequate to Regulate or Eliminate the Environmental Exploitation of the Globe's Last Wilderness?' (1992) 14(3) *Houston Journal of International Law* 597, 633; James Crawford and Donald R Rothwell, 'Legal Issues Confronting Australia's Antarctica' (1992) 13 *Australian Year Book of International Law* 53, 67; Christopher D Beeby, 'The Antarctic Treaty System: Goals, Performance and Impact' in Arnfinn Jørgensen-Dahl and Willy Østregren (eds), *The Antarctic Treaty System in World Politics* (Macmillan, 1991) 4, 17–8; Auburn, *Antarctic Law and Politics* (n 12) 143–5; WM Bush, *Antarctica and International Law: A Collection of Inter-State and National Documents* (Oceana Publications, 1982) vol 1, 104–5.

for an ATCP to make a request for a Review Conference to be called in 2021 or at any time thereafter. In this respect the distinction between an art XII(1) modification or amendment to the Treaty and an art XII(2) Review Conference modification or amendment is important as only the latter process anticipates the proposed modifications or amendments being the subject of debate at a conference, which in turn can result in states withdrawing from the Treaty if within a period of two years the modifications or amendments have not entered into force. One mechanism therefore suggests minor modifications or amendments, while the other anticipates much more substantial modifications or amendments which are of such significance that some parties may elect to completely withdraw from the Treaty. In this respect, the thinking of the parties at the 1959 Washington conference on this issue is instructive. Chile, for example, noted with respect to art XII that

[t]he Delegation of Chile lends its support to the article of the Antarctic Treaty relative to revision on the understanding that if any Contracting Party withdraws from the Treaty, its provisions will not be applicable to that Party from the time of this withdrawal and that with respect to the provisions of article IV, the Parties will return to the previous status quo.<sup>95</sup>

As to the question as to whether it would be possible to call a Review Conference well after the expiration of the 30-year period set down in art XII(2), there would appear to be no impediment to the calling of such a conference. Article XII(2) set down a minimum period of time before a conference could be called and did not set down a maximum period of time within which a conference could be called. In that regard, there is no time limit or constraints beyond 1991 on the calling of a Review Conference. Finally, what can be observed in this regard is that art XII anticipated a formal process whereby an ATCP called for a Review Conference via a request to the *Antarctic Treaty* depositary, which is the United States. While therefore 1991 did result in a series of Special ATCMs dedicated to the negotiation of an instrument that eventually became the *Madrid Protocol*, there is no suggestion that this was an art XII(2) Review Conference nor did that Special ATCM result in a modification or amendment to the *Antarctic Treaty*.<sup>96</sup>

### B *Madrid Protocol Review Conference*

The modification and amendment provisions of the *Madrid Protocol* are closely linked to those in the *Antarctic Treaty*, and art 25(1) of the Protocol refers back to the art XII(1) procedures that have been noted above. Provision is also made for a Review Conference in art 25(2) of the Protocol as follows:

If, after the expiration of 50 years from the date of entry into force of this Protocol, any of the Antarctic Treaty Consultative Parties so requests by a

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<sup>95</sup> ‘Statements by State Representatives at the Final Plenary Session of the Conference on Antarctica, 1 December 1959’ in Ben Saul and Tim Stephens (eds), *Antarctica in International Law* (Hart Publishing, 2015) 43, 46–7.

<sup>96</sup> *Madrid Protocol* (n 5) art 4(1) provides: ‘This Protocol shall supplement the Antarctic Treaty and shall neither modify nor amend that Treaty’. See also Secretariat of the Antarctic Treaty, ‘Final Act of the Eleventh Antarctic Treaty Special Consultative Meeting’ in Secretariat of the Antarctic Treaty, *Compilation of Key Documents of the Antarctic Treaty System* (4<sup>th</sup> ed, 2019) 31.

communication addressed to the Depositary, a conference shall be held as soon as practicable to review the operation of this Protocol.

A Review Conference mechanism is therefore provided for that would become operative in 2048. The Review Conference procedures anticipate two sets of processes. The first would apply with respect to all modifications or amendments to the *Madrid Protocol* other than to the art 7 prohibition on Antarctic mineral resource activities. These procedures, outlined in arts 25(3)–(4), require adoption of the proposed changes by a majority of the states attending the conference, including 75 per cent of those states that were ATCPs at the time of the adoption of the Protocol.<sup>97</sup> The changes would then only enter into force following ratification or an equivalent procedure of acceptance by 75 per cent of the then existing ATCPs, including all of the ATCPs at the time of the adoption of the Protocol. The effect of this procedure is that, while a proposed change to the Protocol could be endorsed at a Review Conference without the support of one of the ATCPs that existed at the time of the 1991 negotiations, the support of that ATCP would be required for the eventual entry into force of the proposed change such that one ATCP would effectively retain a veto.<sup>98</sup>

The additional mechanism that applies to a proposed adjustment or modification to art 7 of the *Madrid Protocol* is found in art 25(5), which requires the Review Conference to have also adopted a ‘binding legal regime on Antarctic mineral resource activities that includes an agreed means for determining whether, and, if so, under which conditions, any such activities would be acceptable’. In a reference back to the *Antarctic Treaty* art XII(2) procedures allowing for a state to potentially withdraw from the Treaty, a similar procedure is established under art 25(5)(b) whereby if a modification to art 7 has not entered into force within three years of its adoption then any Party could seek to withdraw from the Protocol. Such a withdrawal would take effect 2 years after a notification has been given to the depositary.<sup>99</sup>

### C *Treaty Law and Treaty Withdrawal*

An interesting treaty law issue with respect to both the *Antarctic Treaty* and the *Madrid Protocol* is that neither instrument contemplates the withdrawal of a party other than by the mechanisms respectively provided for under art XII of the Treaty and art 25 of the Protocol. This raises the question as to whether it is possible for a party to unilaterally withdraw from either instrument other than via those mechanisms. While this is not an issue that has arisen to date, it may well do so in the future if a party became sufficiently dissatisfied with the ATS and in particular some of the constraints that they feel are placed upon them, such as art IV of the Treaty and art 7 of the Protocol.

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<sup>97</sup> At the time of the adoption of the *Madrid Protocol*, there were a total of 26 ATCPs: see above Table 2.

<sup>98</sup> For an analysis of some of these issues, see AJ (Tony) Press, ‘The Antarctic Treaty System: Future Mining Faces Many Mathematical Challenges’ (2015) 7 *Yearbook of Polar Law* 623.

<sup>99</sup> The depositary for both the *Antarctic Treaty* and the *Madrid Protocol* is the US: *Antarctic Treaty* (n 1) art XIII(3); *Madrid Protocol* (n 5) art 27(1).

The general rules of treaty law are found in the *Vienna Convention on the Law of Treaties* ('VCLT')<sup>100</sup> and there are two generally applicable rules regarding withdrawal.<sup>101</sup> The first, found in art 54, allows for a party to withdraw from a treaty in conformity with the terms of the treaty or with the consent of all the parties. A party that therefore sought to withdraw from either the Treaty or the Protocol, other than by the art XII and art 25 mechanisms, could do so with the consent of the other parties.<sup>102</sup> This would raise immediate challenges for any state seeking to utilise this mechanism given the number of states parties to both instruments and the difficulty they would face in getting the consent from all of those parties, especially if there were concerns as to the motivations of that party in seeking to withdraw. In this respect, it is notable that the wording of VCLT art 54 is 'consent of all the parties' which in the case of the *Antarctic Treaty* and *Madrid Protocol* would leave no room for argument as to a distinction between the 29 ATCPs and the other 25 *Antarctic Treaty* parties.<sup>103</sup>

In the absence of the art 54 procedure, VCLT art 56 provides an alternate mechanism by which a party may seek to withdraw from a treaty. Under this procedure, where a treaty does not otherwise provide for denunciation or withdrawal, a party may denounce or withdraw from a treaty if it can be established that the parties contemplated such a possibility or such a right is implied by the nature of the treaty.<sup>104</sup> A party utilising this procedure is to give not less than 12 months' notice of an intention to denounce or withdraw from the treaty.<sup>105</sup> In the view of Anthony Aust, as art 56 is expressed as an exception, 'the onus of establishing that the exception applies lies with the party wishing to withdraw'.<sup>106</sup> A party seeking to utilise this mechanism to withdraw from either the *Antarctic Treaty* or the *Madrid Protocol* would be able to assert that while there is no general provision for denunciation or withdrawal, it is clear on the basis of the procedures outlined in art XII and art 25 respectively that both treaties do admit the possibility of withdrawal, albeit in very specific circumstances and that accordingly a general right of denunciation or withdrawal does operate consistently with the VCLT art 56 rule. An issue that may arise with the *Antarctic Treaty* is that, given the Treaty concerns questions of sovereignty and seeks to establish a permanent regime, it may be argued that it cannot be subject to state withdrawal,<sup>107</sup> however this argument would be countered by the fact that art XII expressly contemplates withdrawal in certain circumstances.<sup>108</sup>

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<sup>100</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('VCLT').

<sup>101</sup> Cf *ibid* arts 57–62, 64, the applicable rules relating to termination or suspension of a treaty.

<sup>102</sup> For a discussion of this procedure, see Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 3<sup>rd</sup> ed, 2013) 254–5.

<sup>103</sup> As to the interpretation of 'consent of all the parties', see Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 2<sup>nd</sup> ed, 1984) 183.

<sup>104</sup> VCLT (n 100) art 56(1).

<sup>105</sup> *Ibid* art 56(2).

<sup>106</sup> Aust (n 102) 256.

<sup>107</sup> *Ibid*. Aust includes peace treaties, disarmament treaties and 'those establishing permanent regimes' as falling into this category.

<sup>108</sup> For a discussion of art 56 of the VCLT, see Sinclair (n 103) 186–8.

## VI CONCLUDING REMARKS

The 43<sup>rd</sup> ATCM held in Paris (virtually) from 14–24 June 2021 issued a declaration on the 60<sup>th</sup> anniversary of the entry into force of the *Antarctic Treaty* in which the participants sought to ‘[r]eaffirm their strong and unwavering commitment to the objectives of the Antarctic Treaty, its Environmental Protocol and other instruments of the Antarctic Treaty system’.<sup>109</sup> Notwithstanding this ATCP solidarity, it is currently fashionable to critique the ATS and speculate whether it will survive due to a combination of geopolitics and resource tensions and whether it remains ‘fit for purpose’ at a time that is much changed from that which existed when the regime was originally negotiated.<sup>110</sup> Nevertheless, writing in 2012, Brady commented that ‘[t]he Treaty does not suit the current international situation, yet despite this, it appears to be here to stay’.<sup>111</sup> Brady went on to concede that

for all its failings, no other instrument of governance is available to deal with all the issues involved in governing the Antarctic continent and Southern Ocean. So far, the rise of new actors with interests in Antarctica has not upset the current system as they are still working with it as it stands. Antarctic governance clearly needs to democratise and efforts to achieve this have so far been too little, and too late.<sup>112</sup>

Much of this debate has been sparked by the global rise of China in tandem with China’s increased engagement with Antarctica and the ATS. It has also been fuelled by suspicions about China’s Antarctic ambitions, which to date have not been clearly articulated. In that regard, China’s position with respect to Southern Ocean marine protected areas proposed and eventually endorsed under the *CCAMLR* framework has only deepened those concerns.<sup>113</sup> China’s commitment to the ATS has, however, been recently demonstrated through its hosting of the 2017 ATCM in Beijing and its ongoing high level scientific research program which now matches that of the original Antarctic states.<sup>114</sup> Whether China would seek to leave the ATS in the foreseeable future can only be speculated about.<sup>115</sup> In this respect it needs to be acknowledged that China is currently able to assert a much greater role in Antarctic governance through its

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<sup>109</sup> ‘43rd ATCM: Adoption of a Declaration on the Occasion of the 60th Anniversary of the Entry into Force of the Antarctica Treaty and the 30th Anniversary of the Signing of the Madrid Protocol on Environmental Protection to the Antarctic Treaty (Paris, 14–24 June 2021)’, *France Diplomacy* (Web Page) [7] <<https://www.diplomatie.gouv.fr/en/country-files/antarctica/news/article/43rd-atcm-adoption-of-a-declaration-on-the-occasion-of-the-60%E1%B5%97%CA%B0-anniversary>>, archived at <<https://perma.cc/PDB9-NN6C>>.

<sup>110</sup> See, eg, Liggett et al (n 6); Jacob A Reed, ‘Cold War Treaties in a New World: The Inevitable End of the Outer Space and Antarctic Treaty Systems’ (2017) 42(4–5) *Air and Space Law* 463.

<sup>111</sup> Brady, ‘Democratising Antarctic Governance’ (n 76) 455.

<sup>112</sup> *Ibid* 460.

<sup>113</sup> Liu and Brooks (n 78).

<sup>114</sup> In December 2020, China also cooperated with the United States to assist in the medical repatriation of an Australian scientist: Rachel Treisman, ‘US, China and Australia Evacuate Expeditioner from Antarctica in 5-Day Mission’, *NPR* (online, 25 December 2020) <<https://www.npr.org/2020/12/25/950320579/u-s-china-and-australia-evacuate-expeditioner-from-antarctica-in-5-day-mission>>, archived at <<https://perma.cc/HHV6-GA8>>.

<sup>115</sup> Liu and Brooks (n 78) 194, where they claim ‘[i]t is highly unlikely that China will leave the ATS in the foreseeable future’.



status as an ATP than it does in the Arctic where it is an observer on the Arctic Council.<sup>116</sup> Nevertheless, debate continues as to whether China,<sup>117</sup> or any other party, may seek to initiate a *Madrid Protocol* Review Conference in 2048.<sup>118</sup> Even if a Review Conference was called, overturning the mining prohibition would be legally very difficult given the mechanisms set down in art 25 of the *Madrid Protocol*.

While 2048, like 1991 before it, may prove to be an important ‘milestone’ for the ATS,<sup>119</sup> the history of the regime shows that it has faced a number of challenges and those challenges have been actively addressed. The result is that the ATS has been able to demonstrate great resilience over the past 60 years. This resilience should not be underestimated, and, while the ATS still only has a membership of approximately one quarter of UN member states, it does include all of the Permanent Five members of the UN Security Council, in addition to all the members of the G7 and all but three members of the G20.<sup>120</sup> Nevertheless, while the ATS has enjoyed enormous success, the global international order is currently experiencing a backlash against some aspects of international law and institutions which is partly driven by a concern from some states that certain global institutions and mechanisms are no longer appropriate and are in need of reform, modification or even alternate frameworks.<sup>121</sup> In some instances, this has resulted in states abandoning long established international legal frameworks and institutions to pursue unilateral goals or to support new regimes. It would therefore be inappropriate to become complacent about the ATS and the challenges that it faces. While there has been considerable attention in the past to the prospect of an *Antarctic Treaty* Review Conference, and increasingly a *Madrid Protocol* Review Conference, states have other available mechanisms they could rely upon to withdraw from either treaty. In addition, despite the passage of time, an *Antarctic Treaty* Review Conference could also be called by a dissatisfied state or states. While the ATS currently presents itself as a stable legal regime, the reality is that both the *Antarctic Treaty* and *Madrid Protocol* are subject to treaty law mechanisms allowing for review of their cornerstone provisions. The international law and global governance issues that could arise from such events should not be underestimated.

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<sup>116</sup> Sara Reardon, ‘China Gains Observer Status on the Arctic Council’, *New Scientist* (online, 16 May 2013) <<https://www.newscientist.com/article/dn23553-china-gains-observer-status-on-the-arctic-council/>>, archived at <<https://perma.cc/P288-WWRK>>; Matthew Willis and Duncan Depledge, ‘How We Learned to Stop Worrying about China’s Arctic Ambitions: Understanding China’s Admission to the Arctic Council, 2004–2013’ in Leif Christian Jensen and Geir Hønneland (eds), *Handbook of the Politics of the Arctic* (Edward Elgar Publishing, 2015) 388.

<sup>117</sup> Liu (n 82) 128.

<sup>118</sup> Liggett et al (n 6) 463.

<sup>119</sup> Ibid.

<sup>120</sup> Those members of the G20 who are not parties to the ATS are Indonesia, Mexico and Saudi Arabia.

<sup>121</sup> Peter G Danchin et al, ‘Navigating the Backlash against Global Law and Institutions’ (2020) 38 *Australian Year Book of International Law* 33. See also Janne E Nijman and Wouter G Werner, ‘Populism and International Law: What Backlash and Which Rubicon?’ (2018) 49 *Netherlands Yearbook of International Law* 3; Eric A Posner, ‘Liberal Internationalism and the Populist Backlash’ (2017) 49 (Special Issue) *Arizona State Law Journal* 795.